

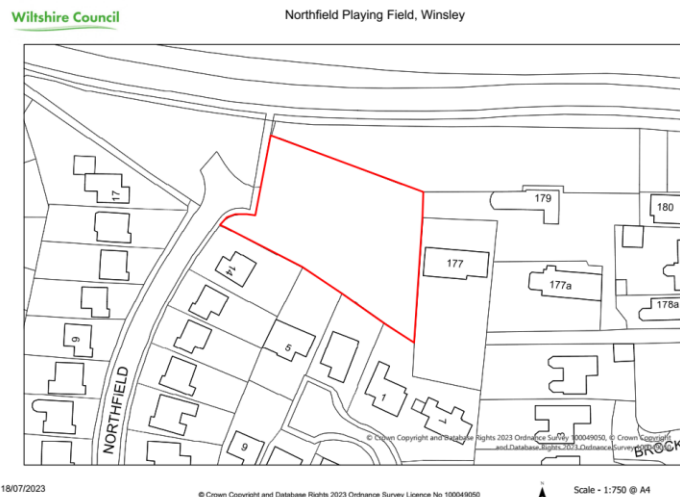
Commons Act 2006 – Sections 15(1) and (2)
Application to Register Land as Town or Village Green – Northfield Playing Field, Winsley – Application no.2021/01TVG

Appendix 12 – Officers Consideration of the Legal Tests

Please note: the Parish Council minutes; correspondence and user evidence forms referred to within this report, are available with the Application “Form 44” received 1st March 2021 - Application to register land as town or village green (TVG), Northfield Playing Field, Winsley, which may be viewed using the following link:
<https://apps.wiltshire.gov.uk/RightsOfWay/Green/Index/TVG2021001>

The Application Land

1. The area subject to an application to register land as a TVG under Sections 15(1) and (2) of the Commons Act 2006 and known as Northfield Playing Field, Winsley, is shown outlined in red on the plan below:



Right to Apply

2. The Growth and Infrastructure Act 2013 introduced a series of provisions to make it more difficult to register land as a TVG amid concerns that TVG applications were being made to thwart planning applications, outside the planning system. This included, at Section 16, the insertion into the Commons Act 2006, of Section 15C “Registration of greens; exclusions” and the removal of the “right to apply” to register land as a TVG where specific planning “trigger” events had occurred in relation to the land, e.g:

- Where an **application for planning permission**, which would be determined under Section 70 of the Town and Country Planning Act 1990 is first published in accordance with requirements imposed by a development order by virtue of Section 65(1) of that Act, or
 - A **draft development plan document** which identifies the land for potential development is published for consultation in accordance with regulations under Section 17(7) of the Planning and Compulsory Purchase Act 2004, or
 - A **development plan document** which identifies the land for potential development is adopted under Section 23(2) or (3) of the 2004 Act.
3. The right to apply is revived where a corresponding “terminating event” has taken place, e.g:
- The withdrawal of the planning application; a decision to decline to determine the application is made under Section 70A of the 1990 Act; planning permission is refused and all means of challenging the refusal by legal proceedings in the UK are exhausted and the decision is upheld; or where planning permission is granted and the period within which the development to which the permission relates must be started, expires without the development having begun, or
 - The draft development plan document is withdrawn under Section 22(1) of the 2004 act; the document is adopted under Section 23(2) or (3) of that Act; or the period of two years beginning with the day on which the document is published for consultation expires, or
 - In the case of a development plan, the document is revoked under Section 25 of the Planning and Compulsory Purchase Act 2004; or a policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of Section 38(5) of that Act.

(A full list of planning trigger and terminating events is included at Schedule 1A of the Commons Act 2006, as added by Section 16 of the Growth and Infrastructure Act 2013 and amended to extend the list of events).

4. This alters the way in which the Commons Registration Authority (CRA) deals with new applications to register land as a TVG. DEFRA has issued interim guidance to Registration Authorities which recommends that upon receipt of an application the CRA should write to the local planning authorities and the Planning Inspectorate, to seek confirmation of whether or not there are planning trigger/terminating events in place in relation to all or part of the application land, (see DEFRA Guidance at **Appendix 5**).

5. In the Winsley case, as per the guidance, the CRA wrote to the Planning Inspectorate; Spatial Planning and Development Control at Wiltshire Council upon receipt of the Application, on 3rd March 2021, using the letter template set out within the DEFRA guidance, including a map of the application land and links to the list of trigger and terminating events, as amended. The Planning Authorities confirmed that there were **no planning trigger or terminating events in place on the land**, (see planning trigger event consultation replies at **Appendix 6**) and the application was accepted in full on 23rd April 2021 and Form 6 issued allotting the application no. 2021/01TVG.
6. The landowner and Objector Mr M Bandaru on behalf of BK Land and Estates Ltd (BKLE), writes in his holding objection e-mail dated 30th December 2021 (**Appendix 7**) – *“From my initial review of the application, I do believe that there may be a possibility that one of the ‘trigger’ events in the legislation may apply, thereby preventing the application from being submitted.”*, however, this is not pursued as a matter of formal objection within the full objection of BKLE, dated 12th February 2022.

Right to Apply – Wiltshire Council as the CRA, have accepted the application where the planning authorities have confirmed that there are no planning trigger events in place which would extinguish the right to apply to register all or any part of the application land as a TVG.
The Objector does not maintain objections which challenge the CRA’s interpretation of planning trigger events and no evidence is presented to support the presence of planning trigger events in place over all or part of the application land.

Main Considerations for the Council

7. Under section 15(1) of the Commons Act 2006, it is possible, (where the right to apply is not extinguished), for any person to apply to the CRA to register land as a TVG and under section 15(2) where a significant number of 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 20 years or more and they continue to do so at the time of application, (please see legislation attached at **Appendix 5**).
8. The legal test set out at section 15(2) of the Commons Act 2006 can be broken down into a number of components, each of which must be satisfied in order for the application to succeed, where *“it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town [or village] green...”* (R v Suffolk County Council, Ex p Steed (1996) 75 P & CR 102).

9. The burden of proving that each of the statutory qualifying requirements are met, lies with the applicant and there is no duty placed upon the CRA to further investigate the claim, as set out in *Oxfordshire County Council v. Oxford City Council and Anor* [2006] UKLH 25 “61. ...*the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant’s case. It is entitled to deal with the application and the evidence as presented by the parties.*” The standard of proof lies in the balance of probabilities, i.e. in order to register the land it must be found that it is more likely than not that recreational rights for local inhabitants have been acquired.

Significant number of inhabitants

10. The meaning of the word “significant” has never been defined, but was considered at the High Court in *R v Staffordshire County Council, ex parte Alfred McAlpine Homes Ltd* [2002] EWHC 76 (Admin). It was held that this did not mean a considerable or substantial number, as a small locality or neighbourhood may only have a very small population, but that the number of people using the land must be sufficient to show that the land was in general use, by the local community, for informal recreation, rather than just occasional use by individuals as trespassers.
11. The requirement is that users should include a significant number of inhabitants of the claimed locality or neighbourhood within a locality, in order to establish a clear link between the locality or neighbourhood and the proposed green, even if these inhabitants do not comprise most of the users.
12. In this case the application is supported by written representations from 171 parties (statements/questionnaires completed jointly are counted as one and some parties have submitted both statements and questionnaires):
- 124 completed evidence questionnaires
 - 29 written statements (with application)
 - 70 written statements (at public consultation) (**Appendix 8**)

The population figures for Winsley Parish are as follows:

1981 – 1,777

1991 – 1,834

2001 – 2,001

2011 – 1,920

2017 – 1,831

(Wiltshire Council – Community History – Census)

13. Of the 171 parties giving evidence in support of the application (see Summary of Witness Evidence at **Appendix 13**):
- 153 are resident of Winsley Parish at the time of application.
 - 6 give no current address (although 1 of these witnesses confirms formerly being a resident of Bradford Road, Winsley 1993-2015).
 - Of the 12 remaining parties who are not currently resident of Winsley, all confirm that they are former residents of Winsley, (1 x Bradford Road; 5 x Tynning Road; 1 x Tynning Estate; 2 x Ashley Lane; 3 x Winsley* (**parents reside at Bradford Road*)), so all within Winsley village settlement area.
14. The Objector Mr Cooper (resident of Winsley for over 35 years) disputes use by a significant number of inhabitants in his statement dated 30th November 2021 (**Appendix 7**): *“I have lived in Winsley for over 35 years and have only ever seen this small area (a left-over piece of land following the completion of the eastern end of Winsley bypass – B3108) used by small boys kicking balls around on an irregular basis. This has been observed by myself and/or my wife on our almost daily walks in and around the village.”*
15. The Applicant in correspondence dated 14th April 2022 (**Appendix 9**), confirms that this objection from a local resident is against representations of support from over 70 current or past residents of Winsley, as well as evidence questionnaires and residents’ statements:
- “5.1 Winsley Parish Council believes that for a relatively small neighbourhood, the responses to the Evidence Questionnaire demonstrate clearly that the land has been in general use by the local community for informal recreation...*
- 5.2. ...The quantity of evidence provided by Winsley Parish Council shows that the land has been used by a significant number of people, resulting in the land being used regularly by the community as a whole, and that use of the land far exceeds the definition of ‘trivial or sporadic’.”*

Significant number of inhabitants – The application is supported by 171 written statements/questionnaires, 153 of whom confirm being current residents of Winsley Parish and 13 former residents, which suggests a significant number of inhabitants.

The evidence of use by a significant number of inhabitants is disputed by a long-term resident of Winsley Parish who claims that in over 35 years, the use they have witnessed has been irregular and by small boys, which does not suggest use by a significant number of inhabitants.

Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

Of any locality or neighbourhood within a locality

16. A town or village green is subject to the rights of local inhabitants to enjoy general recreational activities over it. The “locality” or “neighbourhood within a locality” is the identified area inhabited by the people upon whose evidence the application relies, (although it is acknowledged that there is no requirement for most of the recreational users to inhabit the chosen “locality” or “neighbourhood within a locality”, as long as a “significant number” do, other users may come from other localities and/or neighbourhoods). However, it is the people living within the identified locality or neighbourhood who will have legal rights of recreation over the land if the application is successful.
17. The definition of “locality” and “neighbourhood within a locality” were considered in the case of *Paddico (267) Ltd v Kirklees Metropolitan Council & Ors* [2011] EWHC 1606 (Ch) (23 June 2011) as follows: a “locality” being an administrative district or an area with legally significant boundaries, such as a borough or parish, whilst a “neighbourhood” does not need to be an area known to law, but must be a cohesive area which is capable of meaningful description, e.g. a housing estate can be a neighbourhood, but not just a line drawn around the addresses of the people who have used the claimed green.
18. In this case the application at section 6, which requires details of the claimed locality or neighbourhood within a locality, does not state the name of the locality/neighbourhood in words, but refers to “*Exhibit C: Neighbourhood within the locality to which the claimed green relates.*” Exhibit C is a plan entitled “*Locality of the claimed green*” highlighting an area which corresponds mainly with the Winsley Settlement Boundary (Exhibit B2) which lies within Winsley Parish Boundary (Exhibit B1). From this information Officers consider that the Applicant is claiming the neighbourhood of Winsley settlement within the locality of Winsley Parish:

Exhibit C: Claimed Locality/Neighbourhood:

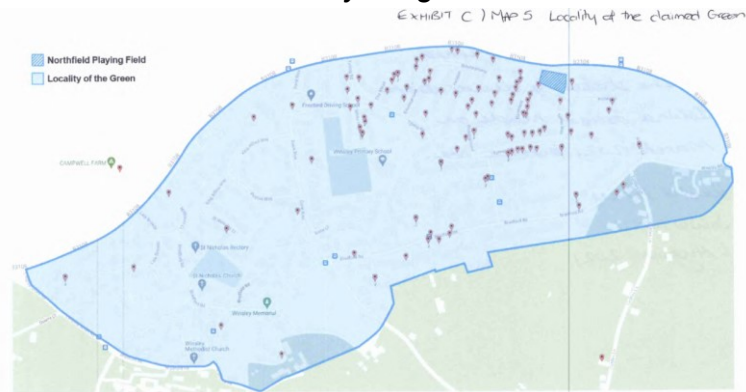


Exhibit B2: Winsley Settlement Boundary:

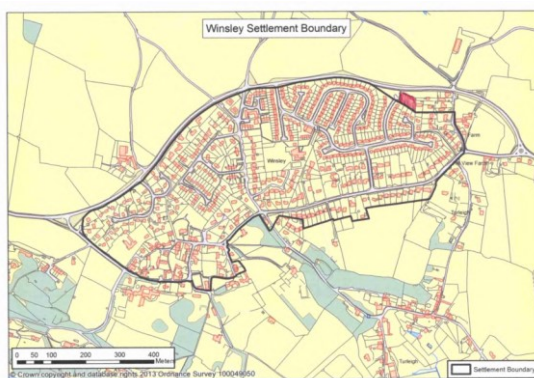
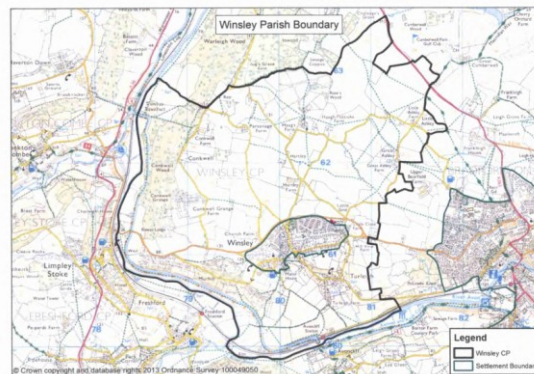


Exhibit B1: Winsley Settlement Boundary shown within Winsley Parish Boundary:

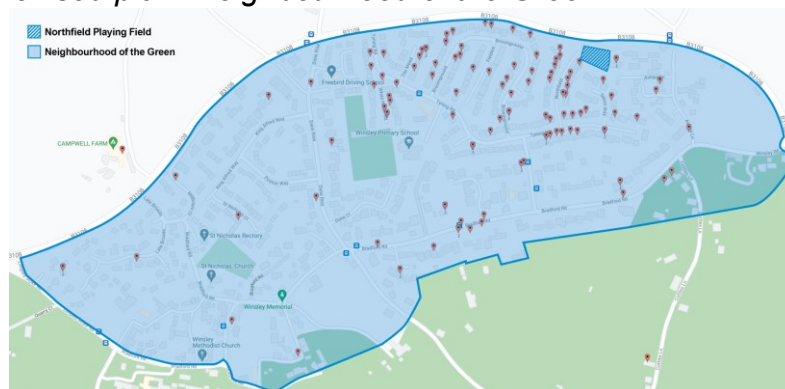


19. The Landowner BKLE in objection (12th February 2022 – **Appendix 7**) states that *“The Application is not duly made as it does not adequately identify the locality or neighbourhood within a locality that is relied upon.”* The Objector claims that the application, which describes the locality or neighbourhood within a locality as *“Exhibit C: Neighbourhood within the locality to which the claimed green relates”* and Exhibit C to which it refers, entitled *“locality of the*

claimed green”, (emphasis added by Officers), is inconsistent with the application form where it is indicated that the application is made on behalf of a Neighbourhood within a locality.

20. They further claim that Exhibit C insufficiently defines the claimed neighbourhood or locality and “...appears to simply be a line drawn on a map (it does not follow the precise boundaries of the Winsley Settlement Boundary plan, for example). The map is of such poor quality that it is impossible to understand the exact boundaries of the claimed neighbourhood or locality if that is what it is meant to illustrate and it has not been identified by any meaningful name or description.”
21. Further, “If a neighbourhood is relied upon it is noteworthy that the Applicant has adduced no evidence regarding the existence of any such neighbourhood and its cohesiveness. If a locality is relied upon the Applicant has failed to state by what name the area identified in Exhibit C is known to the law. Accordingly the Application should now be rejected.”
22. In correspondence dated 14th April 2022 (**Appendix 9**), the Applicant confirms that Wiltshire Council accepted the revised application and did not find this to be a defective element, but the Applicant agrees that the key on Exhibit C – Map 5 referring to the “*Locality of the green*” could be confusing and submitted a revised map labelled “*Neighbourhood of the Green*” to replace the map. They confirm that the Locality used in the application is Winsley Parish which meets the criteria as “A locality must be an area known to the law such as a borough, parish or manor”:

Revised plan: Neighbourhood of the Green:



“3.4 The neighbourhood within the locality of Winsley Parish to which the claimed green relates is closely aligned to the Winsley settlement boundary, with a small number of additional properties included. It is clear from any map

that the neighbourhood area has been based on the main residential area of Winsley, including the 'old' village, the Tynning estate and residences along the main Bradford Road. The northern edge of the neighbourhood boundary runs alongside the B3108 which provides a clear edge to the residential area. The southern and eastern edges of the neighbourhood boundary deviate slightly from the settlement boundary to include a small number of properties which lie just outside the settlement boundary. Northfield playing field itself lies outside the settlement boundary so the neighbourhood boundary has been drawn to include Northfield and the properties adjacent to this area of land."

23. The Applicant confirms that within the defined neighbourhood there is a shop, primary school, health centre, pub, social club, village hall and two churches serving the local community, to demonstrate the cohesiveness of the defined neighbourhood.

"3.7 The amended maps which Winsley Parish Council submitted in August 2021 as part of the TVG application process, demonstrate a locality which meets the criteria for a TVG and a cohesive neighbourhood area, also meeting the TVG requirements."

24. Evidence questionnaire responses have been submitted from people across the identified neighbourhood and helpfully the revised map provided by the Applicant shows the locations of the witnesses providing evidence, mostly within the identified neighbourhood of Winsley settlement. Question 5 of the evidence questionnaire, asks *"Do you consider yourself to be a local inhabitant in respect of the land?"*, of the 124 questionnaires completed, 117 consider themselves to be local inhabitants; 4 did not and 3 did not know, (please see Witness Evidence Summary at **Appendix 13** and Witness Distribution Map at **Appendix 17**).

25. In correspondence dated 3rd June 2022 (**Appendix 10**), the Objector BKLE considers that:

"5. The Applicant has failed to address the critical point...The Applicant has simply drawn a line on a map in a position that appears convenient...The Applicant has failed to appreciate that a settlement boundary, by and of itself, does not identify a neighbourhood for the purposes of the 2006 Act without something more. A settlement boundary is a planning tool. It says nothing as to the existence of a cohesive neighbourhood..."

7. ...*The EQ's ask the person completing the same if they consider themselves to be local inhabitants in respect of the land. There is no plan attached identifying the claimed neighbourhood asking if those completing the EQ consider themselves to come from that neighbourhood. There is no question asking those completing the EQ's whether they consider the area now identified by the Applicant to be a neighbourhood and, if so, why. There is no question asking those completing the EQ's by what name their neighbourhood is known.*"

26. The neighbourhood within a locality map submitted by the Applicant is based on the identified Winsley settlement boundary, however, this area is extended to the north, east and south to include the application land and other properties.
27. In correspondence dated 29th December 2021 (**Appendix 8**), Cllr J Kidney, Wiltshire Councillor for Winsley and Westwood states: *"The playing field is located in the heart of the Tynning Road estate in Winsley, a large residential estate built in the late-1960s. The wider estate is notable for its relative lack of public green amenity space and I imagine that were the estate being built today, it would not be granted planning consent in its current form due to the shortage of public green space. The playing field at Northfield is the only space centrally located within the estate where a child can run around in safety and kick a football around or a family can have a picnic – which is exactly what generations of residents in the estate have done as of right for more than 50 years...I wholeheartedly support the application to register Northfield Playing Field as a Town/Village Green so that future generations of young people in the Tynning Estate and wider village can continue to benefit from the physical and emotional wellbeing of having a public green within the estate, just as previous generations have done over more than half a century."*
28. It appears from the application and the evidence provided by users, that the land has been maintained by Winsley Parish Council for a number of years and whilst not a material consideration in the use of the land by local inhabitants, it does assist in linking the land to the local community, i.e. the locality of Winsley Parish, within which the identified neighbourhood of the Winsley settlement is located. It appears that the Parish Council were maintaining the land for recreational use and 49 evidence questionnaire responses consider that the land is owned by Winsley Parish Council:
- i) The application at Exhibit H, includes a selection of "maintenance contracts documents" from 1993 – 2021. These consist of quotes sought

by the Parish Council from West Wilts District Council and private contractors, as follows:

- 2021 Contract – Quote from James Lock to Winsley Parish Council, dated 3rd January 2021: *For the grass maintenance of designated areas in Winsley as follows for 2021 including Northfield football pitch grass cut... There will be 1 grass cut in March, April, October & November. There will be 2 grass cuts in May, June, July, August & September.*
- 2012 Contract – Quote from S&J Grounds Ltd to Winsley Parish Council: *To maintain the Parish grounds for the period 1st April 2012 to 31st March 2013 including Small play area at the end of Northfield.*
- 2005/06 Contract - Request for quote from S&J Contracts by Winsley Parish Council, dated 31st January 2004: *Grounds Maintenance Winsley Village – 2005-06 including Northfield playground twelve cuts per year.*
- 2002/03 Contract – Request for quote from West Wilts District Council by Winsley Parish Council, dated 19th February 2002: *Grounds maintenance, Winsley village 2002/3 including Northfield playing field twelve cuts per year.*
- 2001 Contract – Request for quote from Stephen Bowles by Winsley Parish Council, dated 26th May 2001: *Grass Cutting in Winsley including Northfield Playing Field twelve cuts per year.*
- 2001 – Request for quote from West Wilts District Council by Winsley Parish Council, dated 8th October 2000: *Grass cutting in Winsley including Northfield Playing Field twelve cuts per year.*
- 1997/8 contract – Request for quote from West Wilts District Council by Winsley Parish Council, dated 28th November 1996: *Grounds Maintenance 1997/8 including Area 1 – Northfield/Saxon Way.*
- 1995/6 Contract – As above for the year 1995/6, dated 28th September 1994.
- 1993/4 Contract – Confirmation from West Wilts District Council to Winsley Parish Council, dated 13th November 1992, offering services for *Grounds Maintenance for 1993/1994 including Northfield/Saxon Way.*

Correspondence dated 25th April 2001 from Winsley Parish Council to West Wilts District Council states (Application Exhibit H):

*“...the Parish Council is pleased to learn that agreement has been reached with the District Council to enable the grass verges within the Parish to continue to be cut during this Financial year.
It is understood that the present arrangement is for one year only, and that you are currently assessing the situation in order to put arrangements in*

place for future years. The Parish Council would welcome the opportunity to be involved in the assessment and is prepared to discuss with the County Council how it may help the Highways Authority to meet its obligations.

Attached to this letter is a schedule of Highways grass areas which it is understood the County Council has been paying the District Council to cut on its behalf. Beside each area are comments which the Parish Council hopes you will find both useful and helpful in making your assessments.”

The schedule sets out the application land as follows:

“Northfield, 1100 sq.m. This area is used by the Parish Council under licence as a children’s recreation field and the Parish Council have been paying the District Council to cut the grass for at least the past twenty years.”

The recreational purpose of the land is reflected in the Winsley Parish Council minutes dated 22nd May 2001 (Application Exhibit R) - Minute 9 Northfield Recreation Field – *“It was agreed that the land at the end of Northfield should be retained for recreational purposes and to review its use at some time in the future.”*

- ii) The application also refers to works carried out by the Parish Council to replace a single goalpost present on the land, (installed by the Parish Council in the mid-1970’s as reported by a previous Parish Councillor at part 7 of the Application), as shown in Exhibit I, Google Maps image 2009 (see below), with a pair of goalposts in 2020. The application includes 3 letters and a petition signed by 6 local residents requesting new goalposts, (setting out the use of the land for sports) (Application Exhibit E). The Parish Council minutes dated 7th July 2020 confirm that the Parish Council would obtain quotes for two goalposts, one or two benches and a waste bin (Exhibit F). Photographs provided by I Sparrowhawk (26th February 2021, Exhibit G, below), confirm that 2 new goal posts were erected on the application land by November 2020.

Application Exhibit I – TVG Application – Google Street View image 2009 showing single goal post:



Photograph showing the former (single) goal post in September 2020 (I Sparrowhawk – Application Exhibit G):



In front of the old goal post - 26th Sept 2020

The new goalposts (pair) erected on the application land by November 2020, by the Parish Council (I Sparrowhawk – Application Exhibit G):



Testing the new goal posts - 4th November 1



Covid-19 Lockdown P.E. Lesson, January 15th 2021

The Applicant confirms in correspondence dated 14th April 2022 (**Appendix 9**), that when works by Winsley Parish Council to install new goal posts were carried out in 2020, “...no permission was sought for this work...”.

The Objector BKLE (10th June 2022 – **Appendix 10**) provides evidence of the Parish Council’s application to West Wilts District Council for grant funding for a skateboard ramp / BMX track on the land, dated 16th August 2005 and states: “The covering letter refers to the application land having been designated as a children’s play area. There is no reference to the land being privately owned and the Applicant having no authority to construct the facility for which it was seeking funding, despite the letter received by the Parish Council in 1991. It is clear that the Applicant continues to treat itself as authorised to use the Application Land by the Council and was communicating that permission to users of the land.” This use for the land is reflected in the Parish Council minutes (Application Exhibit R), but the installation of the BMX track / skate ramp, did not go ahead:

28th December 2005 Minute 114 Proposal to build a BMX track –
“Councillors had before them a proposal developed by councillors Beale and Kieschke for an amenity for teenagers either a skateboard or a BMX track in Northfield play area, the preference being for a BMX track. Cllr Griffith questioned the apparent high cost...”

27 March 2007 Minute 117, Future for teenage facilities including skateboard / BMX track – “Cllrs resolved to end the debate about the provision of skateboard / BMX facilities.”

29. Witnesses support maintenance of the land by the Parish Council for a number of years and the provision of goalposts. As well as the proposed BMX track / skateboard ramp, some witnesses also suggest that the Parish Council were in the process of installing seats on the land, before its sale, please see extracts at **Appendix 14**.

Locality – The Applicant sets out the claimed neighbourhood within a locality as Winsley settlement, within the parish of Winsley and submit revised documents to clarify the identified neighbourhood and the reasons for this. The witnesses and documentary evidence such as Parish Council minutes and requests for quotes, support maintenance of the land by the Parish Council. Additionally the Parish Council erected new goalposts in 2020 and

considered the installation of a BMX track / skate ramp and benches, all of which assists in linking the land to the local community.

The Objectors dispute the claimed neighbourhood of Winsley settlement, which they consider i) does not fully accord with the settlement boundary for Winsley, ii) where it is mainly based on the settlement boundary (as a planning tool), they consider this alone not to be sufficient to identify a locality for the purposes of the 2006 Act, and iii) the witnesses do not provide sufficient evidence regarding the neighbourhood question.

Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

Have indulged as of right

30. Use “as of right” means use without force, without secrecy and without permission. In the TVG case of *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335, Lord Hoffman commented on use as of right:

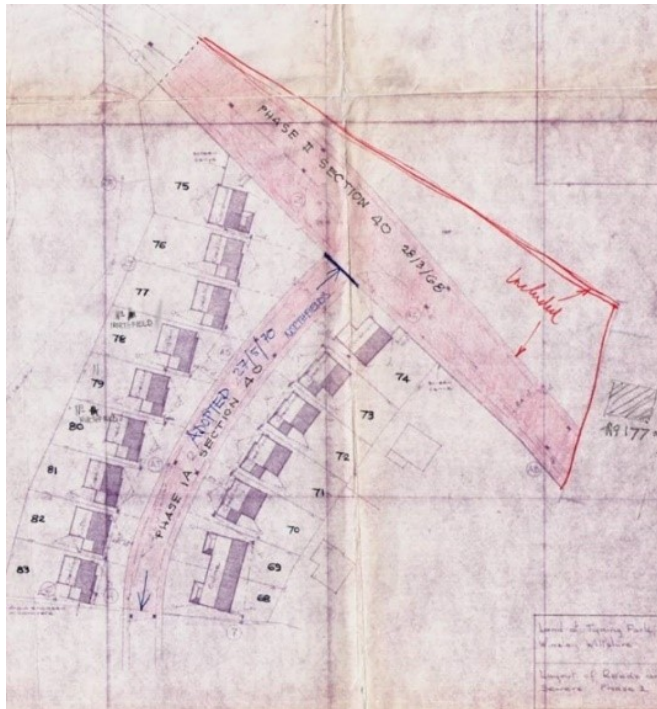
“It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner...The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited time.”

31. The Objector BKLE in their correspondence dated 12th February 2022 (**Appendix 7**), helpfully sets out a history of the application land, as summarised below:
- At the time the Tynning Estate was built in the 1960’s the landowner was Alfred Robinson Builders and Contractors Ltd. The Application Land was dedicated to Wiltshire County Council for ‘highway purposes’.
 - For a time the land was temporarily used as a play area with a view to that use continuing until such time as it was required for highway purposes.
 - The land was never required for highway purposes, as evidenced by the Parish Council minute dated 26th March 1991, which includes notification that the Application Land was not needed and it would be returned to the

'control' of the developer. The Parish Council minutes record that the Clerk was to write to the Council to express an interest in the Application Land and to ensure that the Parish Council would be consulted before any decision in respect of the Application Land was made.

- Winsley Parish Council continued to maintain the Application Land.
- 2020 – The owner of the application land became aware that its ownership subsisted.
- 13/01/2021 - The Oldham Estate Company purchased the assets of Alfred Robinson Builders and Contractors Ltd, including the application land.
- 10/03/2021 - The Application Land is sold at auction to BKLE.

32. This appears to be an accurate account of the history of the land based on the available evidence and there is consensus amongst the parties that this was an area of land left over by the developer upon the development of the Tynings Housing Estate in the 1960's and that the land was dedicated for highway purposes by the developers in a section 40 (Highways Act 1959) Agreement, to be held by the then Wiltshire County Council, as the Highway Authority, for the purposes of the Winsley bypass:



*Highways Act 1959 -
Section 40 agreement
plan
28 March 1968*

33. Mr J Allison who was on Winsley Parish Council between 1970 and 2011, within his user evidence form completed 19th May 2021 (Application Exhibit J), suggests that permission to use the land as a play area was requested from Wiltshire County Council – “As a member of Winsley Parish Council I was aware that the dumping space was unlikely to be needed for some years for a

proposed Relief and Distributor Road. We enquired of Wiltshire County Council whether it could be used as an informal play area, managed by the Parish Council...I attended a meeting with the County Solicitor at County Hall, seeking consent for the vacant land to be used for informal casual play, managed by the Parish Council, unless and until needed for part of a Relief and Distributor Road. Letters were received by the Parish Council confirming that arrangement...I am aware that the land has been used throughout, as agreed, without challenge. The road was eventually constructed on a different line, finally after a Local Public Inquiry in 1995 and opened in 1997.” There is no correspondence provided from this time, to support the request for permission and permission being granted by Wiltshire County Council, however, the land is referred to as a “temporary” play area in 1991 correspondence from the Chief Assistant (Roads), Wiltshire County Council (please see below).

34. An alternative route for the Winsley bypass was agreed in 1991 and the application land included in the section 40 agreement, was no longer required for this purpose. Where the land had never been used for highway purposes, it carried no highway rights and it appears to have reverted back to the control of the landowner. The situation is explained in a letter from P White, Chief Assistant (Roads), Wiltshire County Council, to Winsley Parish Council 14th March 1991, following their register of interest in the land (Application Exhibit Q):

“I refer to your letter dated 28th February, 1991, in which you register the Parish Council’s interest in land which has been reserved for completion of the bypass around Winsley. The Transport and Highways Committee has recently approved a revised line for the eastern end of the bypass and shortly a planning application will be made based upon this revised alignment. If approved, some of the land which is currently reserved for the bypass, but which is temporarily used as play area, may no longer be required. However, this is not owned by the County Council. At the time the housing development took place the land was dedicated to the County Council for “highway purposes” as part of a planning agreement. The area which is not used for highway purposes must therefore, be returned to the control of the freeholder of the land who I presume to be the original developer of the site, Alfred Robinson of Harrow.

You will see therefore, that the County Council will not be in a position to dispose of any of the land not required for the bypass. In due course, after the area of surplus land has clearly been identified, it may be necessary to make

contact with the landowner in which case I will register your Council's interest."

35. In a memo from the Director Planning and Highways, P White (Chief Assistant (Roads), to Director of Property Services 12th April 1991 (Application Exhibit Q), it is stated:

"...I can confirm that the 'play area' was not excluded from the S.40 Agreement as suggested in the correspondence attached to your memo, and as a consequence was included on the adoption plan. However I have discussed the matter with Mr. G. Harris and his comments can be summarised as follows:

- 1. Even though the adoption plans show the whole of the 'play area' as being highway, in fact on the ground this area has not been used for highway purposes and is not therefore highway. It is clear that the intention was for this land to be reserved for highway use if so needed.*
- 2. If the 'play area', in whole or in part is not required for highway purpose there will be no need to make application to Magistrates Court to have highway rights extinguished as they do not exist. Total control of this land would revert to the freeholder, presumably Robinsons.*
- 3. The Parish Council would therefore need to negotiate with the landowner if they wish to purchase that part of the 'play area' that is not required for the bypass."*

36. This is reflected in the Parish Council minutes at the time (Application Exhibit F):

26th February 1991:

"ANY OTHER BUSINESS

Land at the east end of the Bypass and at the top of Northfield, Winsley.

The Clerk was asked to write to the Director of Planning and Highways, Wiltshire County Council to express the Parish Councils interest in the above area of land and to ask that before any decision is taken in connection with the use of the land, the Parish Council would like to be consulted."

26th March 1991:

"MATTERS ARISING

b) Land at Northfield. The Clerk read a letter dated 14.3.91 received from the Department of Planning and Highways, indicating that the land, temporarily used as a play area, is not owned by the County Council, but was dedicated to that Council for "highway purposes" as part of a planning agreement. The

area of land was not used for highway purposes, due to the revised line for the eastern end of the Bypass. It is assumed that this will be the developer of the site Alfred Robinson.

When the area of surplus land has clearly been identified the County Council will register the Winsley Parish Council's interest with the landowner."

37. Although there is an understanding locally that the land is owned by Wiltshire Council/County Council or the Parish Council, as seen in the completed evidence questionnaires (see Summary of Witness Evidence at **Appendix 13**), there is no evidence that the application land was ever owned by, or leased to Wiltshire Council or its statutory predecessors, or the Parish Council. In the TVG application form at 11 – "Any other information relating to the application", the Applicant states – *"Ownership of this land was retained by the original builders of the estate, Alfred Robinson, who are now a dormant company. In 2019 the Parish Council established that Alfred Robinson's assets were being managed by Aggregate Industries. In 2020, unknown to the Parish Council, the land was sold to Legacy Land Holdings. This came to light on 12 February 2021 when the land was put up for auction, to take place on 10 March 2021.*
- This has led to significant concern amongst residents of Winsley that the land might be bought and removed from use by residents..."*

Without permission

38. During the period from the 1960's when the Tynings Estate was built to the land being returned to the 'control' of the developer as the landowner when it was no longer needed for 'highway purposes' in 1991, the Objector BKLE claims that (see **Appendix 7**) *"...the Council has essentially licensed the Applicant to use the Application Land for the provision of community recreation space...The Council (who had effective control over the Application Land given its dedication to highway purposes) had assumed authority to permit the Applicant to use the Application Land for the provision of recreational space to local people."*

From 1991 until the landowner became aware of their continued ownership in 2020 the Objector claims: *"The Parish Council had continued to deal with the maintenance of the Application Land, holding itself out as having the authority to do so and as having the authority to permit members of the public to use the land. Many of the EQs state the belief that the Applicant owned the Application Land."*

39. The Applicants correspondence dated 14th April 2022 (**Appendix 10**), disputes this:

“4.2. Of the 124 respondents to the Evidence Questionnaire:

- *none had ever sought permission to use the land from the owner of the land at the time (Robinsons).*
- *none had ever been denied or granted permission to use the land by the owner of the land at the time.*
- *none had ever been discouraged or prevented from using the land by the owners of the land at the time.”*

40. It is not possible to register land as a TVG, where it is already recorded as highway, or where the land is registered as “Public Open Space” and use of the land for lawful sports and pastimes may not be “as of right”, rather “by right”, on the basis of public licence where land is acquired and held by a public body. The case of R (on the application of Barkas) (Appellant) v North Yorkshire County Council & Anr (Respondents) [2014] UKSC 31, considered the case of Helredale playing field, Whitby, subject to a TVG application and owned by Scarborough Borough Council, acquired as part of a larger site by their predecessor, Whitby Urban District Council, acting pursuant to their powers under section 73(a) of the Housing Act 1936, which permitted a local authority to acquire land as a site for the erection of houses. Most of the land was then developed including the laying out and maintenance of the field as recreation grounds pursuant to section 80(1) of the 1936 Act. The Inspector at inquiry found that whilst use of the field met all the other requirements of section 15(2) of the Commons Act 2006, use of the field had been “by right” rather than “as of right”, as required under section 15(2), the question on appeal to the Supreme Court being:

“12. ...where land is provided and maintained by a local authority pursuant to section 12 of the Housing Act 1985 or its statutory predecessors, is the use of the land by the public for recreational purposes “as of right” within the meaning of section 15(2)(a) of the Commons Act 2006?”

Lord Neuberger, giving leading judgement, found that:

“21. ...So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise.”

41. It appears that the land was held by Wiltshire County Council for highway purposes from 1968 to around 1991, when it was no longer required for that purpose and returned to the control of the landowner, (Robinsons). When the caselaw is applied, it follows that, for the period during which the land was held for highway purposes, the land is not registerable as a TVG because the statutory incompatibility test applies and therefore any use of the land between 1968 and 1991 would not be qualifying user “as of right”, where use during that period is “by right”.
42. On the evidence provided by the Parish Council (M J Allison, see paragraph 33 above), it appears that Wiltshire County Council agreed to use of the land as a play area, however, there is no evidence that at any time the land was owned or leased by the Council, having the power to grant such rights/permission, the land was held specifically by the Authority for highway purposes and remained fully in private ownership. Additionally, once the land was no longer required for highway purposes in around 1991, the land was returned to the full control of the landowner, Robinsons, the developer and during the user period in question in this case, i.e. 2001-2021, the land was not held/owned/leased by Wiltshire Council or its predecessor Wiltshire County Council.
43. Witness evidence suggests that the majority of users of the land did not seek and were not granted permission before using the land. When asked if they had ever sought permission to use the land, (Question 13 in the questionnaire), 119 confirmed that they had not sought permission with comments as follows, (with individual witness number – see **Appendix 13** Summary of Witness Evidence and Application, Exhibit J User Evidence Forms):
- 48 – I have always thought that it was free to access and there was no indication to the contrary at any time.
 - 61 – It was clear to everyone it was free to use as a public play area and this was never challenged or questioned to my knowledge.
 - 73 – It is public access land.
 - 75 – No permission seemed necessary.
 - 77 – We thought it belonged to the village!
 - 89 – Wasn’t ever any reason to – it was open access from the road with no restriction or signage. No one ever spoke to me or my friends about using the land. When we built the bonfire in the run up to Nov.5th there were no comments or attempts to prevent us.

- 98 – We didn't need permission, it was spare land that the Council just kept tidy.
- 99 – It has always been open to the public with no signs saying otherwise. Have never been asked or stopped from using the land.
- 111 – Assumed it was the Winsley residents right to use.
- 124 – My understanding is that this was not necessary as I believed the parish owned the land for community use.

3 respondents confirmed that they had requested permission:

- 65 – Yes, from Parish Council, 4 yrs ago requested that a Parish Council meeting raise the idea of planting a community orchard and putting in an outdoor table tennis table, (declined).
- Mr J Allison, as at paragraph 33 above.
- 104 – Yes contacted Parish Council for possible use for under 5's football training / Bradford Town Youth Club (permission denied). NB have not sought permission for my children to go and play there with friends.
- Although witness no.10 states that no permission to use the land was sought/granted, they confirm that Bradford Youth Football Club requested use for reception childrens football on Saturday, but this was refused.

2 respondents did not know if they had requested permission.

44. Clive Bolshaw in correspondence dated 30th November 2021 (**Appendix 8**), confirms – *“The Northfield Playing Field has always been regarded by Winsley residents as a safe, pleasant green space for children’s play, away from traffic and freely available to all without requiring anyone’s permission.”*

Without Force

45. In the Planning Inspectorate publication “Wildlife and Countryside Act 1981 Definitive Map Orders Consistency Guidelines”, (updated 16 March 2021) it is stated that *“force would include breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate.”*
46. In correspondence dated 14th April 2022 (**Appendix 9**), the Applicants confirm that *“4.3 Since its creation as part of the Tynning housing estate there has always been open access along one side of Northfield playing field, allowing users to access the land freely and without secrecy. Fifty-seven respondents to the Evidence Questionnaire had accessed the land via Northfield or from the bypass (B3108); 49 had walked to the land and 7 had cycled; 10 stated it*

was open access land or that they accessed the land ‘through the obvious entrance’. These responses demonstrate that there was no secrecy involved in using the land.”

47. In the user evidence forms (Application Exhibit J), 40 respondents confirm that they accessed the land from Northfield, 1 confirms access from the bypass; 15 confirm access from both the bypass and Northfield and 4 neighbouring property owners confirm use via their garden gates, directly onto the land, (see Summary of Witness Evidence at **Appendix 13**). The evidence forms are completed around May 2021, at which time 24 respondents confirm that the land was unfenced and open. The evidence suggests that the land has previously been unfenced on the Northfield (west) side and remained so at the time of the TVG application, giving witnesses free and direct access onto the land, without the need for use by force. Mr David Morrell in evidence includes the photograph below of the application land, which is undated, but his use of the land spans from 1990 to 2021 (Application Exhibit J):



Rebecca Burvill submits a photograph of use of the land for a birthday party on 7th June 2020, which appears to show the land unfenced from the highway behind the attendees (Application Exhibit J):



As part of the application, the Applicant includes a Google Street View image of the land in 2009 (Exhibit I), showing no fence from the highway, Northfield, (see paragraph 28 ii).

48. The land was fenced by the current landowner BKLE in July 2021, after the sale of the land and the TVG application. Any use after that date, i.e. crossing/breaking the fence/lock would be user by force which is not qualifying user “as of right”:



Wiltshire Council photograph of application land (west side against Northfield) – November 2021

49. Open access to the land from Northfield (prior to July 2021) is supported by residents in correspondence, (see **Appendix 8**):

Janet and Chris Baker – 21st December 2021 – *“For the 34 years that we have lived near NPF [Northfield Playing Field] it has always been a freely accessible area with no fencing or signs limiting use or access.”*

T Hogan & Family – 4th December 2021 – *“I have resided, and with my wife brought up our two boys in Winsley over the last 23 years. Throughout that time and along with other villagers we have frequently enjoyed unfettered [sic] access to Northfield playing field for ad hoc recreation purposes with our boys...As well as witnessing other local people using the facility (until recently unfenced) while I have lived here and furthermore I have never seen any overt notice to suggest the site was anything other than common land for recreation.”*

S Winter-Alsop – 2nd December 2021 – *“I have personally been using Northfield Playing Fields for recreational purposes as of right since I was a child. I am approaching the age of 28 and can remember visiting Northfield from around the age of 6 onwards. Access has never been prevented over the 21.5 years I have used the land with my friends and family. I always believed Northfield Playing fields belonged to the parish council or community. As far as I am aware, no land owner has tried to prevent the community from using the playing field since the village green application was submitted. The public have been able to access the land as of right without interruption.”*

50. Use by force does not refer just to physical force, but also where use is deemed contentious, for example by erecting prohibitory notices in relation to the use in question. In the Supreme Court Judgement R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another (Respondents) (2010), Lord Rodger commented that:

“The opposite of “peaceable” user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is “vi” only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant context vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner has told him not to do it. In those circumstances what he did was done vi.”

51. In correspondence dated 14th April 2022 (**Appendix 9**), the Applicant confirms *“4.4 There is no evidence of, and residents who have lived in the area*

throughout the 20 year period do not recall, any form of prohibitory signage ever being installed on the land.”

52. In the evidence questionnaires (Application Exhibit J), 117 respondents claim that there were no gates/fences/signs or other measures to deter use of the land (Question 15. Are you aware of any attempt made by notice, fencing or other means to prevent or discourage use being made of the Land by local inhabitants? – see Summary of Witness Evidence at **Appendix 13**):
- 48 – There has been a ‘goal post’ which seemed to encourage rather than deter participation.
 - 84 - I am aware the land has been used throughout, as agreed, without challenge.
 - 89 – In all the time I used the land (and whenever I have seen it since – my mother lives in the village and used the land on bonfire night(s) with me, my father and sister), I never saw any attempt in any way to restrict my use of the land or anyone else’s...No one ever restricted use, prevented bonfire building, play etc.
 - 122 – Never in my 46 years of living at Northfield.
- 1 respondent confirmed:
- 10 – We were told local residents often blocked erection of new goals and would complain at BTYFC (Bradford Town Youth Football Club) use.
- 5 respondents did not know and 1 respondent left Question 15 blank.

Without Secrecy

53. In objection the landowners BKLE state (12th February 2022 – see **Appendix 7**):

“24. It cannot be genuinely said that the users of the Application Land (and no admission is made regarding the nature and extent of any of the claimed use) were asserting a right as against the owner of the land such that the owner had to choose between warning them off or them establishing a right...”

28. There is no evidence that the Council ever did return the Application Land to the ‘control’ of the original owner [once the land was no longer needed for highway purposes]. The fact of its continuing ownership only came to the owner’s attention when the Applicant contacted the owner regarding a separate piece of land in 2020. The Parish Council had continued to deal with the maintenance of the Application Land, holding itself out as having the

authority to permit members of the public to use the land. Many of the EQ's state belief that the Applicant owned the Application Land. It is inconceivable in those circumstances that the landowner, who thought the Application Land had been dedicated to highway purposes and considered itself to have been divested of the obligations and opportunities of ownership, would have had any reason to object to use of the Application Land by local inhabitants.

29. In the circumstances it cannot possibly be concluded that any use of the Application Land by members of the community amounted to an assertion of any right against the landowner that required the landowner to elect to either ignore its continuance or object to such use. The use relied upon by the Applicant cannot be properly described as use as of right."

54. The Applicant states (14th April 2022 – **Appendix 9**) – *"4.5 The landowner would have been able to tell that the field was well used and looked after by the local community (for example, from the goalpost in the field, the worn grass and the maintenance of the area). As use of the land was clearly not by stealth the landowner could, at any point during the 20 year period in question, have identified that the land was being used by local residents and could have exercised his right to prevent use of the land. The landowner did not do this at any point."*

55. In correspondence dated 3rd June 2022, the Objector BKLE (see **Appendix 10**), suggests that the Applicants have in the above-correspondence sidestepped the issue raised by BKLE, *"...namely that the owner of the land was effectively unaware that it owned (or had control of) the land, it having been originally earmarked for highway purposes, and could not therefore have known it could and should be warning off trespassers...the Council which had effective control of the Application Land, assumed authority to licence the Applicant to use the Application Land which in turn gave local inhabitants permission (used at the invitation of the Parish Council) rendering any use precario or permissive.*

10. The Applicant makes reference to the correspondence dated 12 April 1991 and maintains that thereafter the predecessor in title to BKLE had total control of the Application Land and that the Parish Council would have needed to negotiate with the landowner. The Applicant did not negotiate with the landowner, despite that correspondence, and continued to deal with the Council as the party that continued to have control over the Application Land and the authority to deal with the same."

56. There is evidence that the land was maintained by the Parish Council and even goalposts erected on the land by them, as well as plans to build a skate ramp / BMX track and erect benches on the land which never came to fruition, all of which is set out publicly in Parish Council minutes. Certainly, in considering use by local inhabitants, it is necessary to consider how use would have appeared to a reasonable landowner as Lord Hoffman giving leading judgement in the Sunningwell case, states:

“In Mann v. Brodie Lord Blackburn put the rationale as follows, at p. 386: “where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.

My Lords, I pause to observe that Lord Blackburn does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land...

...namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right.”

57. Whilst the current owner of the land in this case, whose ownership is from March 2021, provides evidence that the previous owner of the land was effectively unaware of its ownership until 2020, it is noted that there is no evidence provided from previous landowners as first-hand testimony on this point and that the March 2021 sale particulars show an aerial view of the land with two goalposts in place and a worn area around the goals which might suggest to a prospective purchaser that the land was being used for sports and pastimes (Application Exhibit D).
58. Cllr J Kidney, Wiltshire Councillor for Winsley and Westwood in correspondence dated 29th December 2021 (**Appendix 8**), states: *“The Parish Council submitted this application to register the playing [sic] as a Village Green prior to the recent sale of the freehold land. The application was made known to the auctioneers who were asked to include this information within the sale particulars. There was also extensive publicity around the submission of the application. Any potential purchasers will therefore have had every*

opportunity to be aware of the intention to register this valued amenity space as a Village Green.”

59. The evidence of C & G Pearce in undated correspondence with e-mail dated 1st December 2021 (**Appendix 8**), suggests that the original developer of the land and owner, is likely to have been aware of use, given that the 4 properties adjoining the land had access from their gardens: *“We have always had access to the play area from our garden and we know from the previous owner that this access has been available since they had moved into the house – the first owners who brought the property from the developer. We can confirm that all 3 houses in Saxon Way that back on to the field all have access from their back gardens...as it has been used since the estate was built.”*

As of Right – The Applicants set out that use of the land by local inhabitants has taken place as of right, the Objector disputes that the use of the land has been: 1) without permission – where it considers that Wiltshire County Council effectively issued a licence to use the land for the provision of community recreation space where it had effective control over the Application Land given its dedication to highway purposes, and 2) without secrecy - where the landowner would not have been aware of use, its true ownership not coming to light until 2020, (the Parish Council continued to deal with the Wiltshire County Council / Wiltshire Council, whom they believed had authority over the land), such that the landowner was not aware that they had to choose whether to object to such use or to acquiesce. Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

Lawful sports and pastimes

60. The Objector Mr B Cooper (30th November 2021 – **Appendix 7**) in objection to the application, acknowledges use of the land *“by small boys kicking balls around”*, but confirms that this was on an irregular basis as he and his wife observed, not sufficient to support the field as a village green.

The Applicant, (14th April 2022 – **Appendix 9**), confirms:

“5.5 There are a number of residents who have lived in the village long enough to be able to testify that the land has been used regularly throughout

the 20-year period. For example, Mr and Mrs G Pearce, whose property backs onto the field, provide details of the field being used regularly:

“During the almost 31 years that we have lived here we can confirm that we have had families using the play area on a very regular basis. We have had football, rugby (especially during the time of the world cups), cricket, tennis, and running competitions. We have seen young people learning to ride 2-wheel bikes out there and we have seen adults using it for exercise and personal fitness; we have had end-of-school year picnics...Since lock-down just over 12 months ago the play area has been used daily...”

Northfield resident Ms K Kemp recalls the land being used by herself and her friends from the 1970’s onwards and, as a resident of Northfield to the current day, has seen the land ‘being well utilised by local children and adults’.

5.6 There has been a single goalpost in the field for many years with a photo of the goalpost from Google Maps in 2009 (Evidence I). In 2020 residents, including young children, asked the Parish Council for a new goalpost and two goalposts were installed (no permission was sought for this work) (Evidence E). Photos included on the auctioneers website showed the two goal posts; the worn ground in front of each indicating that they were well used (Evidence D). Bases have also been installed by the Parish Council for two benches planned for the field.

5.7 There are some specific illustrations of the evidence submitted by the Parish Council that indicate that the land has been in general use by the local community for informal recreation for over 20 years. The evidence provided by the Parish Council (responses to the Evidence Questionnaire; additional statements from residents; minutes from Parish Council meetings; photos) is extensive, detailed and clear in demonstrating 20 years of informal use by the local community. It is considered that this evidence is more than adequate to satisfy the statutory test.”

61. In analysis of the evidence questionnaires and representations, the main use of the land is for football (85 witnesses undertaken, 119 saw others playing football), followed by playing (42 undertaken, 113 saw others), picnicking (31 undertaken, 70 saw others). The land seems to be used more for games and sports, as a destination for these activities, rather than walking and dog walking – walking (23 undertaken, 77 seen), dog walking (18 undertaken, 84 seen), i.e. users were not traversing the land to reach another destination, (see **Appendix 15** Witness Evidence – Lawful Sports and Pastimes).

62. There appear to be few community events taking place on the land such as fetes etc, with only one reference to an organised bonfire display (witness evidence form no.89 - Application Exhibit J) – *“When we built the bonfire in the run up to Nov.5th there were no comments or attempts to prevent us. Lots of families attended, fireworks were let off, potatoes and sausages cooked.”* The witness later refers to bonfire night(s) suggesting perhaps multiple bonfire night events, although no additional clarification is given and no other witnesses refer to attending bonfire celebrations on the land. 3 witnesses have had/attended parties on the land (1 seen) and 4 witnesses refer to attending family celebrations (27 seen), (see **Appendix 15**).
63. There do appear to be organised groups using the land, i.e. keep fit/training classes taking place on the land. The Cubs and the Scouts as well as the Winsley Acorns Pre-School appear to use the land for activities. In the evidence questionnaires, 39 respondents confirm that there are no groups using the land; 49 don't know; 2 left blank and 34 confirm that groups do use the land, (see **Appendix 13** Summary of Witness Evidence):
 Cubs/Scouts/Guides/Brownies/Beavers = 20
 Group Keep Fit/Exercise/Personal Training = 15
 Football Club = 2
 Village School = 1
 Visiting School = 1
 Winsley Residents/Children = 9
64. The activities taking place on the land are set out in more detail by residents in correspondence, see extracts at **Appendix 15**. The Applicant refers to Parish Council minutes which refer to children playing golf on the land, however, this is reported as a nuisance and a danger to neighbouring property so is unlikely to qualify as a lawful sport and pastime, it is also noted that it was hoped that this use would not continue to be exercised on the land (Application Exhibit F):

Winsley Parish Council minutes – 26th March 1991:

“MATTERS ARISING. c) Golf Ball Nuisance – Northfield Play Area. The Clerk read a further letter from the parishioner whose property is adjacent to the play area. It was agreed that the Clerk reply to the letter advising of the probable change of use of ownership of this land and also indicating that the boys involved have been alerted to the grave danger inherent in their golf practice. It was hoped that the problem would not arise again.”

65. The evidence questionnaire asks users how frequently they have used the land (124 users) (Question 8 – see Summary of Witness Evidence at **Appendix 13** and Application Exhibit J). Where users have quantified the frequency of use, it appears that the most use is occurring 1-2 times a week (20 users) or weekly (13 users).
Where witnesses do not put a number on their frequency of use the following replies are given:
Many occasions / numerous / frequent / very often / many times / hundreds of times/ extensively / constantly = 21 users
Regularly = 13 users
Occasionally / not often / sometimes / intermittent / whenever / infrequently / ad hoc = 13 users.
66. In undated correspondence submitted with the Application (Exhibit G), K & D Kemp state: *“During Covid and lockdown this area of land has been invaluable to families and they have waited patiently to use the ground when other families were there. This area is used everyday and it [sic] so important to be kept as a village asset. Today there has been over 30 people using it.”* (Mrs Kemp has lived in Winsley all her life and in Northfield, opposite the land, for over 16 years).

Lawful Sports and Pastimes –

The user evidence suggests substantial use of the land, by residents, over a long period. BKLE as the landowner do not make any representations regarding the lawful sports and pastimes which are claimed to be taking place on the land. Mr Cooper agrees that he has seen children kicking a football on the land, football being the main use of the land set out by users, however, he and his wife have observed this use to be infrequent and not sufficient to support TVG status, whilst witnesses using the land suggest frequent use, at least 33 witnesses are using the land weekly or twice weekly.

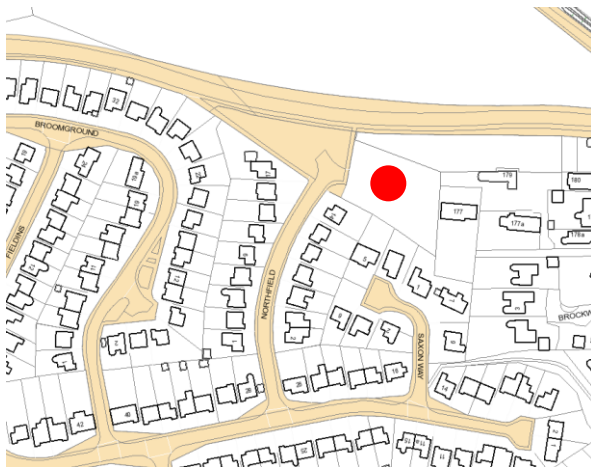
Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

On the Land

67. As at paragraph 40 above, it is not possible to register land as a TVG, where it is already recorded as highway, or where the land is registered as “Public Open Space” and use of the land for lawful sports and pastimes may not be “as of right”, rather “by right” on the basis of public licence where land is

acquired and held by a public body (as in the Barkas case), therefore, the current status of the land must be considered.

68. The CRA is entitled to rely upon the highway record which confirms that the majority of the application land is not recorded as highway. This is in contrast to the land located directly to the west of the application land, which was also included in the 1968 Highways Act 1959, Section 40 agreement held for highway purposes, and which is now recorded as highway, (please see current highway record extract below):



Current Highway Record

© Crown Copyright and Database Rights 2024 Ordnance Survey 100049050

69. Officers consider that this occurs where the Winsley bypass was completed in stages. A section of the bypass was constructed over the land to the west of the TVG application land before the eastern section was agreed and completed. The land to the west was used for highway purposes, with Tynning Road and Northfield, before being landscaped, with an adopted footway leading from Northfield to the bypass, once the bypass was agreed on the northern route and the land was no longer required. No part of the bypass was ever constructed on the TVG application land and the Wiltshire County Council, Chief Assistant (Roads) confirms in 1991, that where the application land was not used for highway purposes, highway rights had not been acquired over it and there was no requirement to formally stop up highway rights (see paragraphs 34 and 35). This is not the case for the land to the west over which a section of the bypass was built and used for a time, therefore the two areas are treated separately within the highway record.



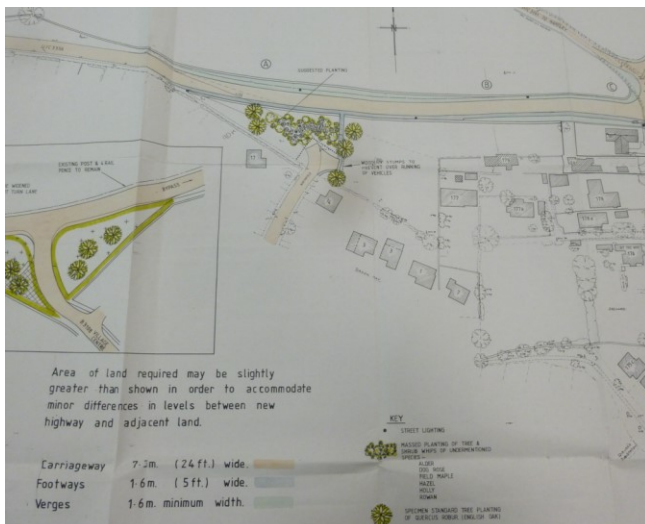
© Crown Copyright and Database Rights 2024 Ordnance Survey 100049050

The WCC Highways Sub-Committee report dated 24 July 1996 – Winsley Bypass B3108 - Proposed Speed Limit, sets out that the bypass consists of 3 lengths: 1) first (central) section completed in the 1960's in conjunction with the construction of Tynning Park Estate; 2) second (western) length completed in the early 1980's in conjunction with the construction of the Church Farm Estate; 3) eastern section to be constructed 1996, i.e. D(i); D(ii) and D(iii) on the plan attached to the report (extract opposite).



© Crown Copyright and Database Rights 2024 Ordnance Survey 100049050

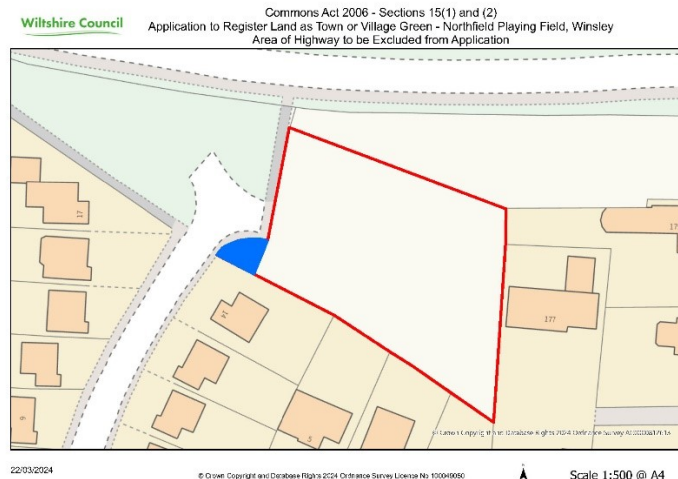
Temporary Road Closure Plan showing route of bypass constructed, at one time incorporating Tynning Road, Northfield and the land to the west of the TVG application land, i.e. the bypass was partly constructed over land to the west of the TVG application land (now recorded as highway), but not constructed on the application land itself (not recorded as highway).



© Crown Copyright and Database Rights 2024 Ordnance Survey 100049050

Wiltshire County Council Plan Completion of Winsley By-Pass Route B – Drawing No.CR0221/1/4, showing the landscaping of the route already partially constructed and provision of new footway leading north from Northfield, on land to the west of the TVG application land, once it was no longer required.

70. It is noted however, that the south-west corner of the application land is already recorded as highway in the highway record. Therefore, if the application is successful, Officers recommend that the section of the application land shaded blue on the plan below, is excluded from land registered as a TVG:



In the Trap Grounds case (Oxfordshire County Council v Oxford City Council & another [2006] UKHL 25), at paragraph 62, Lord Hoffman, giving the leading judgement, considered that it was open to the CRA to register a smaller area, without amendment of the application:

“62. I also agree with the Court of Appeal that the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed.”

71. Mr B Cooper, in objection (**Appendix 7**) confirms that the area is a left-over piece of land following the completion of the Winsley Bypass (B3108) and that based on the level of use he has observed *“It certainly could not be described as a playing field, much less a ‘village green’, since it is too small and too close to the bypass and other houses for this purpose. Indeed I believe it’s best use would be for the building of a few additional houses (preferably low cost/social housing).”*

He suggests an alternative site for the location of a TVG “...opposite the entrance to Dorothy House, which has been and continues to be used as a playing field and could be used for the other activities associated with a TVG. Unfortunately I believe it is owned by Dorothy House, even if it is not now used by them as a [sic] overflow carpark since their council approved additional parking arrangements have been completed.”

72. T Richards in correspondence dated 30th December 2021 (**Appendix 8**), confirms: “During our time in the village, [Tyning Estate over 21 years] there has only been 3 spaces I know of where children have been able to play ball games & other recreational games close by:
- the community play area (between the primary school & Lyddieth Court)
 - the football field by Dorothy House
 - Northfield Playing Field, the subject of this application.”

P Seeley – 15th February 2022 (**Appendix 8**) – “You may or may not be aware, but there is only one quite small (and underfunded) park in the centre of Winsley village. Firstly, children no longer have an outdoor space to play sport or football with their friends as they used to when the field was open to the public.

Secondly, the small little park in the middle of the village, has become the only congregation point for other older children, who also used to make use of Northfield playing field to play football. As a result younger children a) no longer have access to Northfield playing field, and b) no longer feel comfortable playing in the small Winsley park as the older children have started using it for their sports, much better suited for Northfield playing field.”

M Legh-Smith – (undated correspondence with Application at Exhibit G) – Facilities Manager Bradford Town Youth Football Club – “With Winsley school nearby, it allows an area of different recreational use to the local playground where the younger academic years play and avoids wayward sporting equipment potentially harming the young children...Aside from the playground there is not anywhere in Winsley where the younger children can walk to on their own and feel safe...”

73. On this point, Officers would agree with the Applicants who, in correspondence dated 14th April 2022 (**Appendix 9**), confirm that that the size and location of the land are not factors for consideration in deciding a TVG application. In addition the consideration of alternative recreation sites within the identified neighbourhood within a locality, are not a relevant consideration,

it is the use of the application land for lawful sports and pastimes by local inhabitants which is in question.

74. Witnesses do not supply plans individually marked with the area they have used with their completed evidence questionnaires, but sign the application plan provided. It is not necessary to demonstrate use of the whole of the application land if not all of the land was used, or it was not possible to use all of the land, where it formed part of the overall character of the land itself. In the Trap Grounds case the question of “...*must the “significant number of inhabitants” have set their feet everywhere on the land...?*”, was considered. At paragraph 66, the judgement includes the previous findings of Mr Chapman acting as Inspector at the public inquiry in this case, followed by comment on his findings:

“66. Secondly, Mr Chapman dealt with the inaccessibility of a good deal of the scrubland:

“...I do not see why much more densely vegetated land should not be capable of being subject to recreational rights, either by custom or prescription. In my view, it is necessary to look at the words of the statutory definition and to ask whether the scrubland, considered as a whole is land which falls within that definition. In my view, the evidence proves that the recreational use of the scrubland is, and has been over the relevant 20 year period, sufficiently general and widespread, by way of use not only of the main track but also of minor tracks, glades and clearings, to amount to recreational use of the scrubland viewed as a whole.”

67. ...If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.

68. ...Every case depends upon its own facts and I think that it would be inappropriate for this House in effect to legislate to a degree of particularity which Parliament has avoided.”

75. In applying this caselaw in the Winsley case, it is considered that where the area is relatively small (approximately 1,860m²) and the main use of the land has been for activities such as football and playing, it is likely that these activities have covered the whole of the application land. The Objectors make

no representations to suggest that any part of the application land should be excluded.

On the Land –

Mr B Cooper disputes that the land is suitable as a TVG and that there is an alternative site more suitable for use as a TVG. However, the Applicant considers that the size and location of the land are not factors to be considered in the determination of a TVG application, as is the provision of alternative recreation areas within the identified neighbourhood within a locality.

It is recommended that if the application is successful, a small area of land at the south-west corner, which is recorded highway and not capable of registration as a TVG, should be excluded.

Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

For a period of at least 20 years

76. In this case the application is made in March 2021, at which time the application land was accessible along its western side to Northfield, before its fencing by the new owner in July 2021. The application is made under Section 15(2) of the Commons Act 2006, with use continuing at the time of application, the user period in question is therefore 2001 – 2021. Of the 171 respondents – 25 have used the land for the whole of the user period in question and 80 have used the land for part of that period (see Summary of Witness Evidence at **Appendix 13**). It is not necessary for all users to have used the land for the full period of 20 years, however, it can be a cumulative effect to support use over that period.

77. The Objectors BKLE in their correspondence dated 12th February 2022 (**Appendix 7**), state that: *“On the whole the evidence contained in EQs is wholly inadequate to amount to sufficient evidence of use to justify registration of any piece of land as a new TVG. The evidence contained therein, such as it is, is so general and unspecific as to be of little probative value.”* They list some examples:

“...the EQ of Suzanne Stark says she used the land between 1992 and 2007. She says in reply to a question about frequency of use “many times when our children were young”. As evidence of use within the relevant application

period that EQ is worthless because it does not give any information about whether the claimed activity actually occurred during the application period.

The EQ of Richard and Pam Cornforth does not constitute evidence of qualifying use because their claimed use ceased in 1986. The same is true of Lucy Allison whose use ceased in 1993.

The EQ of Mr and Mrs GV and JM Connor claims use between 1989 and 2021 yet in terms of frequency it says “very often from 1989 with our children and now grandchildren”. Given the nature of that use it seems highly improbable that such use has been continuous from 1989 – 2021. There has inevitably been a period between the children getting older and grandchildren coming along during which no use of the type claimed was made of the Application Land with either children or grandchildren within the period during which use has been claimed. That detail, as is always the case with EQ evidence, is absent and the exact nature and frequency of such use can only be established following cross examination at a public inquiry.

32. The aforementioned EQ’s are just a few examples (and there are many more) that speak to the wider point. The evidence so far produced by the Applicant, notwithstanding its first appearance as being extensive, in fact says very little as to the detail of use actually made of the Application Land during the application period, any use outside that period being totally irrelevant to meeting the statutory test for registration...

35. ...As was recognised in R (Suffolk County Council, ex parte Steed (1996) 75 P & CR 102, the burden of proving that the statutory test is met lies firmly with the Applicant. It is no trivial matter for a landowner to have land registered as a TVG and all the statutory elements required to establish a new TVG must be “properly and strictly proved”, per Pill LJ. The evidence so far produced falls a long way short of what is required.”

78. The Applicant confirms (14th April 2022 – **Appendix 9**):

“5.4 The summary results from the Evidence Questionnaires (Evidence L) show that:

- 66 households had used the land for some of the 20 year period and were still using the land at the current time.*
- 16 households had used the land during the 20 year period being considered for the TVG application but were not using the land currently.*

- *28 households had used the land prior to the 20 year period being considered for the TVG.*

79. The Applicant confirms that where the statutory requirement is use of the land “for a period of at least 20 years”, they include all evidence from residents including those who used the land prior to the relevant 20 year user period. The earliest period of use begins in 1969 and the land is first known from 1961, which corresponds with the building of the Tynings Estate in the 1960’s. However, where the land was held for highway purposes from 1968 - c.1991, use of the land during that period cannot be considered as qualifying user “as of right”, where the statutory incompatibility test is met. It is considered that the statutory incompatibility test no longer applies after 1991, i.e. when the land is no longer held by the Authority and reverts back to the control of the landowner. Therefore, qualifying user can only be considered after 1991, in any case this does not affect the user period in question of 2001-2021.
80. In correspondence dated 3rd June 2022 (**Appendix 10**), the Objector BKLE comments on the additional statements submitted in support of the application after the advertisement of the making of the application: *“None of those responses improve the inadequate quality of the evidence relied upon for the reasons set out in the original OS [Objection Statement] and many raise irrelevant issues such as the desire to maintain the Application Land as public recreation space which forms no part of the statutory test.”*

For a period of at least 20 years –

Witnesses support use of the land for at least 20 years and there is evidence of user long before the relevant user period 2001 – 2021, since the Tynings Estate was built in the 1960’s, although only use since c.1991 may be considered as qualifying user as of right, where the land was previously held by the Highway Authority for highway purposes and the statutory incompatibility test applied. The Objectors dispute the sufficiency of the evidence which in their view, although extensive on first appearance, gives very little detail of the use actually made of the application land during the application period and any user outside the period 2001 – 2021, is, in their view, irrelevant.

Where there is dispute of the evidence which is likely to be resolved by hearing from the witnesses, it is open to the CRA to hold a non-statutory public inquiry at which the evidence of witnesses may be heard and tested under the process of cross-examination, to assist the CRA in its determination of the application.

Use continuing

81. The application is made under Sections 15(1) and (2) of the Commons Act 2006, with use continuing at the time of application. The evidence suggests that at the time of the application in March 2021, the land was accessible, the western side being unfenced from the Northfield highway and it was possible to continue using the land. However, the land was sold at auction in March 2021 and it was reported that the new landowner was erecting a fence in July 2021 on the Northfield side, to prevent access. When Officers from the CRA visited the site in November 2021 it was not possible to access the land and it was fenced off with a padlocked gate, (see photographs at **Appendix 3**). In the evidence questionnaires completed May 2021, after the TVG application and prior to the fencing, 24 witnesses give evidence of the land being open and accessible, at that time, (see Witness Evidence Summary at **Appendix 13**). However, in the evidence produced in the statements to the formal consultation in November 2021, after the fencing of the land, witnesses now make reference to use being prevented by the fencing (please see representations in full at **Appendix 8** and relevant extracts at **Appendix 16**).

Use continuing –

It is the Officers understanding that at the time of the application in March 2021, the land was open and accessible and the evidence submitted from 12th November 2021 to the formal consultation regarding the application, suggests that users could continue using the land from the time of application, up until the fencing of the land in July 2021. This is not disputed by the Objectors.

Other Matters

82. In correspondence dated 13th December 2021 (**Appendix 8**), E Townsend is concerned regarding the effect on property if the playing field is developed: *“I live at ■ Northfield...The Northfield playing field runs adjacent to our garden and the side view from our house overlooks the playing field across to other fields on the other side of the Winsley by-pass...The development of the playing field would likely have a negative affect [sic] on the value of our house and those of our neighbours whose houses border it as our view would be of new houses rather than green fields...”*
83. Certainly the registration of the land as a TVG protects land from development, as per the Victorian Statutes:

Section 12 of the Inclosure Act 1857 – *“If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof before two justices, upon the information of any churchwarden or overseer of the parish in which such town or village green or land is situate, or of the person in whom the soil of such town or village green or land may be vested, forfeit and pay, in any of the cases aforesaid...”* These activities on a TVG become a criminal offence and are tried in the Magistrates Court. Action may be brought by any Church Warden or Overseer of the parish, or the landowner.

Section 29 Commons Act 1876 – *“An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned...”* These activities on a TVG become a public nuisance and an action may be brought by any inhabitant of the parish, or any Church Warden or Overseer of the Parish, or the landowner. Work carried out with a view to better enjoyment of the town or village green or recreation ground (i.e. linked to enhancing its recreational use) is not unlawful.

84. However, the development potential of the land is not a consideration permitted in the determination of an application made under Sections 15(1) and (2) of the Commons Act 2006 to register land as a TVG. It is only possible to consider the evidence of use of the land by local inhabitants for lawful sports and pastimes, as of right for a period of 20 years or more.

Conclusion

85. There is a significant amount of evidence submitted in support of the application, however, the evidence of whether a significant number of

inhabitants of any locality, or 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, is in dispute. The application and supporting evidence are disputed by the Objectors on 3 main grounds as set out in the objection of BKLE dated 12th February 2022, (see Objections at **Appendix 7**):

- i) Locality/neighbourhood not adequately identified and therefore the Application is not duly made;
- ii) User not 'as of right';
- iii) Evidence inadequate to satisfy statutory test, (which is supported by the objection of Mr B Cooper).

86. It is the duty of the CRA, at common law, to determine the application in a fair and reasonable manner. The CRA has received objections to the registration of the land as a TVG which have not been resolved. A non-statutory public inquiry is therefore considered necessary in this case because the factual evidence is strongly disputed. It is open to the CRA to appoint an independent Inspector to preside over the inquiry and produce a report with recommendations to the determining authority. Although it is open to the CRA to later reject the Inspector's report and recommendation, it can only lawfully do so if the CRA finds that the Inspector has made a significant error of fact or law. If the Inspector's recommendation is rejected, the CRA must give legally valid reasons, supported by evidence of the error of fact or law, otherwise the CRA's decision would be open to legal challenge.

Proposal

87. To appoint an independent Inspector on behalf of the Commons Registration Authority (CRA) to preside over a non-statutory public inquiry at which the evidence of all parties will be heard and tested through cross-examination, and to produce an advisory report and recommendation regarding the application to the Western Area Planning Committee to assist the CRA in its determination of the application to register land known as Northfield Playing Field, Winsley, as a Town or Village Green, as soon as is reasonably practicable.