APPENDIX 4 - INSPECTOR'S ADVISORY REPORT - 9 FEBRUARY 2024

WILTSHIRE COUNCIL

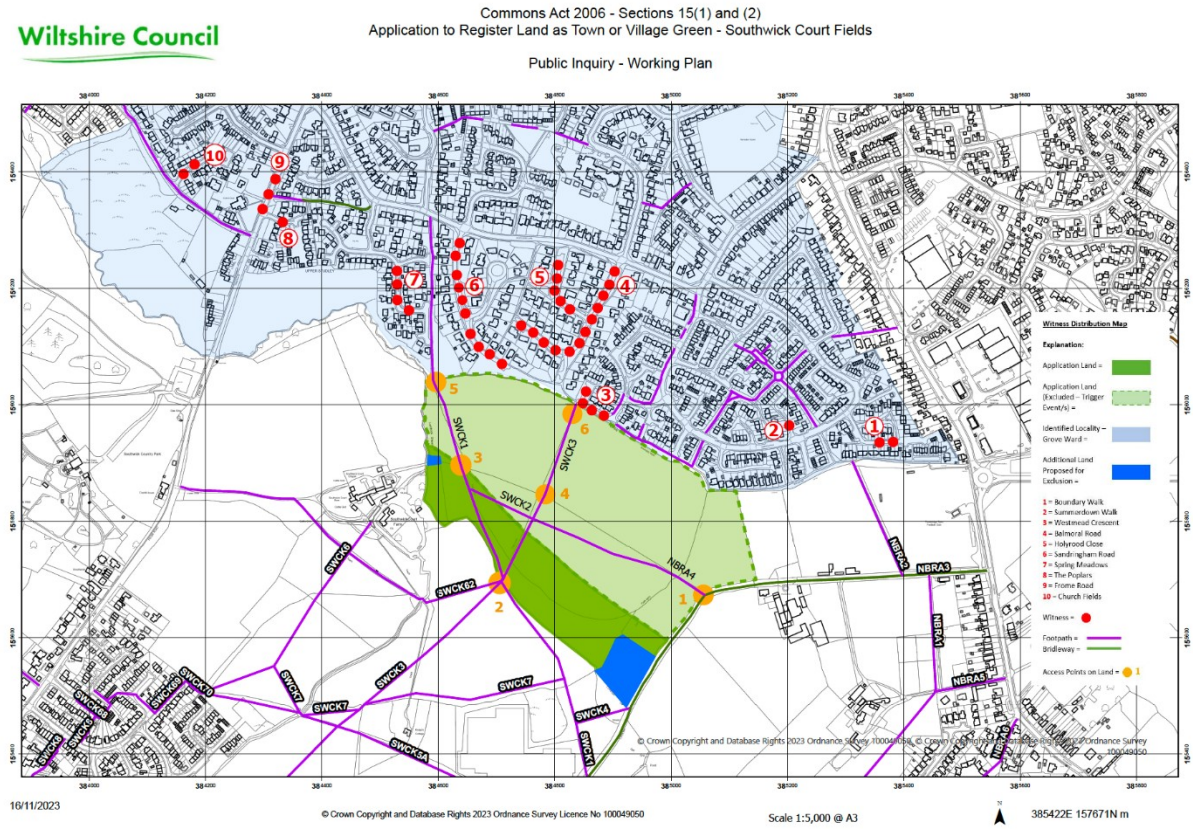
APPLICATION TO REGISTER LAND KNOWN AS SOUTHWICK COURT FIELDS LOCATED WITHIN THE CIVIL PARISHES OF SOUTHWICK AND NORTH BRADLEY AT TROWBRIDGE AS A TOWN OR VILLAGE GREEN

Application reference number: 2020/02 TVG

INSPECTOR'S ADVISORY REPORT

References to A/1 and CRA/1 and so on are to documents in the hearing bundles of the applicant and the commons registration authority ("CRA"). The Objector produced no inquiry bundle.

Application land



1. The application land is shown (at least approximately, as will appear later) coloured dark green on the above map (which bears the title *"Public Inquiry – Working Plan"* – to which I will refer as "the Working Plan") although, when first made, the application land (to which I will hereafter refer in this report as the "TVGAL") also extended to the area coloured light green. The parcels coloured blue are enclosed areas, and the application no longer extends to these areas (this was conceded during the inquiry by the applicant's advocate). The red dots on this plan show where the applicant's oral and written witnesses live. The numbering refers to the addresses in the key.

2. In short, the application in its original form comprised the areas coloured light *and* dark green on the Working Plan (and included the blue parcels).

3. The purple lines shown on the map are public footpaths and the continuous green line (which runs west along Axe and Cleaver Lane from its opening off Woodmarsh Road) is a bridleway. The dashed green lines around parts of the perimeter of both dark and light green areas are open, or at least mainly open, watercourses.

Preliminary

4. I am instructed by Wiltshire Council ("WC"), acting in its capacity as CRA, which is the responsible authority for determining applications within its area to register land as a town or village green ("TVG").

5. The application in Form 44 (which is dated 13 January 2020) was delivered by hand to the offices of the CRA on that date (CRA/342-343). It is made under the Commons Act 2006 ("the 2006 Act"), section 15(2), by a Mr Norman Swanney of [redacted] Balmoral Road in Trowbridge on the usual standard form (Form 44). (On occasions in this report the application will be referred to as the "TVG application" to distinguish it from a related planning application.)

6. The rules (namely The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007) require an application for registration of a TVG to be made using Form 44 and to be signed and accompanied by a statutory declaration and the supporting evidence. On

receipt of an application the CRA is required to allot it a number and must stamp the application indicating the date when it is received. The CRA must then send the applicant a receipt (see regs.3/4 – and reg.4 allows Form 6 of the 1966 General Regulations to be used when notifying an applicant that a duly made application has been received and allotted a number by the CRA).

7. It is necessary to deal with the procedure on receipt of an application in greater detail as it assumes importance on this particular application.

8. Regulation 5 provides that where an application "is made" the CRA must then send those liable to be affected by the application and likely to object to it a notice in Form 45. The application should also be publicised in the manner described in reg.5. Where it appears to the CRA that the application has not been "duly made" it may reject it without having to deliver a notice in Form 45 to affected parties or to publicise the application in accordance with reg.5. However, the application should not be rejected where (reg.5(4)) it appears to the CRA that the applicant is able to put the application in order, in which case the applicant should be given a reasonable opportunity of taking that action.

9. On 7 June 2023 WC's Western Area Planning Committee (which exercises the authority's function of CRA) resolved to appoint an independent inspector to hold a non-statutory public inquiry to hear evidence and to provide an advisory report to members on the merits of the application.

10. I gave directions for the holding of the inquiry on 18 September 2023 and an inquiry was fixed for 21-24 November 2023. It soon became apparent that Mr Swanney would be unable to participate in the inquiry process and David Vigar, a WC councillor and also a town councillor for Trowbridge Grove Division, came forward to replace Mr Swanney. There is little doubt that without Mr Vigar's assistance and advocacy skills and, of course, his local knowledge the work of the inquiry would have been considerably prolonged.

11. In the event, the inquiry took place at St John's Parish Centre on 21-22 November 2023. The only objector to the application was the landowner, the Hon. Mrs S.M Rhys, who is aged 97. She was represented at the inquiry by Caroline Waller who is a partner in Clark Willmott LLP and a specialist in this

area of the law. Her son, George Rhys, also attended the inquiry and gave oral evidence on how the TVGAL was managed.

12. I am indebted to Councillor Vigar and Ms Waller for their helpful and conscientious submissions. I am also grateful for the administrative support provided by officers, namely Janice Green (whom I shall refer to as "the case officer") and Sally Madgwick, which was indispensable to the smooth-running of the inquiry. The case officer's report to the committee was also very thorough and helped me considerably.

Trigger events

13. Section 16 of the Growth and Infrastructure Act 2013 inserted section 15C and Schedule 1A into the 2006 Act which excludes the right to apply under section 15(1) of the 2006 Act to register land as a TVG when a "trigger event" has occurred in relation to that land. The trigger event is treated as spent whenever a corresponding terminating event occurs (which are set out in the second column against the various trigger events mentioned in Schedule 1A).

14. The material trigger events considered on this application are those at para/1 to Schedule 1A, namely where a planning application had been publicised before the TVG application was made, and at para/3 where a published draft of a development plan document had identified the TVGAL for potential development (adoption is unnecessary for these purposes).

15. On 21 January 2020 the case officer was advised by Mike Wilmott (a senior officer in WC's planning department) that, on 15 January 2020, the authority had received a planning application (under reference 20/00379/OUT) which affected part of the TVGAL. The area shown light green on the map on p.1 is only an approximation of the land affected by the planning application. The outline proposal involved an extensive residential development and associated infrastructure (where the context permits, I shall refer to the planning application as "the planning application trigger").

16. The planning application was publicised on or after 17 January 2020 (CRA/225) which post-dates the delivery of the TVG application in its original

form on 13 January 2020. The planning application was refused by WC on 2 March 2023 (date when the refusal notice sent) and an appeal was determined by way of a public inquiry which took place sometime in October 2023. The inspector's decision letter is awaited and could be imminent.

17. At this point the TVG application was not stamped, nor was it allotted a number. This is a potentially important omission as it would be misleading for an application to be dated with the date of its receipt if that were not its effective date. Put another way, if the date when the application was duly made was crucial (and in certain cases it can be) it would place an applicant at the mercy of the CRA if it chose to date the receipt of the application at a date later than the date on which the original, perhaps defective application, had been lodged.

18. Although not in point on the facts, it is now plain in light of *R (Church Commissioners for England) v Hampshire County Council* [2014] 1 WLR 4555, that where deficiencies in an application can be remedied under reg.5(4) (involving say problems in identifying the locality or neighbourhood, or in giving the precise date for cessation of recreational use or in curing defects in the statutory declaration) such that, in the view of the CRA, the application was duly made within the meaning of the regulations, the application would be treated as having been duly made on the date on which the original defective application had been lodged, which in this case would be 13 January 2020.

19. It must be right that the planning application was not a trigger event as the TVG application had, in my view, been duly made before the planning application had been publicised.

20. On the 18 February 2020 the Planning Inspectorate ("PINS") advised the case officer that what was described as a "Site allocations plan" existed and that it was a trigger event within the meaning of Sched.1A at para 3.

21. What is meant by the phrase "Site Allocations plan" is that part of the TVGAL was comprised within an allocation for development contained in the Wiltshire Housing Site Allocations Plan ("the WHSAP") (I shall refer to this, where the

context permits, as “the WHSAP trigger”). The letter (and helpful attachment) dated 19 February 2020 from Geoff Winslow (WC’s Spatial Planning Manager) (see CRA/234-237) to the case officer also noted that the WHSAP had been examined and, with modifications, was deemed to be sound. It was subsequently adopted by WC on 25 February 2020 (CRA/241-242) (itself a trigger event at para/4 to Sched.1A) at which point it became part of WC’s development plan.

22. The TVG application was eventually stamped and allotted a number by the CRA on 30 November 2020, over 10 months after it had been lodged on 13 January 2020. It is relevant to deal with what happened as between the CRA and the applicant (then, of course, Mr Swanney) after he was informed by the case officer by letter dated 24 February 2020 (CRA/354-355) that it was considered by the CRA that his application could not be accepted as duly made as the TVGAL was subject to the WHSAP trigger.

23. It was assumed at the time by the case officer that the planning application was not a trigger event and the draft WHSAP trigger extended to the whole of the application land which meant that a new application plan was not required. This was an assumption that I myself made on reading the papers. At any rate, I take the view that the CRA were in error in advising Mr Swanney that, because of the WHSAP trigger, the TVG application could not be accepted “and progressed to determination” (as it was put to him in the case officer’s letter dated 24 February 2020). There were two main reasons for this. First, the WHSAP land did extend to the whole of the TVGAL. Second, although it was always open to the CRA to invite Mr Swanney to amend the application plan (that is, if it had been thought that the application had not been duly made (reg.5(4)), any correction in such a case would by law have been backdated to the 13 January 2020. Put another way, in my view, the law did not require Mr Swanney to resubmit his application simply because it was affected by an operative trigger event. All that was required in such a case was a new plan (with the justifiable omission of the WHSAP land) in order to put the application in order.

24. In short, the CRA's decision to return the application papers to Mr Swanney on 24 February 2020 was misconceived as the WHSAP trigger did not mean that the application had not been duly made. It was, I think, unnecessary for Mr Swanney to resubmit his application (in other words, that he should make a further application) in order that WHSAP land might be omitted from it. As the case officer put it in her email to Mr Swanney dated 24 February 2020 (CRA/357-358): "… until this trigger event is terminated it will not be possible to apply to register the land ..". In my view, this is not the case. If the trigger event was operative all that was required was an amendment to the plan and an updated statutory declaration.

25. Mr Swanney resubmitted his second application on 12 June 2020 (CRA/359). As before, the case officer advised Mr Swanney that the CRA was unable to confirm that it had been validly made, saying that advice had to be obtained from WC's planning department and PINS. On 22 June 2020 advice was duly sought on the applicability of trigger events from these bodies. In both cases (CRA/363 & 366), the case officer stated that answers about this "will determine whether or not the authority can accept an application for registration". The outcome was, as before, and the resubmitted application was rejected by the CRA (CRA/372).

26. The case officer's letter to Mr Swanney dated 7 October 2020 (CRA/372) confirmed that there were trigger events (namely, the WHSAP trigger and the planning application trigger) affecting the TVGAL "which extinguish the right to apply to register" until a terminating event had revived such right (by this time the WHSAP had been adopted). The resubmitted application was duly returned to Mr Swanney and he was again advised that "until these trigger events are terminated by a corresponding terminating event … it will not be possible to register the land". Again, this was, I think, erroneous advice.

27. Undeterred, Mr Swanney submitted his application for a third time on 29 November 2020 (CRA/374). Mr Swanney disputed that the WHSAP trigger was a valid trigger. He also thought that the planning application (which by then had still not been determined) was "moribund" and that neither of the claimed trigger events was an impediment to his TVGA proceeding. On this

occasion, the case officer confirmed safe receipt of his application on 30 November 2020. In her email to Mr Swanney (CRA/378) the case officer stated that although she was confirming safe receipt of the resubmitted application this did not constitute “an acceptance” of the application by the CRA and that further advice was being sought about this. The same process, as before, took place in relation to both trigger events and with the same result.

28. On 6 May 2021 the case officer notified Mr Swanney (see CRA/396-403) that the CRA considered that there were two operative trigger events which meant that the application “can be accepted only on part” of the TVGAL (as I think should have happened previously). The case officer was obviously telling Mr Swanney that his application was (on its third submission) accepted subject to the limitations imposed by the two trigger events where the right to apply to register in relation to the trigger event land was necessarily excluded until such time as a relevant terminating event had occurred. It was only at this point that the application was stamped 30 November 2020 and allotted the reference number 2020/02 TVG.

29. Steps took place after the case officer’s letter to Mr Swanney dated 8 July 2021 to deal with some minor deficiencies that were identified by the case officer in the application paperwork (as, of course, is permissible under reg.5(4)). The required amendments were made, and I see that the case officer sent Mr Swanney an email on 27 August 2021 expressing satisfaction with what she called the “revised application” received on 23 August 2021. The application (and it was still probably assumed by the CRA and by Mr Swanney that the boundaries of the WHSAP trigger and the planning application trigger were the same) was duly publicised in November 2021.

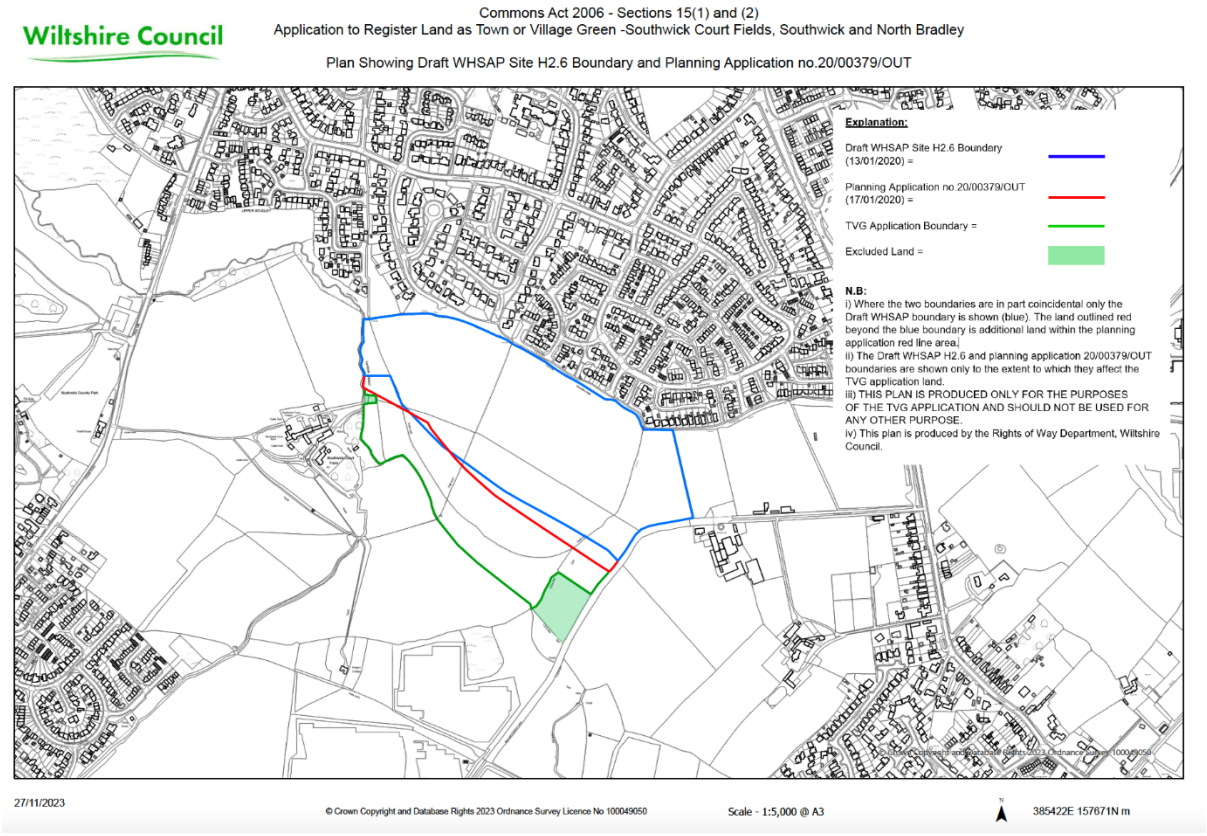
30. It only became apparent to me (and others) after the inquiry had closed on the first day that the boundaries of the two triggers were not the same in that the assumed planning application trigger was slightly larger than the WHSAP land. This is important in light of my finding that the planning application was not an operative trigger event.

31. It therefore becomes necessary to identify, and with reasonable precision, the extent to which the land subject to the planning application falls outside the WHSAP land as it would then be available for registration.

32. It follows that if (i) outline planning permission is granted on appeal, and (ii) the application to register is allowed, it would include some of the planning application land and might, as a consequence, interfere with the development proposal in view of its status as a TVG. In view of the imminence of a decision on the planning appeal, it is clearly important that the developer knows where it stands about this and the sooner the better, and an early decision on the application by the CRA is therefore encouraged.

33. I asked the CRA whether a plan might be made available showing the true extent of the areas affected by the two assumed trigger events. This plan would demonstrate with precision what land was available for registration. The matter was discussed with both advocates and the objective was to ensure that such a plan was made available, preferably before closing submissions in writing were lodged.

34. The plan below has been produced by the CRA since the inquiry showing the extent of the WHSAP and the planning application land and, by necessary inference, the extent of the land which is available for registration.



35. The land available for registration is the land between the blue and green lines (perhaps roughly two-thirds of the lower field to which reference is made below). The slither of land between the blue and red lines is where the planning application land (red) extends beyond the WHSAP trigger land (blue) on its southern side. What it means is that although these parcels comprise roughly the same areas, they are not identical in those places where gaps are shown between the red and blue lines. As will be seen, the Working Plan does not provide this level of detail and is only useful in showing the general location of the boundaries of the WHSAP land (light green) and the TVGAL (dark green).

36. In her closing submissions, Ms Waller submits that the refusal of the CRA to accept the first two submissions of the TVG application is no longer open to challenge on conventional administrative law grounds. It must follow, she submits, that the planning application is a valid trigger event as it pre-dated the date when the application was eventually accepted by the CRA as a duly made application. Were it not for the application of the back-dating principle in the *Church Commissioners'* case I think she may be right about this, but I

accept that there are credible arguments on both sides on what is a difficult point.

37. The *Church Commissioners'* case concerned corrections which needed to be made to an application in order that it could rightly be accepted by a CRA as having been duly made. Although the actual decision in that case resulted from a finding that the applicant had unreasonably delayed in taking steps to put her application in order (and the case involved the omission of statutory particulars), it was the view of the court that where an application had in fact been put in order to the satisfaction of the CRA (such that it was duly made), it should thereafter be treated as having been duly made on the date on which the original defective application had been lodged.

38. In my view, there is no sensible reason why an otherwise duly made application (which an applicant had every reason to think was valid) which may or may not have been affected by an operative trigger event should not be treated as having been made when it was first lodged, consistently with the finding made about this in the *Church Commissioners'* case.

39. There is advantage in this on both sides. In the first place, an applicant is not prejudiced by delays which may have arisen through no fault of his or her own, and, in the second, an objector is given an early opportunity of responding to the application under the rules (reg.5). Ms Waller notes in 2.33 that it was only on 5 November 2021 that a letter was sent by the CRA notifying the objector that an application had been made. There had been no prior disclosure regarding the occurrence of trigger events, nor any reason in the mind of the objector (that is, until I pointed this out on Day 2 of the inquiry) that there was any issue over this. I suspect that the difference in the boundaries of the WHSAP and the planning application triggers (and the implications of this on the application to register) might have been uncovered earlier if the objector's advisers had been aware of the risk that that some of the planning application land might still be available for registration.

40. My conclusions on trigger events are these:

40.1 The planning application is not an operative trigger event as it was first publicised after the TVG application had been lodged. Mr Swanney and Mr Vigar were therefore right to question the CRA's reliance on this trigger event.

40.2 The WHSAP trigger was an operative trigger (the draft DPD has now been adopted). The draft of the WHSAP was first published for consultation before the TVG application was lodged on 13 January 2020 (the time and order in which events happened can be seen at CRA/235).

40.3 The CRA's refusal to accept the application on the first and second occasions it was submitted was not justified. It follows, in my view, that the application should in fact be stamped as having been received on 13 January 2020 and I would recommend that this be corrected by the case officer.

40.4 The effect of an operative trigger event affecting only part of the claimed TVGAL should, in my view, have involved merely the amendment of the application plan and an updated statutory declaration (by virtue of the power in reg.5(4)) as it was an action which would have put the application in order and the CRA should have given the applicant an opportunity to do this. Clearly, if the operative trigger event(s) had affected the whole of the TVGAL it would be incapable of remedy in circumstances where a terminating event had not by then occurred.

40.5 My view about this is consistent with the para 96 of the DEFRA Guidance to CRAs on sections 15A to 15C of the 2006 Act (December 2016) which concerns those cases where the exclusion of the right to apply applies to only part of the claimed TVGAL. The guidance provides that for the portion of land, which is not subject to the exclusion, the application should proceed as usual. For the portion of land on which the right to apply has been excluded then an applicant should be informed that that portion of the land cannot be considered for the registration as a new TVG. In other words, it is not open to a CRA to refuse to accept an application as duly made just because only part of the TVGAL is subject to a trigger event. If there is debate over the incidence of a trigger event, then there will need to be a formal determination

about this by the CRA. What a CRA should not do is to repeatedly refuse to accept more or less identical applications until satisfied that they can in fact accept the application (on whatever basis is relied on).

40.6 I am satisfied that the foregoing errors on the part of the case officer were unintentional and resulted from incorrect advice received by her.

Legal framework

41. Section 15(2) of the 2006 Act enables any person to apply to register land as a TVG in a case where -

> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.

42. It is the duty of the CRA to consider the various elements of the statute all of which have to be made out to justify registration.

a significant number

43. 'Significant' does not mean considerable or substantial. What matters is that the number of people using the 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 (*R v Staffordshire County Council, ex parte McAlpine Homes Ltd* [2002] EWHC 76 at [64] (Admin) (Sullivan J)).

of the inhabitants of any locality

44. The term 'locality' is taken to mean a single administrative district or an area within legally significant boundaries. On this application the claimed locality is Grove Ward, Trowbridge whose boundaries can be seen on the plan at CRA/16. This is a lawful locality for TVG purposes.

have indulged as of right

45. To be qualifying use it must be use 'as of right' which means that it must be without force, secrecy or by permission (the so-called "tripartite test"). Once the claimed use has passed the threshold of being of sufficient quantity and of a suitable quality, it is necessary to assess whether any of the elements of the tripartite test applied, judging these questions objectively from how the use would have appeared to the landowner. In this case, the claimed use has undoubtedly been peaceable, open and without consent.

lawful sports and pastimes

46. The expression "lawful sports and pastimes" (or "LSP") form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play.

47. As the application involves the use of paths within and around the perimeter of the TVGAL, a question arises as to whether the use of such paths would be referable to the exercise of existing, or the potential acquisition of new, public rights of way rather than rights sufficient to support a TVG application.

48. In *Oxfordshire County Council v Oxford City Council* [2004] EWHC 12 (Ch) at [103]-[103] Lightman J said that the use of tracks will generally only establish public rights of way unless the use is wider in scope, or the tracks are of such a character that use of them cannot give rise to a presumption of dedication at common law as a public highway. Lightman J also said that where there was any doubt about the matter, the inference should be drawn of the exercise of the less onerous right rather than the more onerous right to use the land as a TVG.

49. The footpath issue was also addressed in by Sullivan J in *R (Laing Homes Ltd v Buckinghamshire County Council* [2004] 1 P&CR 36 at [102]-[110]. It was suggested that a useful test is to discount walking, with or without dogs, on the paths in order to determine whether the other activities over the remainder of the land were of such a character and frequency as to indicate an assertion of a right over the whole of the TVGAL. It was also noted by Sullivan J that, as

he put it, he did not consider that a dog's wanderings or the owner's efforts to retrieve his errant dog would suggest to a reasonable landowner that the dog-walker believed he was exercising a public right to use the land beyond the footpath for informal recreation. In the *Oxfordshire* case in the House of Lords ([2006] 2 AC 674 at [68]) Lord Hoffmann approved of the guidance offered by Lightman J and Sullivan J.

50. I deal with the law at some length under this head as it is likely to be relevant to the outcome in this case. This is why I mentioned the relevant authorities to Ms Waller and asked her to send copies to Mr Vigar.

51. What it all boils down to is this: would the proven use have appeared to a reasonable landowner on the spot as referable to the exercise of a right of way along a defined route or the right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous then it must be ascribed to a lesser right, i.e. a right of way.

52. I should also mention that as there are in fact three public footpaths crossing the application land (SWCK1, SWCK2 and SWCK3) any use of these paths is not by law qualifying use as the public have a right to use highway land for reasonable purposes provided it does not interfere with the public's right to pass and repass. In the result, the public's use of public footpaths must be discounted (see *DPP v Jones* [1999] 2 WLR 625).

on the land

53. The expression "on the land" does not mean that the CRA has to look for evidence that every square foot of the land has been used for LSP. Rather it needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the TVGAL has been used for LSP for the relevant period, always bearing in mind that qualifying use will be heavier in some areas than in others (*R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2003] EWHC 2803 (Admin) at [29]).

Severance

54. The CRA does have a power to sever from the application those parts of the land where qualifying use may not have taken place or where the excluded land is non-qualifying.

for at least 20 years

55. The relevant period in this case is the period of 20 years ending on 13 January 2020 (CRA/342-343) when the application was first lodged by Mr Swanney.

56. Qualifying use has to be continuous throughout the 20 year period (*Hollins v Verney* (1884) 13 QBD 304) although temporary interruptions are not to be equated with a lack of continuity. This is not a case involving interruptions.

Procedural issues

57. The regulations which deal with the making and disposal of applications by CRAs outside the pilot areas 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 in cases where there is a serious dispute where, almost invariably, an independent expert is instructed by the CRA to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

58. However, the CRA is not empowered by statute to hold a hearing and make findings which are binding on the parties. 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.

59. The only question for the CRA is whether the statutory conditions for registration are satisfied and the onus is on the applicant to establish this on the balance of probabilities. There is no scope for the application of an administrative discretion or any balancing of competing interests. In other

words, it is irrelevant that it may be a good thing to register the land as it is a convenient open space for use by local inhabitants or that it is a necessary step to prevent its development in the future.

60. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. It is very simple in that (a) anyone can apply; (b) unless the CRA rejects the application on the basis that it is not 'duly made' or the right to apply is extinguished by a planning trigger event or events, it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the CRA then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

61. It has been said that it is 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*' (*R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p.111 (Pill L.J) and approved in *R (Beresford) v Sunderland City Council* [2003] UKHL 60 at [2] (Lord Bingham)).

Consequences of registration

62. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the TVG land. Upon registration the TVG land becomes subject to s.12 of the Inclosure Act 1857 and s.29 of the Commons Act 1876 (these are known as 'the Victorian statutes') which make it an offence to damage the land or to impede its use for recreation. The effect of this is to preclude development on the TVG.

63. The interpretation of the Victorian statutes was considered by the Supreme Court in *TW Logistics Ltd v Essex County Council* [2021] AC 150 which, put shortly, held:

(i) Registration meant that the public acquired the general right to use the land for any lawful sport or pastime, whether or not corresponding to the particular recreational uses to which the land had been put during the 20-year qualifying period.

(ii) The exercise of that right was subject to the give and take principle which meant that the public had to use their recreational rights in a reasonable manner having regard to the shared use of the land during the qualifying period.

Description of the application land and surrounding area

64. The TVGAL forms part of a much larger holding of agricultural land within a tranquil setting on the southern outskirts of Trowbridge, lying roughly to the north of and between the small settlements of Southwick and North Bradley. The soil is mainly clay. I saw for myself that the wet soil is very damaged where it has been regularly walked upon, particularly at the access pinch points. Although the larger holding is generally flat the central areas are uneven and pitted through use by cattle grazing on the land over many years. This is includes much of the TVGAL.

65. As is shown on the Working Plan and the more detailed plan at paragraph 34 above, the TVGAL is comprised within the southern of two large fields. Both fields are reasonably well maintained and not especially tussocky (the grass is cut in June each year). On its NW side there is an obvious floodplain where the land drops down to a dashed green line shown on the Working Plan which is a watercourse (being a continuation of Lambrok Stream which runs around the southern boundary of the TVGAL). The smaller of the two blue parcels shown on the Working Plan is an enclosure where cattle are corralled. There is also a road at this point enabling cattle to be transported offsite.

66. For the most part, the southern boundary is bounded by a dense hedgerow. Indeed, both upper and lower fields are ringed with hedgerows (within which there are a number of very fine oak trees) and a watercourse (or watercourses) which I think must be piped at various points.

67. The overall holding with which we are concerned consists of two large fields. The two fields are divided by fencing (albeit with large gaps at the eastern end at or around point 1 where the public right of way NBRA4 enters the lower field off Axe and Cleaver Lane). There are three crossing points dividing the two fields marked 3, 4 (both stiles) and 1 on the Working Plan. It is, I think,

convenient that I refer to the field closest to the housing estates as “the upper field” and the other field as “the lower field” within which the TVGAL will be found.

68. Although the TVGAL is unfenced on its northern side it is relatively simple to imagine where it is located within the lower field. When it came to giving evidence the applicant’s witnesses were rightly informed where the TVGAL land was located, and they were directed to the dark green land shown on the Working Plan. In practice, witnesses explained what they did and where they went when they used the lower field. I was quite satisfied that, even though the Working Plan did not accurately show an outline of the TVGAL, all of the applicant’s oral witnesses gave reasonably coherent accounts of their own use of the lower field and those observed by them on the part of other users, and this has enabled me to make findings on whether the use relied on justifies registration. The position is clearly more difficult when it comes to the written evidence which was drawn up in advance of the inquiry.

69. Access to the TVGAL from the housing estates shown on the Working Plan is via the three openings crossing the watercourse which corresponds with the dashed green line running along the northern boundary of the upper field of which only those at 5 (Spring Gardens) and 6 (Westmead Crescent) are noted on the Working Plan. There is a relatively new kissing gate (which at the inquiry we referred as gate 7 – where there is said to have once been a barbed wire fence or at least a gap in the hedgerow of some description) which leads into Boundary Walk which is located on the NE side of the upper field.

70. The TVGAL is accessible to the public and the public rights of way (“PROWs”) are plain to see on the ground which has been trodden down by regular use. The network of public footpaths in the vicinity of the TVGAL shows that the lower field is an obvious crossing point to those using the TVGAL as a means of access to destinations in Southwick and North Bradley. One of these paths (SWCK62) also runs to Frome Road.

71. There are some very useful photos of the upper and lower fields at CRA/187-194 (these were put in by Mr Swanney) and at CRA/453-456 which were put in by the case officer and are accompanied by a helpful location plan (CRA/455 shows the flood plain area and the area where animals are corralled in the background. The land slopes upwards to the east at this point).

72. Image 1 below was given to me at the inquiry by Councillor Graham Hall ("Cllr Hill") showing where the flood plain is in the NW corner of the two fields. The lighter areas are prone to flooding by comparison with the darker areas on each side, especially on the eastern side where the ground is noticeably higher (this is a classic flood plain). Image 1 is produced by DEFRA using the LiDAR technique (which stands for light detection and ranging) which is a technology used to measure various attributes of an object or a phenomenon, in this case the land's surface water drainage attributes.

Image 1

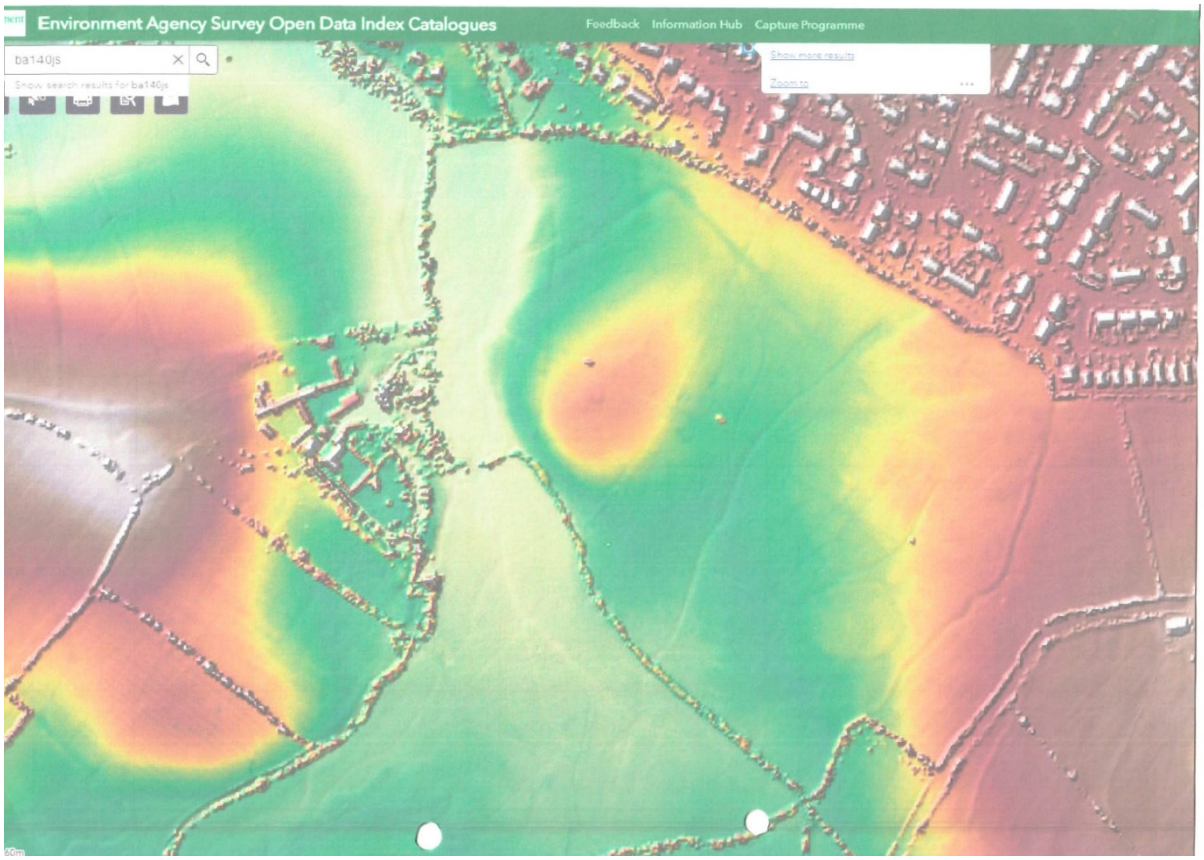


Image 2

This image shows flooding on the NW side of the application land.

73. On my accompanied site visit both lower and upper fields were very wet. One really needed wellingtons/sensible footwear to walk anywhere, not least in the NW quadrant of the light green/dark green areas shown on the Working Plan (look at Image 1 above). It seems obvious that qualifying use within the flood plain area mentioned above is likely to be trivial or occasional in the drier months and practically non-existent during the wetter periods.

74. Before my accompanied view of the upper and lower fields which started at around 9.30am on Day 2 of the inquiry, I spent time walking around the housing estate(s) roughly to the south of Silver Street Lane. I was particularly struck by the large number of dog walkers heading towards the fields. I think it

entirely probable that a significant number of dog walkers living close to these fields are using them on their long or short walks.

Applicant's written and oral evidence

Applicant's written evidence

75. I propose to start with the plans and principal photos. At A/15 we have Exhibit C which forms part of the applicant's case for registration. At para/7 of the Form 44 the following is noted at the second bullet:

> The unfettered use of the land has been unchallenged over this period and is symbolised by the footpaths and/or trackways formalised upon it.

In fact, the sheet at A/15 is headed as follows:

> Footpaths established during use of land in this application

There are two photos on this sheet. One is unmarked and shows perimeter and cross-field paths, and the other is the same image but with the same paths marked in black for clarity. One is able to visualise the dark green land on the Working Plan on this image. It seems clear that the applicant has included three PROWs which cross this land, namely SWCK1, SWCK2 and SWCK3.

76. I have not included the above images as the applicant's case on paths, formal or otherwise, is, I think, better depicted on the plan produced to the CRA on 5 April 2022 when Mr Swanney responded to the first statement of objection dated 16 December 2021. The objector was making the point that the use of footpaths was non-qualifying and should be distinguished from qualifying LSP. In his response Mr Swanney says this on CRA/182:

> As evidenced by the trackways map and photo in appendix c), the designated footpaths are supplemented by a series of trackways and meander lines which cover the entirety of both the application site and the allocated portion of the land.

77. The point being made by Mr Swanney is that qualifying use also takes place outside the PROWs. See his appendix (c) map/photo at CRA/189.

Appendix C

Current footpaths and trackways

Whilst photographs exist taken from ground level, this is the clearest representation of the numerous paths and trackways in us at the current time.

Current footpath/trackways key:

Black	Principal circular path
Yellow	Secondary "internal" paths running either side of the remains of the fencing and the Southern perimeter.
Blue	Right is the path from the kissing gate, Left follows the high water line of the flood zone.
Orange	The principal North-South footpath.
Red	Blocked off pathway
Purple	Right access to bridleway, left access onwards to Southwick, North Bradley and Hoggington.
White	Dog walker route

189

78. Mr Swanney's appendix (c) image is followed by the image in appendix (d) which will be found on CRA/190.

79. The above image may be compared with the image on the next page which will be found at CRA/71 and is dated 2020/2021. The image at CRA/71 also shows the very distinct layout of paths, formal or otherwise, which exists on the ground. Indeed, the pattern is largely unchanged, as I observed on my accompanied visit on 22 November 2023, where the perimeter path around the outside of both fields is obvious and is doubtless more pronounced in the growing season before the grass is cut in June each year. At such times it is the obvious place to walk.

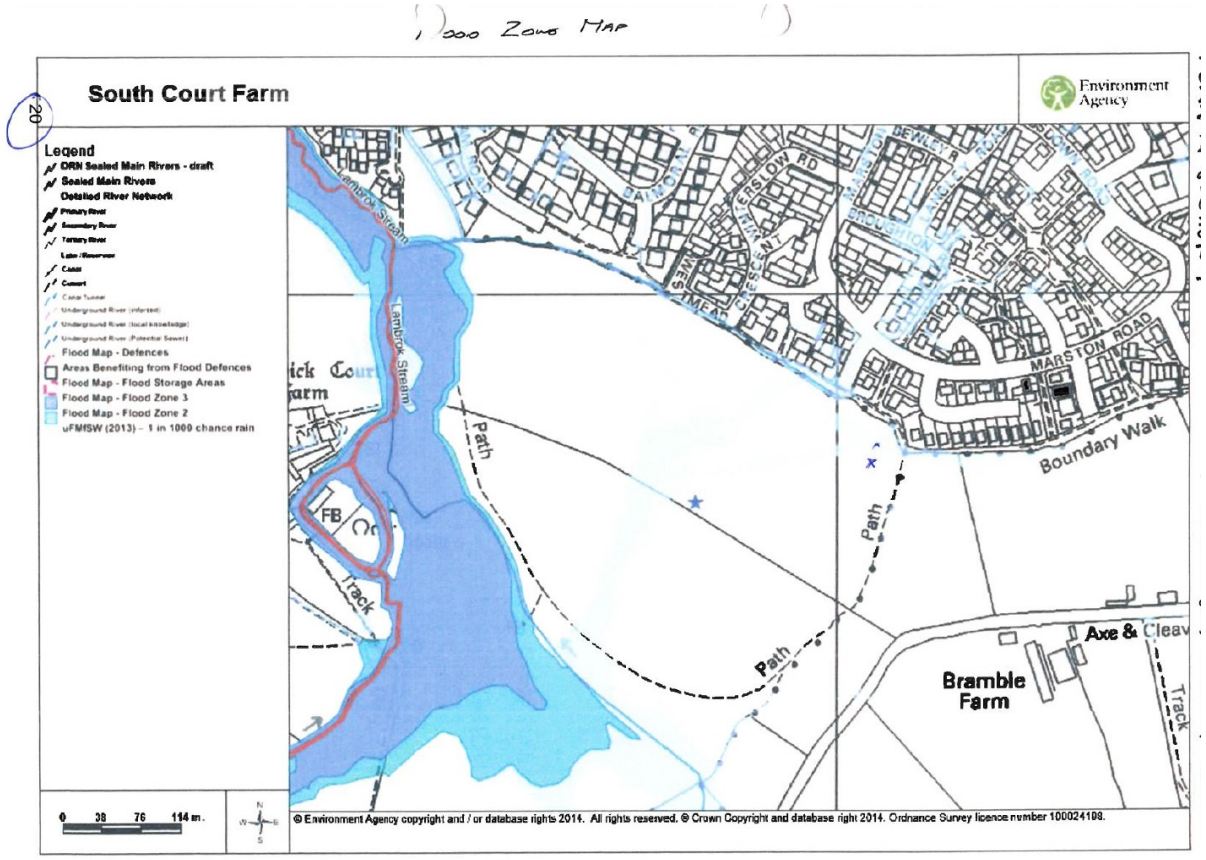
80. The position then is that the TVGAL in this instance is subject to identifiable paths running (i) around the southern perimeter; (ii) cross-field (SWCK3); and (iii) that headed in a NW direction to the exit at point 5 on the Working Plan (SWCK1). Note also (iv) Mr Swanney's outer "Dog Walker Route" along the white line close to the edge of the field on his appendix (c) plan at paragraph 77 above. It is important that we remind ourselves that the true extent of the TVGAL is the land to the south of the blue line shown on the plan at para 34 (p.10) which falls short of the cross-field fencing line dividing the upper and lower fields.

81. I have not overlooked the photos of the access points on CRA/31 all of which demonstrate that both the upper and lower fields are accessible to the public. The photo at the foot of CRA/31 showing the stile at point 4 on the Working Plan is particularly significant. The photo is liable to have been taken in the summer when the field was not as saturated and muddy as it was on my accompanied view.

Applicants other written evidence relevant to user

82. At CRA/20 the applicant produced a flood zone map produced by the Environment Agency (2014) which again shows the flood plain already mentioned and a path running around the perimeter of the lower field which aligns with the path shown on the above three plans.

Flood Zone Map



83. The Form 44 was accompanied by a note at CRA/24 in which the application land (at that time, of course, extending to both upper and lower fields) was said to have been used for a variety of qualifying recreational activities. There was also a supporting petition which had been signed by 23 people. The "Policy statement" at CRA/33-68 does not advance the case for registration which is not concerned with planning issues.

84. In his opening remarks Mr Vigar seems to me to have a surer grip on the evidence required to justify registration. He accepts that the application relates to what he described as the "southern section of Southwick Court

Fields" and the need to prove those elements under section 15 of the 2006 Act in order to justify registration. Mr Vigar also makes the mistake in supposing that the planning application land "to the north" is subject to a trigger event, along with the WHSAP land, since the former land is included within the latter. He accepts that this makes proof of qualifying use more difficult in what is left of the TVGAL.

85. When it came to the sufficiency of qualifying use Mr Vigar said that he found no difficulty in finding, as he put it, "12 witnesses prepared to attest that they have used the land for more than 20 years before the date of the application". He refers to the case officer's summary of the witness evidence in her report in which 24 witnesses claim to have used the land for more than 20 years. He says that many of these witnesses are prepared to state that they represent a relatively small sample of the residents who routinely use the land. Another resident, so Mr Vigar claimed, "conducted an informal survey in early 2021 who says that more than 3,500 individuals were counted entering the whole of Southwick Court Fields area in a one-month period in early 2021". Mr Vigar also refers to another petition which opposed the grant of outline planning permission which he says contains 196 signatures most of whom live in Trowbridge. All this material ignores, of course, the effect of the operative trigger event in the case of the WHSAP land and the very low weight which must be attached to petitions.

86. Mr Vigar agrees with me that the relevant application date is when the application was originally lodged and that any deficiencies in the application, once cured, meant that the application should be treated as having been duly made on the date on which the original, albeit defective application, had been lodged. Mr Vigar also invites me to find (as I take him to mean) that the witnesses who provided statements are a representative sample of how local residents have used the land over the years and not only during the qualifying period. In terms of LSP, Mr Vigar says that the land has been used for a range of activities for at least 20 years and has included walking, with or without dogs, playing games and for exercise. In terms of sports, he refers to jogging, ball games, including football, kite flying and "many children's

games". Mr Vigar also mentions the fact that none of the applicant's witnesses say they were prevented from using the TVGAL. It is his submission "that on the balance of probability the application fulfills all of the criteria for the land to be registered as a town or village green".

The applicant's user evidence

87. At CRA/266-280 the case officer has produced a helpful schedule of the applicant's witness evidence which is, of course, referable to the whole of the TVGAL in a no trigger event world (consistently with the Form 5 advertisement). A total of 49 individuals (including the Parish Council's of Southwick and North Bradley and those who signed two petitions) supported the application on the first two submissions. The case officer also notes that Trowbridge Grove Ward had an estimated population of 4,458 in 2020.

88. Before the inquiry Mr Vigar also sent me a helpful breakdown of his written and oral evidence in which he summarises the nature and extent of the user relied on in each case. I will deal with this evidence in detail below.

89. It was made clear to each of these witnesses that they should be focusing their evidence on the area coloured dark green on the Working Plan which they were told was the land available for registration. By the second day of the inquiry, it was clear that there was slightly more land available for registration than had been supposed on the first day, I am quite satisfied that no damage was done to the applicant's case as a result of this discovery. This is because there is no physical division between dark and light green areas within the lower field. Because of this it seemed plain enough to me that the witnesses would have been dealing with their activities within the lower field as a whole. In practice, the additional land available for registration owing to the exclusion of the planning application land results only in the addition of a small portion of land to the dark green land shown on the Working Plan, albeit within the same unfenced area within the lower field.

The applicant's statements

90. A total of eight statements are to be found in A/57-64. Four were very short (Clarke, Clarkson, Noutch and Stevens). Hilary Chamulewicz put in a lengthy statement in which she mentions the "well-worn paths (arising) from such a high footfall of people walking daily". Karen Dewfall's statement is helpful as she says that she and her family have "used the fields behind boundary walk, particularly the southern part, consistently over the years". She says she has dogs whom she walks "over the southern part of the fields". She has lived at Langley Road for 26 years. Mrs Dennis does not give her address but she says that the "proposed village green is on our doorstep". Malcolm Oliver and his late wife have used the fields for a great many years as did their four children when they were growing up.

Applicant's oral evidence

Mr McCartney

91. This witness has lived with his wife at [redacted] Balmoral Road since 1985 (their joint written evidence is at A/55). Mr and Mrs McCartney brought up their four children at this address which is very close to the upper field. In chief he said that they used the fields in the early days with the children. He recalled collecting leaves for nature studies at school, picking blackberries and, as he put it, looking at nature such as the birds on the fields. He also introduced his eight grandchildren to nature. He says that they did not stay on the tracks and wandered outside them. He also saw other people on the fields and saw people flying kites and children running around and kicking balls. He could see from his home people using both fields. He could not recall grass on the lower field being cut or grazing taking place on this field. He says that there is widespread "bogginess" across the lower field as it is so close to the watercourse and that wellingtons would need to be worn in the wet weather. He added that when on his own he used the lower field for exercise and used it for walking to the pub in Southwick. He also said that when on his own he stuck to the footpaths. He said that people mainly walked on the paths.

92. In cross-examination he accepted that he walked on the perimeter paths where he sees dog-walkers sticking to the paths. He also accepted (and I am sure he must be referring to his walks after his children had grown up when he said they played games outside the paths – he mentioned this in re-examination) that the only time, as he put it, he walked off "the established path" was when it was waterlogged.

Mark Stevens

93. Mr Stevens and his wife have lived at [redacted] Sandringham Road (which is close to the upper field on its NW side) for 44 years. His statement is at A/54. He says that they have regularly walked on the TVGAL with their children and five grandchildren. His statement notes annual blackberry picking (he also mentioned sloes in his oral evidence). In his oral evidence he said that when out with his son playing football "I was all over the place". They even fished in the stream. He also thinks that when they moved to Sandringham Close more children played in the fields. He said that he knew "lots of people walking around the perimeter – always ten people walking around the perimeter". In cross-examination he mentioned that his daughter has lived in Spring Meadows for nearly 21 years (also within Grove Ward) and walks her dog on the fields some five times a week. He has also walked his own and his daughter's dog in the fields (I think he has had three dogs over the years). He said he did not walk on the grass when it was long other than to retrieve his dog. He also said that "dog-walkers tended to stick to the path", more so than the younger children.

Rachel Hunt

94. Mrs Hunt lives at [redacted] Frome Road. She says that she has been using the TVGAL almost daily since 1999. Her statement is at A/51. She currently walks her dog there three times a day. When her children were small (they are now aged 23 and 20) they played and rode their bikes on the land. It is, she says, "an amazing resource for the family" and (in her statement) is "much treasured by local residents". She said that she does not confine her walks to the paths running around the field. She accepts that "a lot of the

time" is spent on the footpaths (which I take to mean the PROWs and the informal paths) but on other times this is not where she walks. She said that since the planning application there are no longer cows in the field. In terms of the use she has observed by others, she says that she has "certainly seen" as many as 10-15 people on the land whilst she has been walking her dog there. She said in cross-examination that the predominant use (that is, by people walking on the land) was "mainly on tracks around the field". She also accepted that the land was "boggy" in the NW area of both fields. In dealing with cattle, Mrs Hunt said that since the planning application cattle have not been in the field but there used to be around 30 there at any one time. Dog-walkers kept their dogs on a leash and tended to avoid the cows when they were in the fields. She also said that there were fewer people using the fields when cattle were on the land.

Rik Clews

95. Mr Clews has lived at [redacted] Boundary Walk since April 2002. The family has always had dogs in that time. Mr and Mrs Clews foster children. In his statement at 48 Mr Clews says that he and his wife would have welcomed over 50 children into their home most of whom would have used the land. This is in addition to their own children now aged 25 and 21 along with their three adopted children. (On my accompanied view of the fields the home of Mr and Mrs Clews was pointed out to me close to the new opening at 7, off Boundary Walk.)

96. In chief Mr Clews said that since they had been living at Boundary Walk they have had at least 3 dogs and they have used the upper and lower fields "about every day". He was at pains to point out that they would have used the TVGAL and not just the field close to their home. He said that they not only walked on both fields but also played with frisbees, kites and balls off the paths. When pressed about this he said that although they had walked off the path (meaning the perimeter path starting close to their home) this was "not often". He also mentioned picking mushrooms and blackberries. He also mentioned cattle in the field (which they avoided) and water ponding on the land in what looked like channels or gullies.

Councillor Graham Hill

97. Cllr Hill is a town councillor for the Grove Ward and lives at [redacted] Balmoral Road. Cllr Hill was an extremely helpful witness and provided valuable assistance to Mr Vigar. Cllr Hill's statement is at A/50. He also provided me with the two images at pp.2-21.

98. Cllr Hill and his family moved to Balmoral Road in 2002 since when, his statement says, his family have "freely used the adjacent field system with its footpaths and trackways". In his oral evidence he says that his children were in their early teens when they moved to Balmoral Road and spent a lot of time on the TVGAL. More recently, the family have played frisbee and he has indulged in photography and the family have also used the fields to visit his daughter and three grandchildren in North Bradley (Ms Waller notes that he said that when crossing the site to visit his family in North Bradley he did not leave the footpaths). Sometimes they met up with his grandchildren on the fields. This would have been in the summer. He says that the application land was a good place to meet up.

99. Cllr Hill also dealt with the flooding issue. Put shortly, he says that the NW area of both fields is prone to "flood and waterlogging on a bi-annual basis" when it is unusable for anything, even for farming. It was his view that 20% of the TVGAL lies within a flood zone and was unusable for around 5-6 weeks per annum; even outside this period you would still need to use adequate footwear. He said that only around 80% of the TVGAL was (as my note puts it) "OK" and, as I infer, would be available for all-year-round use.

100. Cllr Hill says that he can see the fields from his study. He sees "lots" of dog-walkers, youths sitting around on blankets and children on the land in the summertime. He has not seen cattle on the fields for around the last 2-3 years. He thinks that he and his wife use the fields for walks around 1-2 times per week (he is not a dog-walker).

David Goodship

101. Mr Goodship has lived close to the upper field at ■ Sandringham Road for 49 years (it will be 50 years sometime in December). His somewhat brief statement (which was signed on his behalf by Mr Vigar as he was on holiday) is at A/49. His two children are in their 40s.

102. Mr Goodship retired in 2000. He is not a dog-walker but takes regular exercise on the application land. He says the condition of the land is very seasonal. The ground gets "boggier" if you go westwards. He says that cattle have not used the fields for some time. He had only seen them there from time to time in the early stages of the growing season. They would not be there when the grass was cut in May/June. He said that "loads of people" used the land before and after Covid (Ms Waller notes that he also said that there had been an "explosion of use post COVID"). He mentioned dog-walkers and adults with their children. There was nothing to prevent anyone using the land. He said that he would use the public rights of way for what he described as his "quick walks" and at other times he used the "wider area" which I understood him to mean by way of the path around the perimeter of both fields.

103. When cross-examined, Mr Goodship said that if he was on "a slow walk" he would use the light green land on the Working Plan. If not, he would use the dark green land. He also confirmed that he used "the perimeter path" when using the dark green land on this plan. He says that "lots of people" exercise their dogs on the TVGAL, "sometimes on the footpath, at other times not on the footpath" (which I take to be a reference to the perimeter path). He has seen groups of children sitting on the ground and listening to music and children flying kites. Mr Goodship also said that before 2007 he used to jog on the TVGAL twice a week. His routes varied but they included runs on the TVGAL.

Geoff Whiffen

104. Mr Whiffen and his wife have used the fields continuously for leisure and dog-walking since they moved to ■ Holyrood Close in 1997. Their three

daughters did likewise, as do their grandchildren. His daughter living at [redacted] Boundary Walk has four dogs who are walked on the fields on a daily basis. Mr Whiffen or his wife usually accompany their daughter on these walks (they meet up in the fields). Mr Whiffen says that they tended to walk "nearer to the stream than keep to the track" (I take this to mean that he/they must have entered the upper field at any one of the entry points at 5, 6 and 7 (which he said he used) before using any one of the cross-field paths identified on the Working Plan in order walk near the stream on the southern edge of the dark green land).

105. Mr Whiffen also mentions seeing other dog-walkers on the land whenever he enters at point 6. He also says that when the weather is warmer children play in the fields off the paths. When it comes to cattle, he says that they are generally "down at one end of the field or other" and do not worry him. He thought there could have been around 20 plus cattle in one or other field at any one time. Dogs were always kept on a lead whenever there were cattle in the fields.

106. When cross-examined about his walks he said that if it was a quick walk "it's circular" (which I take to mean is a walk around the perimeter path) whereas if it is a longer walk then they walk outside the fields. Mr Whiffen also noted that when it was cut the grass (and he says that the grass was cut each year) would have been around 2 feet in length. By this time the ground around the edge of the grass would have been worn down and "very short".

Barry Jones

107. Mr Jones lives on the NE side of the fields at [redacted] Summer Down Walk. He and his wife have lived there since 1982. Until Covid they always had dogs. In his brief statement at A/52 he says that a substantial number of people "from both the Trowbridge side and also both Southwick and North Bradley use all of the fields criss-crossing the proposed open space" (which can be seen coloured green on the planning proposals' map at CRA/222 – in other words, the statement for this witness may also have been used on the planning application). At any rate, Mr Jones says in his oral evidence that he mainly

uses the land for dog-walking. He uses both fields, saying that the number of people you could see “was remarkable”. He says that he walked “the entire perimeter every day”. He says he walks “on paths as well as on the perimeter”. He says he follows his dog which can lead him off the footpaths.

108. He too mentions how the fields get boggy where the land dips (as he put it) in the way one imagines from the image on p.20 (with the yellow/orange area being the higher ground than the lighter shaded area which, as Mr Jones is saying, is where the land is at a lower level).

109. He was aware of the fact that cattle grazed in the fields. They tended to run around when they were first put out but settled down after a few days. He said that you knew where cattle were in the field, and you kept away from them. He always kept his dog on a lead when there were cattle in the field.

110. He said that in the summer months you would see a number of families in the field. Occasionally there were ball games, but the ground is uneven. He also mentioned a swing near, as I recall, to the edge of the watercourse (not the one already mentioned but another) which is no longer there. He says that people flew kites and he also saw a couple of picnics taking place. He mentions students from Trowbridge College using the land and others likewise from Southwick and North Bradley (who are unlikely to have been qualifying residents).

111. Mr Jones says that the fields are used for walking and exercise “rather than playing in the middle”. He also says that if he is on his own (i.e. without his dog) he sticks to the paths. This is, he says, “the place where people are mainly walking”. He also mentions that “all entrances are used constantly” and “litter bins [are] overflowing”. In the case of his own daily walks, he says that his walk lasts at least an hour in the morning and between 30-45 minutes in the afternoon. Ms Waller also noted that Mr Jones referred to the intensification in the use of the land during the lockdown.

Blair Keltie

112. The joint statement of Mr Keltie and his wife is at A/53. They have lived at [redacted] Westmead Crescent since 1987. It is close to the upper field and entry point 3. They have used the fields on a daily basis as they have a dog. Mr Keltie throws a ball around and he says that he follows his dog. He walks straight across the upper field and enters the dark green land and walks across it in the direction of the solar farm site. He has 2 children and four grandchildren living in Trowbridge and they enjoy playing football, frisbee and kite flying.

113. He mentions kite flying, a rope hanging from a tree in the 1990s and picking blackberries and sloes. As a former officer involved in child protection (he retired in 2019) he considers his use of the land to have been valuable for his mental well-being. He likes using the TVGAL as it is "more remote". He says he observed many other people enjoying the same location for exercise and relaxation. He says that he kept away from the cattle when they were in the fields, and he was clear that the grass was cut and baled in June every year. He thinks that the grass was some 3 feet high when it was cut. For this reason, he says that people kept to the paths when the grass was growing. He thinks that there are more dog-walkers using the light green area.

114. The Keltie's statement is very detailed. In it they say that the "large footfall is immediately evident from the wear of the footpaths … indicating their popularity and high demand".

Mrs Dennis

115. Mrs Dennis was not called as a witness for the applicant but attended to give evidence to assist the inquiry. She lives at [redacted] Balmoral Road, and I think since 2012 has been a regular user of the TVGAL. She said that people use the paths. She said that she and her husband do "all of the paths" with their dog. She sticks to the paths. As she put it, people generally use the paths and if the paths are muddy, they use the land alongside it to walk on. They do not go onto the land if it is wet, but they use it in the summer every day. She mentions seeing youngsters congregating in groups in the summer and people with balls.

The objector's case

116. The objector did not put in an inquiry bundle. Instead, Ms Waller relied on two lengthy objection statements dated 17 December 2021 and 23 May 2022. Ms Waller also put in detailed closing submissions dated 5 December 2023 with which I will deal later.

117. Ms Waller did, however, rely on the evidence of the objector's son, George Rhys, who produced a statement (a signed and dated copy of which was produced during the course of the inquiry) and also gave oral evidence. No objection was raised to the late admission of this evidence, and I see no reason why this evidence should be excluded from the inquiry. I might add that it was extremely helpful of Ms Waller to produce a statement for Mr Rhys overnight as it meant that Mr Vigar had the advantage of knowing what Mr Rhys would be covering in his oral evidence.

George Rhys

118. Mr Rhys lives close to the TVGAL at [redacted], off the Frome Road. His mother owns the TVGAL, and, in view of her advanced age, it was only right that her son should have given evidence on her behalf.

119. In his written evidence Mr Rhys says that his family have farmed the land since the 1960s when it was a dairy farm, but the farming business has, for some time now, concentrated on silage, hay and grazing which, in the case of the latter, ceased in around 2019. Cattle were brought onto, as Mr Rhys puts it, the wider farm holding in April each year where they were moved around when areas were cut for silage and hay. He says that once the grass was cut the cattle would be moved onto these fields where they remained until September. This was repeated every year. There has always been a gap at either end of the cross-field fencing to allow the cattle to move around between both fields. Although Mr Rhys mentioned damage to gates, fencing and stiles over the years he concedes that most of the damage (or vandalism as he called it in his oral evidence) occurred outside the TVGAL. It was, however, plain from the way Ms Waller put her case that the issue of non-peaceable use does not arise for consideration on this application.

120. Mr Rhys accepts that the TVGAL is used by local residents for walking with or without dogs. He thinks that other uses involving “kite flying, ball games etc” take place on the upper field. He also thinks that the unevenness of the land makes it probable that joggers or those playing games will stick to the paths. He points out that the application land “is not a park or recreation ground with a flat surface for recreation”. He disputed that football or ball games were played on the fields and he emphasises the growing grass crop after March in each year.

121. In his oral evidence Mr Rhys told us that the TVGAL extended to approximately 5 acres. He said that the grass stood about 3 feet when it was cut and the haymaking process (cutting, turning the grass to dry and baling) could last up to 2 weeks if the weather was dry. As for the cattle there could be as many as 60-80 using both fields. In his second witness statement Mr Rhys said that due to the annual presence of cattle in the field the surface is very uneven and deeply pitted. He said that his daughter had to confine her jogging on the land during the COVID lockdown to the paths where the footfall was more even.

122. Mr Rhys accepts that he gave permission for the introduction of a kissing gate at what was referred to as gate 7 on the NE corner of the light green land close to Boundary Walk. Before then Mr Rhys said that there had been a dense hedgerow. He also said that he used to ask people to walk on the footpath although his evidence about this was not particularly specific. In truth, the position was, as he explained, namely that although he was not happy with people using his land, he accepted it and there was nothing he could do to prevent it, nor, for that matter, did he erect prohibitory signage in an attempt to control the situation. He did though put up signs on gate posts with an arrow pointing in the direction of the public rights of way and he said that he told people who were (as he put it) “wandering around” to keep to the footpaths.

123. Mr Rhys told the inquiry that people “were not walking outside the paths” where in the growing season the grass could grow as high as 3 feet. Dogs also kept away from the cows who were grazing in all parts of the fields

between June-September each year (or even until October if it was dry). Mr Rhys agreed that the public were respectful of the grass crop until it was cut for hay or silage. Mr Rhys disputed that people congregated on the fields. He says they did this off-site. He accepted that the main use of the land by local residents was for walking, with or without dogs. He also said that he was on the TVGAL a few times each week dealing with, as he put it, management issues. At the close of his evidence, it was obvious that the application was causing Mr Rhys some distress.

Ashfords' letter dated 5 December 2023

124. Ashfords are a firm of solicitors in Exeter who act for Waddeton Park Ltd ("WPL") which has a land promotion agreement with the objector affecting part of the land which is subject to the TVGA.

125. Ashfords complain that WPL had not been afforded an opportunity to take part in the inquiry. It is unnecessary for me to comment upon the reasons given for this or to delay the inquiry process now that Ashfords' have made submissions on whether the outline planning permission is a valid trigger event and, if it is not, whether any land comprised within the planning proposal falls outside the WHSAP trigger. It is worth noting that Ashfords do not suggest that the CRA's plan on p.10 above is inaccurate.

126. I have, of course, already dealt with the scope of the outline planning application as a potential trigger event. It is my advice that the planning application is *not* an operative trigger event as it was first publicised *after* the TVG application had been lodged. Mr Swanney was therefore right to have questioned the CRA's reliance on this trigger event and the TVG application should have been stamped and allotted a number when it was lodged on 13 January 2020. It was through no fault of Mr Swanney that this did not happen.

127. Accordingly, it is my advice to the CRA that the area of land available for registration is the land falling between the blue and green lines on the CRA's plan at p.10.

128. In my view, the foregoing is sufficient to deal with the submissions made on behalf of WPL. This is not a case where the applicant had neglected to take action to put an application in order in circumstances where it had not been duly made and where the CRA had given the applicant a reasonable opportunity of taking that action.

Applicant's closing submissions

129. I do not intend to deal comprehensively with Mr Vigar's helpful submissions. Much of what he says is already covered in this report. I will endeavour to summarise what he says.

130. The planning application was not a valid trigger event as it was first publicised after the TVG application had been lodged. I agree with this submission for reasons previously explained.

131. As the planning application land covers a slightly larger area than the land covered by the WHSAP trigger (which is a valid trigger: a further iteration of the draft WHSAP was published in July 2018) the parcel of land between the red and blue lines on the CRA's plan at paragraph 34 is also available for registration. I agree. The WHSAP land edged blue on the plan is not available for registration as I consider this to be a valid trigger event.

132. I do not agree that the earlier draft published in June 2017 is the operative trigger event merely because the Southwick Court Fields allocation was unchanged in the second draft. If it was, Mr Vigar argues that it became subject to a terminating event (noting the provision for lapse after 2 years) before the TVG application was lodged.

133. The adoption of the WHSAP following the lodging of the TVG application is not a trigger event under para 4 to Sched.1A. I also agree with this submission.

134. Mr Vigar is right when he points to the fact that his witnesses identified where LSP took place on land outside the WHSAP trigger land. The applicant's witnesses were clearly advised what land was relevant for the purposes of the

application (by reference to the dark green land shown on the Working Plan) and they spoke of what took place on such land when they used it.

135. Reliance is placed on the locality of Grove Ward in Trowbridge. Most, if not all, of the witnesses live within this Ward. Reliance is also correctly placed on the sufficiency of use test in the *McAlpine Homes* case. Mr Vigar goes on to review the evidence of his witnesses in detail and I do not intend to repeat this process herein. He does though introduce images from *Google earth* from 2005 and 2016 which show tracks within and around the perimeter of the two fields consistently with what is shown on other aerial images. The image from 2001 is somewhat blurred and the image from 2021 is outside the qualifying period.

136. Mr Vigar deals effectively with *as of right.* Non-peaceable or permissive use is not an issue in this case although Mr Rhys did give evidence that he had (at one time) placed footpath way markers at access points and that at various times he had also asked users to stick to the footpaths. However, it was put to none of the witnesses that they had been asked stay on the PROWs. Mr Vigar is right to submit that there had been no, as he puts it, “concerted, robust efforts to deter people from using the land beyond the PROWs”.

137. In terms of LSP and qualifying use, Mr Vigar deals clearly with the law in relation to use which is more characteristic of right of way use as opposed to use as a green, and he cites extensively from the well-known passages in *Oxfordshire* and *Laing Homes*. He asks three questions: (i) would use of the tracks in this case give rise to a presumption in favour of dedication of the land as a PROW; (ii) has the land been used “purely” as a right of way or for the wider purposes which he identifies; and (iii) (and I paraphrase) do local inhabitants use land off the tracks?

138. Mr Vigar submits that it was clear from many witnesses (vis: Jones, Keltie and Hunt) that qualifying use is not confined to the PROWs but extends to the informal (or putative) paths running around and across the fields and that such use has not been in the nature of highway use along defined routes.

139. Mr Vigar also submits (and I again paraphrase) that the evidence of his witnesses show that local residents had also used land off the paths and had used the land in such a way as would be referable to the more onerous right to use the land as if it were a TVG. Indeed, he says, Mr Rhys acknowledged that he had encountered people walking off the PROWs. I do not agree with Mr Vigar when he says that this suggests that such use "was commonplace" or that dog-walking *per se* on a defined track is apt to connote the use of the land (i.e. in how it would have appeared to a reasonable landowner) as a TVG rather than as a right of way. (It is plain in law that the use of paths for recreational walking is quite capable of founding a case of deemed dedication of the use of land as a highway unless it is merely ancillary to recreational activities which would not give rise to a PROW (*Dyfed County Council v Secretary of State for Wales* (1989) 59 P&CR 275)).

140. Mr Vigar invites me to consider (in effect) the quality and quantity of the use of the TVGAL off the paths. For instance, was it only occasional or of limited duration? I have read his submissions and the evidence of witnesses in relation to the number of specific activities to which he refers as having taken place off the paths.

141. Mr Vigar deals with continuous use for 20 years to the date of the application. I do not deal with this in detail as there is ample evidence showing that the applicant's witnesses had been using the land (whether or not for qualifying purposes) for at least 20 years by the time of the application.

Objector's closing submissions

142. Ms Waller started with trigger events. She rightly identified the issue as to whether the TVG application pre-dated the publicising of the planning application. If it had then it could not be a trigger event within the meaning of Sched.1A, at para 1. I have already dealt with trigger events in detail, and it is unnecessary that I repeat this.

143. Ms Waller submits that the refusal of the CRA to accept the first two submissions of the TVG application is no longer open to challenge on conventional administrative law grounds. It must follow, she submits, that the

planning application is a valid trigger as it pre-dated the date when the TVG application was accepted by the CRA. Were it not for the *Church Commissioners'* case it is possible that she could be right about this. I also see the force in Ms Waller's submission that third parties may have wished to become involved in the application if they had fully appreciated the true extent of the land available for registration. I am though satisfied that a combination of the submissions about trigger events contained in Ms Waller's closing submissions and those made within Ashford's letter deal fully with trigger events from the objector's standpoint and I do not see that any real prejudice has arisen as a result of the late disclosure that some of the planning application land remains available for registration. It is also noteworthy that Ms Waller does not question the accuracy of the CRA's plan at paragraph 34.

144. Ms Waller deals with the elements necessary to justify registration. Clearly all must be strictly proved.

145. She starts with the need to demonstrate that the TVGAL has been used by a significant number of the inhabitants of any locality. In the first instance, Ms Waller accepts that Grove Ward is a qualifying locality in law. She also says that a "significant proportion" of the users live outside Grove Ward. What she means is that a number of people use the land who may not be resident within the Ward. She mentions the following users: (i) Mr Whiffen's daughter who very probably exercises or assists in the exercise of birds of prey over the land; (ii) informal gatherings of students from the local 6th Form College; (iii) by witnesses who say they had seen others using the land whose names and addresses are unknown; and (iv) by residents of Southwick and North Bradley (neither of which lie within Grove Ward) or those who cross the application land to walk to or even beyond these settlements or indeed elsewhere.

146. Ms Waller also points to the limited weight which should be attached to the evidence of petitions. I am reminded that I should also be conscious of double-counting where the same witness has put in more than one statement in the course of the application.

147. Use of the land: under this heading Ms Waller deals with a number of matters. I am invited to treat with caution the user evidence for various reasons which include: (i) the fact that access to the TVGAL is via the trigger event land; (ii) that most of the written evidence does not distinguish between use of the trigger and non-trigger land; (iii) the difficulty in even distinguishing the application land from the trigger land in the absence of division on the ground; (iv) the probability that user mostly occurred within the trigger land as it is nearest to where people live (Ms Waller points to the fact that Mr Keltie said that the application land was more remote and that most people only used the "top part"); (v) the Williams' survey was limited to observations from the stile at point 4 (which is within the trigger land) of people entering the trigger land at the three main access points (5, 6 and 7); and (vi) (as I infer from the way this is put by Ms Waller) the colouring on the Working Plan was suggestive of the evidence which would count to justify registration and that which would not be material for these purposes (Ms Waller says this: "… witnesses were given a significant degree of assistance in framing their recollections").

148. Ms Waller also attached great weight to the absence of photographs showing LSP taking place on the TVGAL.

149. Ms Waller also dealt with the flooding issues arising from CRA/20 (she refers to the Flood Zone Map at p.26 above) and the evidence of Cllr Hill. Her submission is that the land shown within the flood zone would not be registrable as it was incapable of use for a significant portion of the year. It will be recalled that Cllr Hill also dealt with the flooding issue. It was his evidence that only around 80% of the application land was (in effect) available for all-year-round use owing to flooding issues.

150. Next, Ms Waller deals with the suitability of the land for LSP (outside the flood zone). First, reference is made to the wet ground conditions; second reference is made to the farming activities (growing grass and grass cutting operations and grazing cattle) which continued throughout the whole of the 20 year period.

151. Ms Waller says that most of the witnesses speak of the wet ground. She also dealt with the evidence that the public's use of the land for LSP would have been constrained (dogs had to be walked on leads) when there were cows grazing in the field.

152. Ms Waller cautions me to bear in mind that the current post-COVID use may not be the same as occurred in the period before the lockdown. She mentions that Mr Jones referred to the fact that "a remarkable amount of people" started using the fields during the lockdown. Mr Goodship also referred to an "explosion of use post-COVID". Ms Waller says I should not assume that the intensity of use post-COVID was the same as it had been before-hand.

153. Ms Waller helpfully sets out at 8.1 and 8.2 what might usefully be said to be the necessary ingredients of prescriptive use. Such use must neither be trivial nor occasional but must pass the threshold of being of sufficient quantity and of a suitable quality and how it would, when assessed objectively, have appeared to the owner (this is not a case where any of the three vitiating elements are relied on by the objector).

154. As part of the LSP analysis, it becomes necessary to consider whether the claimed use would in fact be referable to the exercise of existing, or the potential acquisition of new, public rights of way rather than rights sufficient to support a TVG application. Ms Waller cites from my report dated 19 November 2020 at pp.4-6 in the TVG application for the same CRA involving land at *Church Field, Hilperton under ref: 2017/01* where I deal at length with the law under this head in cases where there is heavy usage of paths around the perimeter of or crossing large fields (whether shown on the Definitive Map as PROWs or in the case of informal paths).

155. Ms Waller also submits, correctly, that use of PROWs should be discounted as it is use *by right* and not *as of right* (DPP v Jones [1999] 2 WLR 625).

156. Ms Waller goes on to submit (and I think this must be the substance of her submission about this) that the use of unrecorded tracks will generally only establish public rights of way *unless* the use is wider in scope, or the tracks

are of such a character that use of them cannot give rise to a presumption of dedication at common law as a public highway. Where there is any doubt about the matter, the inference should be drawn of the exercise of the less onerous right rather than the more onerous right to use the land as a TVG. Clearly the use must have been sufficient to bring to the attention of a reasonable landowner that a right is being asserted against him.

157. At paragraphs 8.7.1 through to 8.7.14 Ms Waller helpfully sets out the oral evidence which she has noted (in the case of all those who support the application to register) supports her submission at 8.8 that "the vast majority of people kept to the paths (either the PROWs or putative public rights of way)." She says this is supported by the images repeatedly shown on *Google earth* during the qualifying period as well as the presence of cattle in the field, the seasonal grass crop and the wetness of the land.

158. Ms Waller also makes the point that, as a narrow field, the TVGAL lies within a network of PROWs which enable local people to access the countryside or walk from one settlement to another. It is not as if the TVGAL includes within its boundaries a circular walk. What I understand Ms Waller to be saying is that, in the absence of the trigger event land, the TVGAL could not sensibly be said to be a destination in itself for LSP as, for instance, might be the case if it contained a circular walk. She says that any use of the TVGAL for walking would be "pure PROW or putative path use and must be discounted". She says that the use of the paths would not have alerted the landowner to a right to indulge in LSP across the whole of the application land. It is, Ms Waller says, improbable that a landowner would interfere with PROW-type use in the countryside which he cannot prevent.

159. Ms Waller's next point is that once the use of the PROWs and other paths is discounted any other use of the application land is too trivial or sporadic to justify registration. She mentions other claimed recreational uses. Ms Waller mentions under this head golf (by just one person, now deceased), ball games, building snowmen, camping by local children, landing and taking off of para-wings, hot air balloons and use by an air ambulance, flying model aircraft, berry-picking and foraging in hedgerows, kite flying, the flying of

drones, the scattering of ashes, riding trail bikes, astronomy by Mr Clews at Gate No.2 on the Working Plan and teenagers congregating on site.

160. Ms Waller analyses each of the uses mentioned above. In broad terms she says that if they occurred, as described, on the TVGAL they were too trivial or sporadic to justify registration. Ms Waller also cites the very low quality of the evidence adduced by the applicant in dealing with these activities. She questions where, when and how often they took place and who was involved. She says the evidence lacks precision. She does not accept that the applicant has strictly proved his case when it comes to qualifying activities taking place on the TVGA land, albeit outside the PROWs and the emergent paths, or that it carried the outward appearance of use as of right.

161. Finally, she reminded me that it was common ground that the parcels shown coloured blue on the Working Plan were no longer available for registration. She also says that this would also include the area within which cattle were corralled close to the blue parcel on the western side of the TVGA land which, as she puts it, is highly unlikely to have been used for qualifying LSP.

Discussion

Some general points to be noted when looking at evidence in TVG cases

162. As a general rule considerably less weight should be attached to the evidence of witnesses who do not give oral evidence. This is principally because the objector will not have had an opportunity to test this evidence by cross-examination.

163. This is of importance in this case as (i) the TVGAL has been much reduced in size since the application was originally made owing to the removal of the trigger land (little, if any, of the written evidence concerned trigger events), and (ii) the arrival, only after the inquiry had closed, of the CRA plan on p.10 above which identifies with reasonable precision the true extent of the land available for registration.

164. I also have to bear in mind that the recollection of events over 20 years is not straightforward or often reliable. Twenty years is a long period. Recollections may dim, or more likely run into one another. The position is aggravated in this case by the COVID lockdowns after March 2020 which resulted in a higher than usual level of use of open spaces for exercise by local inhabitants otherwise confined to their homes. This has meant that, in their recollection of past events, there is a risk for witnesses to believe that their activities have been carried on longer and/or more often and/or more continuously than they really have. It is worth noting that Mr Goodship said that there had been an "explosion of use post COVID". Ms Waller is right when she says, in effect, that it cannot be assumed that the post-COVID level of use was the norm during the qualifying period.

165. Where one is dealing with land in the countryside served by a network of PROWs and informal paths which are available for use by individuals' resident outside the locality, it is unsafe to assume that all or even the majority of those who use the land are necessarily local inhabitants living within the chosen locality. Ms Waller is therefore right to remind me of the very real possibility that a significant number those who use the land for LSP may well live outside Grove Ward. Those she mentions include students from the local 6th Form College and residents of Southwick and North Bradley (neither of which lies within Grove Ward). I might further add that, as a matter of law, an applicant must prove that the TVGAL is used predominantly (rather than exclusively) by those who live within the qualifying locality (*R v Oxfordshire CC, ex parte Sunningwell Parish Council* [2000] 1 AC 335).

166. I always bear in mind that where strong emotions are raised by an application, as is the case here, memories and recollections may be unconsciously coloured or distorted, especially where a group of people with a common interest are involved.

The statutory test for registration

167. The application must be tested against the criteria for registration contained in section 15(2) of the CA 2006, namely whether a significant number of the inhabitants of Grove Ward in Trowbridge (which is agreed to be a qualifying locality) have indulged as of right in LSP on the TVGAL during the relevant 20 year period ending in January 2020.

The TVGAL and its context

168. We are dealing with a 5-acre parcel located within a much larger field (the lower field). The southern boundary of the TVGAL is bounded by a hedgerow. There is no physical division with the adjoining land on its northern side, albeit within the same field. The applicant's witnesses therefore had to give evidence of their use of only part of the lower field by reference to the land shown coloured dark green on the Working Plan (later adjusted, of course, by the CRA plan which none of the witnesses saw at the inquiry) and on the basis of assumptions which they were entitled to make based of their obvious knowledge of the lower field.

169. The TVGAL is very wet and prone to flooding. In places it is virtually unusable for ordinary walking when ground conditions are very wet without wellingtons or robust walking boots. It was the evidence of Cllr Hill that the NW areas of both fields is prone to "flood and waterlogging on a bi-annual basis" when it is unusable for anything, even for farming. It was his view that 20% of the TVGAL lies within a flood zone and was unusable for around 5-6 weeks per annum (I think this is an under-estimate). He said that even outside this period you would still need to use adequate footwear. He said that only around 80% of the TVGAL would be available for all-year-round use.

170. It was obvious on my accompanied site visit that the ground was saturated. This is bound to be the case during periods of high rainfall. This was, I think, more apparent nearer the watercourses which adjoin the upper and lower fields.

171. The upper and lower fields are crossed by the PROWs shown on the Working Plan. The tracks on the ground, including the perimeter path, appear to me to be popular walking routes as the ground is trodden down and evidently well used. The access points, both within the cross-field fencing and at the openings on the northern edge of the upper field, are generally muddy and also well-used.

172. Access to the TVGAL is generally via the upper field and the entry points at 5, 6 and now 7 (which is via the kissing gate off Boundary Walk), and the crossing points at points 3, 4 and 1 are shown on the Working Plan. I doubt whether many people access the TVGAL at point 1 from the direction of Axe and Cleaver Lane.

173. What this means in practice is that access to the TVGAL is generally via the trigger event land. Although walkers from the settlements of Southwick and North Bradley are also able to access the TVGAL at point 2 the inquiry heard little or no evidence about this and I rather doubt whether the volume of such use is significant in practice.

174. As Ms Waller rightly says, most of the written evidence does not distinguish between use of the trigger and non-trigger land. Although she says that, in the absence of division on the ground, there is difficulty in distinguishing the TVGAL from the trigger land, I doubt whether this is as difficult as she thinks it is in the case of those who are as familiar with these fields and the applicant's oral witnesses obviously were.

175. There is no circular walk (or walks) within the TVGAL. What we have is (i) a cross-field PROW between points 2/4 (SWCK3), and (ii) a portion of the circular path running around both fields, a section of which (judging by the Working Plan) runs alongside another PROW (SWCK1). Although the *Google earth* images on pp.23-24 above, appear to show feint tracks running on the southern side of the cross-field fencing I doubt whether these are likely to be material as they fall outside the TVGAL (other than at the western end where the position is not clear-cut). Mr Swanney refers to these (yellow) tracks on his plan on p.23 above as internal paths running either side of what he

describes as the remains of the fencing. This is an interesting plan as it shows three paths running around the southern edge of the TVGAL whereas I could see only a single perimeter path running around both fields. It is perfectly possible, of course, that if the main path running around the outside of these fields (what Mr Swanney calls the “principal circular path”) gets too muddy walkers might choose to walk on one side or other of it leading to the formation of a new path or paths.

176. In my view, the path shown running around the perimeter on the Flood Zone Plan produced by the Environment Agency in 2014 (p.26) is probably a more reliable representation of what exists on the ground at the moment and is certainly consistent with the other aerial images which are to be found at CRA/68-71. The last image is helpful as the paths are more distinct as they probably show flattened paths within growing grass. This image from 2020/21 shows a principal perimeter path running around both fields although one can see an offshoot from it which takes you to point 2 where it links up with the rest of the PROW network to the SW of the lower field. One also observes on the same image another offshoot path running south between point 3 and a gateway which is not marked on the Working Plan which is within the area prone to flood and waterlogging mentioned by Councillor Hill and is, I think, unlikely to be material to the application.

177. The result of all this is that within the TVGAL there now exists, and is likely to have existed throughout the qualifying period, (i) a usable cross-field PROW (SWCK3) running between points 2, 4 and 6, (ii) another PROW (SWCK1) running to point 3 and beyond exiting the upper field at point 5, and (iii) a section of the circular path running around the perimeter of both fields.

178. I am also inclined to agree with Ms Waller that walkers on short walks or those intending to use either field for kite flying, ball games or the like which do not involve walking, with or without dogs, are more likely to have done so on the upper field which is nearest to where people live. In my view, both fields are available for short and longer walks and little else outside agriculture although the very limited use for only a few weeks each year picking

blackberries or foraging in the hedgerows running around the lower land is, I think, too trivial an activity to justify registration.

179. I should also mention the condition of the TVGAL away from the perimeter path or paths. In the first instance, I accept what Mr Rhys says when he describes the surface as being very uneven and deeply pitted which he attributes to the fact that cattle have grazed on these fields for prolonged periods over many years until this ceased in 2019. In the second, I find that the flood plain area identified on the image on p.20 and on the Flood Zone Map at p.26, in conjunction with Councillor Hill's evidence about this and the photo p.21 above, would have meant that such land is unlikely to have been used with any regularity by local residents to justify registration. I therefore find that, for the most part, the land lying outside the paths, although available for recreation, is unlikely to have been used for such purposes to any great extent other perhaps than only occasionally when the ground conditions were dry enough to allow this to take place. However, I can see that dogs might wander off the main path or paths and their owners might even follow them from time to time, but I cannot see that this would be enough to justify registration.

Use by the objector

180. The TVGAL was a place where cattle were grazed between around June-September each year (and until October if it was dry). Mr Rhys (whose evidence about this I accept) said that there could be as many as 60-80 cattle grazing on both fields every year. Most of the applicant's witnesses said that they kept away from the grazing cattle and kept their dogs on a leash. It seems probable that people using the TVGAL, and especially if they were walking dogs, would have walked mainly around the perimeter path whilst cattle were grazing in the lower field.

181. Mr Rhys also said (and I also accept his evidence about this) that the grass was cut in June each year and that before cutting the grass stood at around 3 feet. He also accepted that residents were respectful of the grass crop in the growing season until the grass was cut, turned and baled in June each

year. It must follow from this when the grass was growing between say March and June each year residents using the TVGAL are likely to have kept to the paths at the margins of the lower field and to the PROWs which crossed it where the grass would have been flattened.

The oral evidence of those using the TVGAL

182. Ms Waller contends that the vast majority of users kept to the paths (be they PROWs or informal paths). She helpfully analysed the evidence of the applicant's witnesses and I set out below the extracts from her closing submissions where she dealt with this.

> 8.7.1 Cllr Hill explained that he uses footpaths to cross the site to visit family in North Bradley. Cllr Hill stated "In all honesty, I don't leave footpaths when crossing the site."
>
> 8.7.2 Mr Clews stated that he walks various circuits extending to the southern part (i.e. the TVG Application Land). Whilst Mr Clews noted that he would leave the path for various reasons, he confirmed that the family walk with the dog on the path. He also confirmed that a significant amount of the general use of the TVG Land was walking on paths.
>
> 8.7.3 Mr McCartney would often walk straight across the fields usually and into Southwick Village. If he was using the land on his own, he would stick to the path. The only time we diverted from footpaths was to get around waterlogged areas. Mr McCartney also said that he kept to paths or the more circuitous route for dog walkers (the perimeter path). With children, Mr McCartney said that he would walk extensively. However, this still appeared to be linear walking following the trodden paths on the TVG Application Land. Examples of deviating from the path included "impromptu races" ("race you to the next stile") and taking a football to "boot it ahead" to give kids a point of interest. Both of these examples would broadly follow the route of a trodden path and would be incidental to the path-based walking use.
>
> 8.7.4 Mr McCartney confirmed that people mainly stick to the paths.
>
> 8.7.5 Mr Steven's regular walk would be around the perimeter path during which walks he would pass 10 people or so when walking the path. Mr Stevens noted that the dog goes where it wants and then he had to go and get it back.
>
> 8.7.6 Mr Stevens confirmed that dog walkers mainly stick to the paths as do people with younger children.
>
> 8.7.7 Mrs Hunt confirmed that her use of the TVG Application Land was mainly walking for pleasure with dogs, mainly on tracks and mainly on western side of the TVG Application Land. Mrs Hunt predominantly saw other people using the paths.
>
> 8.7.8 Mr Goodship stated that he would jog or walk the fields. If he wants a quick walk, he will use the PROWs. For a longer walk, he would use the perimeter path. People walking dogs would sometimes be on the path, sometimes not.
>
> 8.7.9 Mr Whiffen used the TVG Application Land to exercise dogs walking to Southwick and back. Mr Whiffen and his daughter tend to enter the Trigger Land at one of the

three entrances to the north (or sometimes access point 1), walk closer to the stream than the perimeter path shown on the OS map but would follow the path round from 6 down to 3. Mr Whiffen clarified his evidence on cross examination to confirm that a quick walk would be a circular walk whereas a longer walk would take him through the TVG Application Land towards Southwick and then back along Axe and Cleaver Lane.

8.7.10 Mr Jones has used the TVG Application Land for walking with or without dogs. He would walk on the perimeter path and would often go beyond the TVG Application Land to Southwick. He would walk on the paths and perimeter but would end up having to follow the dog in some cases.

8.7.11 Mr Jones noted that when he saw other people using the TVG Application Land it was primarily for walking. Mr Jones also agreed to the Inspector's question that most people were sticking to established pathways or the perimeter path.

8.7.12 Mr Keltie typically accesses the Trigger Land at Westmead Crescent, walks down to point 4 and then into the TVG Application Land. Mr Keltie uses the route as part of a "loop" around the solar farm and back in at point 1 (Axe and Cleaver Lane). Mr Ketlie would also walk to the area shown blue on the working plan and walk around the circumference. Mr Keltie would leave the path to walk around cows or to throw a ball for the dog.

8.7.13 Mr Keltie noted that a lot of dog walkers tend to do circular walks or use the PROW as a transit route. He also noted that people kept to the paths.

8.7.14 Mrs Dennis said that she mainly stuck to the established paths on the ground but would also forage in the hedgerows.

183. I accept these notes and they are consistent with my own notes of the evidence as set out above. It seems obvious to me that the predominant use of the TVGAL is by walkers, with or without dogs, and, for the most part, those who gave oral evidence mainly used the established paths. As indicated above at 8.7.11, Mr Jones accepted that most people "were sticking to the established pathways or the perimeter path".

Is use of the paths qualifying use?

184. Ms Waller has dealt with this point at length in her closing submissions under the heading: "Use of Public rights of way and Emergent Routes" (8.3 *et seq*).

185. Firstly, the use of PROWs must be discounted as it is use *by right* and not *as of right*. The public have a right to use a PROW provided the right is exercised reasonably or does not obstruct other users.

186. Secondly, difficulties arise where the predominant recreational use involves the use of paths, such as would have appeared to a reasonable landowner to be referable to the exercise of existing, or the potential acquisition of new,

PROWs rather than rights sufficient to support registration. I dealt with this at length in my report to the CRA on the *Hilperton TVG application* in 2020, parts of which are cited by Ms Waller.

187. The law is, I think, over-complicated on this question but it seems to me that the overview of the law by the late Vivian Chapman QC in the *Radley Lakes TVG application* (13/10/2007) is on point. What he said was that the 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 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 a lesser right, i.e. to a right of way.

188. It seems plain that where a path or paths are merely being used for walking (whilst say walkers' dogs run all over the land) it would *not* normally count as it could not then be said that walkers were using the TVGAL as a whole for LSP. The question then is whether what is left would be qualifying LSP and, if it was, whether it would still be too trivial or sporadic to justify registration?

189. I find that the nature, duration and quality of the uses relied on in the case of other recreational activities (other than walking with or without dogs) is insufficient (either in individual uses or collectively) to justify registration. This is clearly a major deficiency when it comes to the untested written evidence. Put another way, have local inhabitants been using the land off the paths as if they had a right to do so. I very much doubt this. In my view, the activities outside the paths were very probably far too trivial to be relied on and are likely to have been incidental to the primary use of the paths. It is difficult to see how, in light of the quality of the oral and other evidence, it would appear to a reasonable landowner that what was happening off the paths was sufficient enough in terms of its nature, duration and quality to justify a finding that users were acting in a way that was comparable to the exercise of an existing right.

190. The applicant's witnesses have, in my view, also failed to differentiate clearly whether the various non-dog-walking activities take place on the TVGAL or elsewhere on lower land or even on the trigger land. This is hardly surprising

when the application, when first made, extended to both fields and the earlier written evidence should clearly be viewed in this light and, as a consequence, must surely have limited weight. It is always worth reminding ourselves that qualifying use "must be properly and strictly proved" (see Pill LJ in *R v Suffolk County Council, ex parte Steed* [1997] 1 EGLR 131). In my view, the applicant has failed to discharge this burden.

191. I also accept the broad conclusions of Ms Waller about this, under the heading "Other claimed Recreational Uses", at paras 8.30-31 where she says as follows:

> 8.30 In addition, there have been a number of other recreational uses which have been claimed. None of the claimed uses are sufficient in terms of duration, nature or quality to support registration of the TVG Application Land. The uses are either incidental to the primary path-based use of the land or are too trivial and sporadic to give the outward appearance of use as of right (whether considered collectively or otherwise).
>
> 8.31 Further, the evidence lacks precision. The evidence does not demonstrate that the user was of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed.

192. At paras 8.35 to 8.75 Ms Waller identifies a number of non-walking activities and I adopt below the headings which she uses.

(i) *Golf*: this use was carried out by one resident, now deceased. The frequency of such use is unclear or even where or when it took place. It would be impossible to say that such use amounted to the assertion of a right to use the land for hitting golf balls.

(ii) *Football, rugby, ball games and throwing frisbees*: Ms Waller says that Mr Stevens, Mr McCartney and Mr Jones mentioned ball games, but it was obviously very limited. The growing grass and the presence of cattle in the field for months at a time were also a handicap to regular ball games which, as I find, would have been infrequent and insufficient to justify registration even if it had occurred on the TVGAL which is far from clear as I think that the trigger land would have been a better place for ball games.

(iii) *Building snowmen*: there were no photos or any evidence showing how often it snowed which is likely to have been infrequent. I suspect that this activity occurred too infrequently to be relevant.

(iv) *Camping*: Ms Waller notes that this activity was only relied on by Mr Swanney and has not been repeated by other witnesses. It is unclear whether it was in fact mainly children who lived within the locality who were camping. It only happened once and the youths in question left when challenged leaving some of their belongings behind them. Again, this use lacks sufficient quality to be relevant.

(v) *Landing and taking off of para-wings, hot air balloons/air ambulance*: only Mr Swanney mentions this and even if it occurred it is doubtful whether these activities gave rise to qualifying use by local residents.

(vi) *Flying model aircraft*: Ms Waller notes that a number of witnesses mention a person flying model aircraft. Such use is, as I find, likely to have taken place on the trigger land.

(vii) *Picking berries and foraging in the hedgerow*: I doubt whether such use on the outer margins of the TVGAL for a few weeks each year would be material and can, I think, be viewed only as incidental to the use of the perimeter path rather than to the assertion of a public right extending to the whole of the TVGAL.

(viii) *Kite flying*: Ms Waller notes that Mr Jones indicated that kite flying took place on the trigger land in the middle of the field rather than on the TVGAL. Although Mr McCartney said that he flew kites on both the upper and lower land, there was no evidence as to how often this took place. Ms Waller also noted that Mr McCartney's children would have been adults at the start of the qualifying period and now have children of their own. Therefore, as she puts it, the period when Mr McCartney may have flown kites is uncertain. She says the evidence about this lack's precision. I agree. Moreover, Mr McCartney himself said that he found it difficult to distinguish between use on Trigger Land and TVGAL. Mr Keltie said that he had flown kites on the TVGAL about 6 times a year with his grandchildren. Mr Rhys disputed the location of the kite flying suggested by Mr Keltie on the ground that the area indicated by Mr Keltie is constrained by trees and hedges whereas the trigger land is not. Whoever is right about this, it seems to me that if kites were flown on the

TVGAL it would have occurred infrequently and is more than likely to fail, as Ms Waller puts it, the quality of user test, and would not justify registration. I tend to agree with Ms Waller when she says that kite flying is more likely to have occurred on the trigger land close to the housing.

(ix) *Drone flying*: this was mentioned in the written evidence but no evidence was given as to the frequency or place where this activity occurred which I consider to be irrelevant for present purposes. Ms Waller questions whether such use would even have been lawful.

(x) *Trail bikes*: a single reference is made to use of the land by trail bikes in the application. No reference was made to bike riding on the TVGAL at the inquiry. I agree with Ms Waller that no evidence has been provided to support this claim.

(xi) Astronomy at Gate 2: Mr Clews stated in his oral evidence that he engaged in astronomy at Gate 2 owing to the low levels of little light pollution at this point. No details were given about the frequency of this activity. I agree with Ms Waller when she says that because it took place under the cover of darkness, it would probably not have carried the outward appearance to a reasonable landowner of a use being asserted as of right.

(xii) Gatherings on site: some witnesses refer to gatherings of teenagers on the TVGAL listening to music and drinking. In his evidence Mr Rhys said that his only knowledge of this use was that it had occurred outside the TVGAL. I doubt whether this activity is in truth qualifying LSP but even if it was, I doubt whether it took place often enough to justify registration. There is also the question of who attended such gatherings and were they qualifying local inhabitants. The evidence under his head lacks precision and I doubt whether much reliance, if any, can be placed on it.

193. My conclusions on the user evidence are these:

(i) Use of the TVGAL by qualifying inhabitants has mainly been confined to the use of paths for walking, with or without dogs, which would not have been a qualifying use as it would have appeared to a reasonable landowner

as referable to the exercise of a right (or rights) of way along a defined route (or routes).

(ii) Any use of the PROWs located within the TVGAL will not count as a qualifying use as it would involve use *by right* and not *as of right*.

(iii) The applicant has also failed to prove that other claimed recreational uses were sufficient, in terms of their quality and quantity, to justify registration, nor would it have appeared to a reasonable landowner that users were asserting a right to use the TVGAL for recreation.

(iv) The applicant has been unable to demonstrate that, for all practical purposes, it could sensibly be said that the whole of the TVGAL had been used for LSP for the relevant period.

(v) The applicant has also failed to prove that the areas outside the paths on the TVGAL were, throughout the whole of the qualifying period, even suitable for informal recreation owing to (i) the wet ground conditions; (ii) the presence of grazing cattle; (iii) the condition of the ground (which is uneven and deeply pitted) by reason of the presence of grazing cattle for prolonged periods over many years; and (iv) the growing grass crop in the period March-June each year and the limitations to which this is bound to have given rise in walking outside the paths (if the grass crop was to be respected).

Recommendation

194. In light of the above discussion, I recommend that the application to register the TVGAL (proceeding under application number 2020/02 TVG) should be ***rejected*** on the ground that all the criteria for registration laid down in section 15(2) of the CA 2006 have not been satisfied.

195. The CRA must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be “the reasons set out in the Inspector’s report dated 9 February 2024”.

William Webster

3 Paper Buildings

Temple

Inspector **9 February 2024**