

**WILTSHIRE COUNCIL**

**SOUTHERN AREA PLANNING COMMITTEE**

**30 APRIL 2015**

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**COMMONS ACT 2006 – SECTION 15(1) AND (3)**  
**APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE**  
**COMMON / BROWNS COPSE FIELD / BLUEBELL WOOD / VILLAGE HALL FIELD /**  
**THE FIELD, WINTERSLOW**

**Purpose of Report**

1. To:
  - (i) Consider a report and recommendation, dated 10 March 2015, made by Mr Stephen Morgan of Landmark Chambers, appointed by Wiltshire Council as an independent Inspector to preside over a non-statutory public inquiry, held in November/December 2014, to consider an application made under Sections 15(1) and (3) of the Commons Act 2006, to register land known as The Common / Browns Copse Field / Bluebell Wood / Village Hall Field / The Field, in the parish of Winterslow, as a town or village green.
  - (ii) Recommend that Wiltshire Council accepts the Inspector's recommendation.

**Relevance to Council's Business Plan**

2. Working with the local community to provide an accurate register of town and village greens, making Wiltshire an even better place to live, work and visit.

**Background**

3. Wiltshire Council received an application, dated 3 February 2012, made under Section 15(1) of the Commons Act 2006, to register land off Middleton Road, Winterslow known as The Common / Browns Copse Field / Bluebell Wood Field / Village Hall Field / The Field, as a town or village green. The application was also made under Section 15(3) of the Act, i.e. where use of the land for recreational purposes has ceased and the application is made within two years of the cessation of use. The application was made by Mr T Crossland on behalf of the group "Winterslow Opposed to Over Development" (WOOD).
4. Part 7 of the application form requires the applicant to provide a summary of the case for registration. The applicant included the following comments:

*"Indulgence by a significant number of inhabitants of Winterslow as of right in lawful sports and pastimes for a period of at least 20 years and 5 months under Section 15(3) of the Commons Act 2006, as witnessed by the 63 enclosed signed statements showing use for activities including dog walking, picking blackberries, kite flying and bicycle riding by a total of 63 people over a period extending from December 1990 to April 2011."*

5. The application was accepted as a complete and correct application on 29 August 2012. The application was accompanied by 63 completed witness evidence questionnaires. Following the service of formal notice of the application, posting of notice of the application on site and in one local newspaper and placing the application on public deposit, objections and representations were received, as follows:

Objections:

- 1) Petition from residents of Highfield Crescent - undated
- 2) Letter with enclosures from Mrs P Sheppard - 14/01/13 (joint landowner)
- 3) Letter with enclosures from Mr R Sheppard - 27/04/13 (joint landowner)
- 4) Letter with enclosures from Mr R Sheppard – 30/04/13
- 5) “Objectors Response” from Mr and Mrs Sheppard – 27/02/13

Representations:

- 1) Letter from L E Rogers – 16/04/13
- 2) E-mail from Councillor Christopher Devine – 13/05/13
- 3) E-mail from Barbara Coombs, Principal Legal Executive, Wiltshire Council – 08/08/14

6. The claimed land is located to the south-west of Middleton Road, Winterslow (please see location plan at **Appendix A**) and occupies an area of approximately 18 acres, laid to grass and woodland with open access from public rights of way located on the north and south perimeters of the site (please see application plan attached at **Appendix B**). The majority of the land is owned by Mr Richard and Mrs Patricia Sheppard of Weston Hill Farm, Winterslow; a small part of the application land in the north-west corner of Brown’s Copse is owned by Wiltshire Council; Scottish and Southern Electric PLC own an electrical sub-station located at the south-east of the application land and two small parts of the land within the copse are unregistered (please see land ownership plan at **Appendix C**). The Council as landowner did not formally object to the registration of the land in their ownership.
7. Wiltshire Council considered the evidence and the objections received, within a report to the Associate Director of Waste and Environment, dated 31 January 2014 (please see report attached at **Appendix D**). Officers recommended that given the substantial dispute of fact in this case it would be advisable to hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to preside over the inquiry and to provide a report and recommendation to the determining authority.
8. This recommendation was accepted and Wiltshire Council appointed Mr Stephen Morgan of Landmark Chambers (London), as Inspector to preside over a non-statutory public inquiry and having considered documentary and oral evidence to write a report containing a recommendation to Wiltshire Council as the determining authority. The inquiry was held in Winterslow on Tuesday 25 to Friday 28 November 2014 (inclusive), re-convening on Tuesday 16 December 2014 for closing submissions and an accompanied site visit at the close of the inquiry, on that day.

**Main Considerations for the Council**

9. Following consideration of the available documents and the hearing of evidence given in chief; in cross-examination and in re-examination at the public inquiry, the Inspector presented a report to Wiltshire Council, dated 10 March 2015 (please see report attached at **Appendix E**), in which he made the following recommendation:

*“For the reasons set out in Section 5 of this Report, I recommend to the Registration Authority:*

*The Application by Winterslow Opposed to Over Development (WOOD) under section 15(3) of the Commons Act 2006 be approved but only to the extent that Brown’s Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.”*

10. There is no obligation placed upon the determining authority to follow the Inspector’s recommendation (although if the Committee decide not to follow the Inspector’s recommendation they must have good reasons for not following the recommendation) and Members of the Committee are requested to consider the Inspector’s report and the available evidence in order to determine whether or not the application land should be registered as a town or village green.
11. Under the Council’s constitution one of the functions of the Area Planning Committee is, where an objection has been received and has not been resolved, to consider matters of local importance within the area such as the registration of town and village greens. In this case, the owners of the application land objected to the registration of the application land as a village green and have to date not withdrawn their objection following the public inquiry which took place in November/December 2014.
12. Under the Commons Registration Act 1965, Wiltshire Council is now charged with maintaining the register of town and village greens and determining applications to register new greens. The application to register land off Middleton Road, Winterslow as a town or village green, has been made under Sections 15(1) and (3) of the Commons Act 2006, which amended the criteria for the registration of greens. Section 15 of the Commons Act is set out in full at part 7 of the Decision Report attached at **Appendix D**.
13. Sections 15(1) and (3) of the Act, state:

*“15 Registration of greens*

  - (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
  - (3) This subsection applies where-*
    - (a) A significant number of inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
    - (b) they ceased to do so before the time of the application but after the commencement of this section; and*
    - (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).”*

### **Safeguarding Considerations**

14. There are no safeguarding considerations as those relating to safeguarding are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

### **Public Health Implications**

15. There are no public health implications as considerations relating to public health are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

### **Environmental Impact of the Proposal**

16. Considerations relating to the environmental impact of the proposal are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

### **Equalities Impact of the Proposal**

17. Considerations relating to the equalities impact of registering land as a town or village green, are not permitted within Section 15 of the Commons Act 2006. Any determination must be based on the relevant evidence before the Registration Authority.

### **Risk Assessment**

18. The holding of a non-statutory public inquiry and the production of the subsequent report and recommendation to Wiltshire Council from an Independent Inspector, have reduced the risk to the Council of a potential legal challenge as the evidence has been heard, tested and considered.

### **Financial Implications**

19. Presently there is no mechanism by which a Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs are borne by the Council.
20. Where the Council makes a decision to register land as a town or village green it must give a reason for its determination as this decision is potentially open to legal challenge. The legal costs of a successful legal challenge against the Council could be in the region of £40,000 - £100,000.
21. There is currently no duty for Registration Authorities to maintain land registered as a town or village green.

### **Legal Implications**

22. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision by an appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965 ('1965 Act'), which allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify the register. The overall effect is that the registration of the land is deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the town or village green without limit of time. The application which could be made many years after the decision potentially enables the Court to hold a re-hearing of the application and consider the facts and law and could lead to de-registration of the land.
23. Where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, although the decision of the Council may be challenged through judicial review, for which the permission of the court is required and the application must be made within three months of the date of

the decision. A landowner could also use judicial review proceedings to challenge the Council's decision to register their land as a town or village green.

24. There is currently no statutory or non-statutory guidance available to authorities regarding when it would be considered to be appropriate for a Registration Authority to hold a non-statutory public inquiry. However judicial cases have confirmed that it is the authority's duty to determine an application in a fair and reasonable manner and recent judicial decisions have also sanctioned the practice of holding non-statutory inquiries. In *R (Cheltenham Builders Ltd) v South Gloucester District Council* the court decided that the holding of a non-statutory inquiry in some circumstances would be necessary as a matter of fairness. In *R (on the application of Naylor) v Essex County Council (2014)* the Court confirmed that a public inquiry was one means by which a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received in written form.

### **Options Considered**

25. Members of the Committee need to consider whether to:
- (i) Accept the Inspector's recommendation that the application by Winterslow Opposed to Over Development (WOOD) under Section 15(3) of the Commons Act 2006 be approved but only to the extent that Brown's Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council
  - (ii) Accept the Inspector's recommendation, but with modification supported by the available evidence, e.g. modifying the area of land to be registered
  - (iii) Not accept the Inspector's recommendation and refuse the application to register land in the parish of Winterslow as a town or village green
  - (iv) Not accept the Inspector's recommendation and resolve to register all the claimed land as described in the application made under Section 15(1) of the Commons Act 2006 and described known as The Common / Browns Copse Field / Bluebell Wood Field / Village Hall Field / The Field, as a town or village green.
26. Where Members do not resolve to accept the Inspector's recommendation and make an alternative decision, clear reason for this decision must be given as the decision of the Registration Authority is potentially open to legal challenge by both the applicant and Landowner.

### **Reason for Proposal**

27. In the Winterslow case, the evidence of whether 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 at least 20 years, was in dispute. It is the duty of the determining authority to determine the application in a fair and reasonable manner. Due to the substantial dispute of fact in this case, Wiltshire Council determined to hold a non-statutory public inquiry where the facts of the case would be likely to be resolved by the inquiry process through witnesses giving oral evidence in chief and through cross-examination and re-examination, including consideration of documentary evidence by the Inspector.

28. Following the close of the inquiry, the Inspector presented a 123 page recommendation to Wiltshire Council, dated 10 March 2015 and which contained the following recommendation:

*“For the reasons set out in Section 5 of this report, I recommend to the Registration Authority:*

*The Application by Winterslow Opposed to Over Development (WOOD) under Section 15(3) of the Commons Act 2006 be approved but only to the extent that Brown’s Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.”*

29. Officers consider that the full and detailed report is a correct and accurate reflection of the documentary evidence and evidence given by witnesses at the public inquiry and that the Inspector’s recommendation should be accepted.

### **Proposal**

30. That Wiltshire Council accept the Inspector’s recommendation and the application by Winterslow Opposed to Over Development (WOOD) under Section 15(3) of the Commons Act 2006 be approved but only to the extent that Browns Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.

### **Tracy Carter**

Associate Director – Waste and Environment

Report Author:

**Janice Green**

Rights of Way Officer

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### **The following unpublished documents have been relied on in the preparation of this Report:**

None

### **Appendices:**

Appendix A – Location Plan

Appendix B – Application Plan

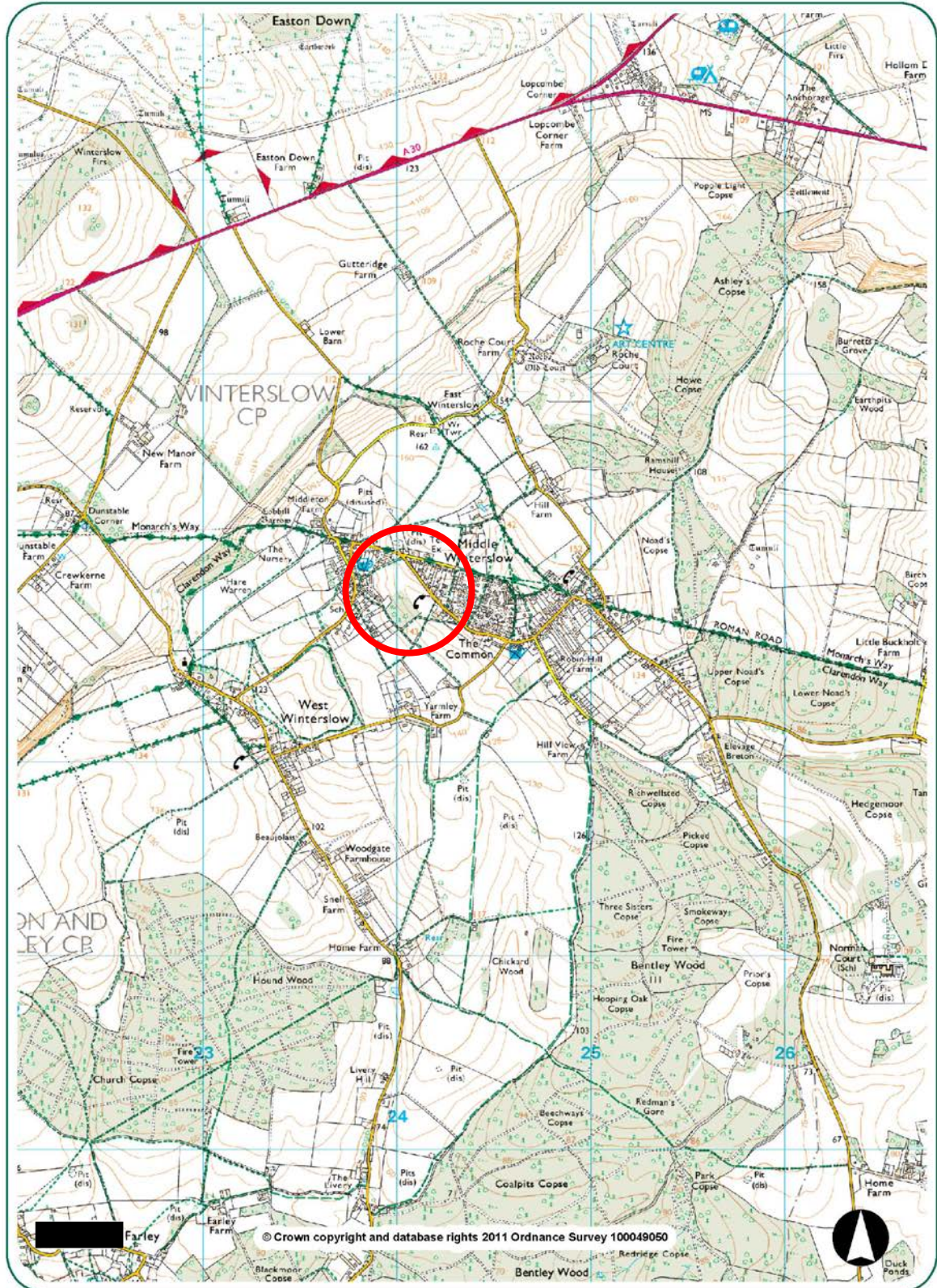
Appendix C – Land Ownership Plan

Appendix D – Wiltshire Council Report on the Recommendation to Hold a Non-Statutory Public Inquiry (31 January 2014)

Appendix E – Inspectors Report (Mr Stephen Morgan, Landmark Chambers – 10 March 2015)



# APPENDIX A – LOCATION PLAN





# APPENDIX B – APPLICATION PLAN

THIS IS THE EXHIBIT MARKED T/C 1 REFERRED TO IN  
THE STATUTORY DECLARATION OF TIMOTHY  
RICHARD CROSS AND MARTA BEAUB MIE  
THIS THIRSDAY OF FEBRUARY 2012



AREA 16 HA  
SCALE: 1:2500  
CENTRE COORDINATES: 424010 , 132865

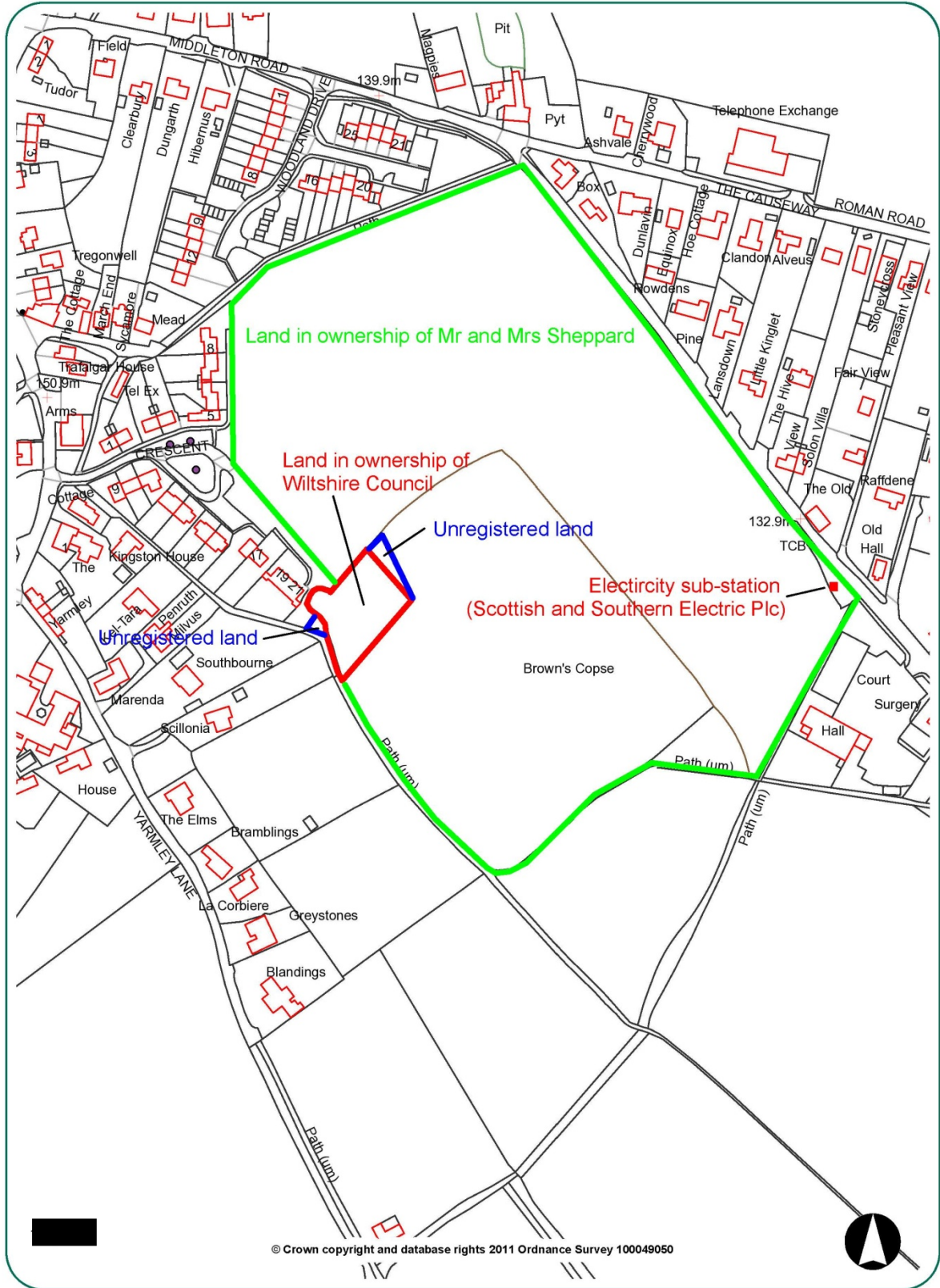
*S. Illmer*  
Collector



Supplied by Streetwise Maps Ltd  
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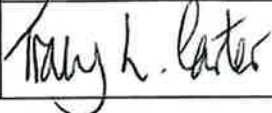
# APPENDIX C – LAND OWNERSHIP PLAN



**APPENDIX D – WILTSHIRE COUNCIL REPORT ON THE RECOMMENDATION  
TO HOLD A NON-STATUTORY PUBLIC INQUIRY (31<sup>ST</sup>  
JANUARY 2014)**

**COVERING PAGE FOR DECISION REPORT ON APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE COMMON/BROWNS COPSE FIELD/BLUEBELL WOOD FIELD/VILLAGE HALL FIELD/THE FIELD, WINTERSLOW**

**PLEASE SIGN OFF THE REPORT NEXT TO YOUR NAME**

		Signature	Date Signed Off
<b>To:</b>	Sarah Marshall (Solicitor – Highways)	 <i>As noted subject to legal privileged comments</i>	22 April 2014
	Barbara Burke (Definitive Map and Highway Records Team Leader)	 <i>Good, agree</i>	23.04.2014
	Richard Broadhead (Rights of Way and Countryside Manager)	 <i>Agreed, noted comments made as requested by JM.</i>	23.04.2014
	Ian Brown (Head of Environment Services)		19.05.2014
	Tracy Carter (Associate Director – Environment and Leisure)		23.5.2014
<b>From:</b>	Janice Green		
<b>Date of report:</b>	31 <sup>st</sup> January 2014		
<b>Return to:</b>	Janice Green, Rights of Way (Ext. 13345)		

**Nature of Report:**

This is a report from Janice Green (Case Officer) to Richard Broadhead (Officer with the relevant delegated powers).

**Executive Summary:**

Wiltshire Council are in receipt of an application dated 3<sup>rd</sup> February 2012, made under Section 15(1) of the Commons Act 2006, to register land off Middleton Road, Winterslow, known as The Common/Browns Copse Field/Bluebell Wood Field/Village Hall Field/The Field, as a Town or Village Green. It is possible to apply for land to be registered as a town or village green 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 at least 20 years.

The application is also made under Section 15(3) of the Act, where use of the land for recreational purposes has ceased and the application is made within two years of the cessation of use.

The application form requires the applicant to provide a summary of the case for registration. The applicant included the following justification:

*"Indulgence by a significant number of inhabitants of Winterslow as of right in lawful sports and pastime for a period of at least 20 years and 5 months under Section 15(3) of the Commons Act 2006, as witnessed by the 63 enclosed signed statements showing use for activities including dog walking, picking blackberries, kite flying and bicycle riding by a total of 63 people over a period extending from December 1990 to April 2011."*

The application was accompanied by 63 completed witness evidence questionnaires and following notice of the application, 2 objections and 3 representations were received.

On examining the evidence received, Officers noted a number of areas of dispute within the claim. It is the registration authority's duty to determine an application in a fair and reasonable manner and where there is serious dispute, or if the case is of great local interest, it is open to the authority to hold a non-statutory public inquiry. Substantial dispute of fact is likely to be resolved by the inquiry process, i.e. through witnesses giving oral evidence and through cross examination. The determining authority may appoint an independent Inspector to preside over the inquiry and to produce a report with recommendations. There is no obligation upon the determining authority to follow the recommendation made.

**Officer's Recommendation:**

To hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to preside over the inquiry and to provide a report and recommendation to the determining authority.

**DECISION REPORT**  
**COMMONS ACT 2006 – SECTION 15(1) AND (3)**  
**APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE**  
**COMMON/BROWNS COPSE FIELD/BLUEBELL WOOD FIELD/VILLAGE HALL**  
**FIELD/THE FIELD, WINTERSLOW**

**1. Purpose of Report**

- 1.1. To consider the evidence submitted with an application made under Section 15(1) and (3) of the Commons Act 2006, to register land adjacent to Middleton Road, Winterslow, known as The Common/Browns Copse Field/Bluebell Wood Field/Village Hall Field/The Field, as a Town or Village Green.

**2. Location Plan**

Wiltshire Council  
Wiltshire Council

Winterslow Location Plan





### 3. Application Plan



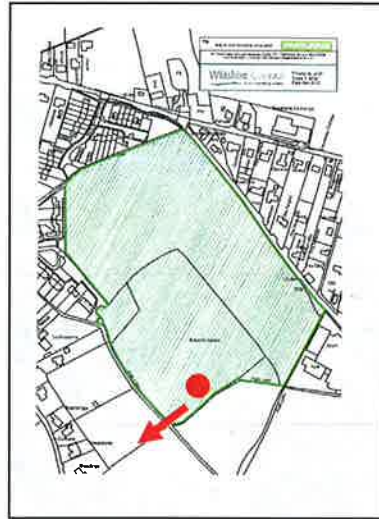
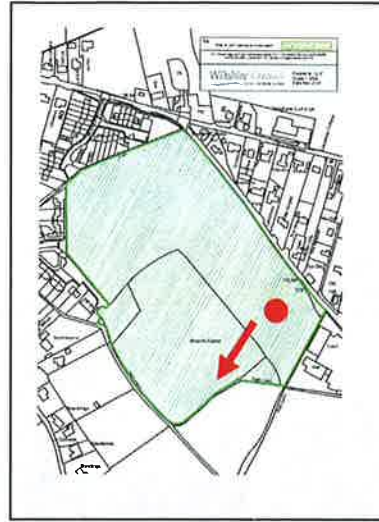
Supplied by Streetwise Maps Ltd  
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### 4. Photographs









Decision Report  
Commons Act 2006 – Section 15(1) and (3)  
Application to Register Land as a Town or Village Green – Land off Middleton Road, Winterslow

**5. Applicant**

**5.1. Winterslow Opposed to Over Development (WOOD)**

C/O Mr T Crossland  
Box Cottage  
Middleton Road  
Winterslow  
Wiltshire SP5 1QJ

**6. Registered Landowners**

**6.1. Mr Richard and Mrs Patricia Sheppard**

Weston Hill Farm  
Winterslow  
Wiltshire SP5 1RL

(Land ownership outlined in green on the plan of the application land below).

**6.2. A small part of the application land to the west, is owned by Wiltshire Council  
(land ownership outlined in red on the plan below):**

Wiltshire Council  
C/O Property Services  
County Hall  
Bythesea Road  
Trowbridge  
Wiltshire BA14 8JN

**6.3. Scottish and Southern Electric own an electrical sub-station located at the  
south-east of the application land (please see land ownership plan below):**





## 7. Legal Empowerment

7.1. Under the Commons Registration Act 1965, Wiltshire Council is now charged with maintaining the register of Town and Village Greens and determining applications to register new Greens. The application to register land off Middleton Road, Winterslow, as a Town or Village Green, has been made under Section 15(1) and (3) of the Commons Act 2006, which amended the criteria for the registration of greens, and states:

*“15 Registration of greens*

*(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*

*(2) This subsection applies where-*

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

*(3) This subsection applies where-*

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

*(4) This subsection applies (subject to subsection (5)) where-*

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
  - (b) they ceased to do so before the commencement of this section; and*
  - (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*
  
- (5) Subsection (4) does not apply in relation to any land where-*
  - (a) planning permission was granted before 23 June 2006 in respect of the land;*
  - (b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and*
  - (c) the land-*
    - (i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or*
    - (ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.*
  
- (6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.*
  
- (7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied-*
  - (a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in*

*subsection (6), those persons are to be regarded as continuing so to indulge, and*

*(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land “as of right”.*

*(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.*

*(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.*

*(10) In subsection (9)-*

*“relevant charge” means-*

*(a) In relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c. 9);*

*(b) In relation to land which is not so registered-*

*(i) a charge registered under the Land Charges Act 1972 (c. 61);*  
*or*

*(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c. 20); which is not registered under the Land Charges Act 1972;*

*“relevant leaseholder” means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted.”*

## 8. **Background**

- 8.1. Wiltshire Council are in receipt of an application dated 3<sup>rd</sup> February 2012, made under Section 15(1) of the Commons Act 2006, to register land off Middleton Road, Winterslow, known as The Common/Browns Copse Field/Bluebell Wood Field/Village Hall Field/The Field, as a Town or Village Green.
- 8.2. The application is also made under Section 15(3) of the Act, i.e. where use of the land for recreational purposes has ceased and the application is made within two years of the cessation of use.
- 8.3. Part 7 of the application form requires the applicant to provide a summary of the case for registration. The applicant includes the following comments:
- “Indulgence by a significant number of inhabitants of Winterslow as of right in lawful sports and pastimes for a period of at least 20 years and 5 months under Section 15(3) of the Commons Act 2006, as witnessed by the 63 enclosed signed statements showing use for activities including dog walking, picking blackberries, kite flying and bicycle riding by a total of 63 people over a period extending from December 1990 to April 2011.”*
- 8.4. The application was accepted as a complete and correct application on 29<sup>th</sup> August 2012. The application was accompanied by 63 completed witness evidence questionnaires. Following the posting of notice of the application on site and publication in one local newspaper 2 objections and 3 representations regarding the application, were received.
- 8.5. The claimed land is located to the south-west of Middleton Road, Winterslow and occupies an area of approximately 18 acres, laid to grass and woodland

with open access from public rights of way located at the north and south perimeters of the site.

## **9. Public Consultation**

- 9.1. Wiltshire Council served notice of the application upon the landowner Mr R Sheppard and other interested parties, on 6<sup>th</sup> December 2012. Notice was also posted on site and placed in the Salisbury Journal on 6<sup>th</sup> December 2012. The application was also placed on public deposit in Wiltshire Council Offices. All parties were given 28 working days to make representations or objections regarding the proposals.
- 9.2. Please note that landowner notice was served upon Mr R Sheppard. In fact Mr Sheppard is a joint owner of the land with his wife Mrs P Sheppard, however it is considered that Mrs Sheppard has not been prejudiced by this error and she has submitted a joint objection with her husband Mr R Sheppard.
- 9.3. It was later noted that small parts of the application land were in the ownership of other parties, i.e. Wiltshire Council owned a small part of the application site to the western side and Scottish and Southern Electric Plc owned an electrical sub-station located at the south-east of the site. Therefore notice of the application was served upon Wiltshire Council and Scottish and Southern Electric on 25<sup>th</sup> October 2013, giving them 28 working days to respond to the proposals. It is considered that neither Wiltshire Council or Scottish and Southern Electric have been prejudiced by this delay.
- 9.4. Following notice of the application 2 objections and 3 representations regarding the application were received (Wiltshire Council were also copied correspondence sent to Mr R Sheppard from Mr John Glen MP regarding the system of registering land as a town or village green in general, however this



has not been included as a formal objection or representation as it was not addressed to Wiltshire Council). The following consultation responses were received (please note that full copies of all correspondence are available to be viewed with the Rights of Way and Countryside Team, Newbury House, Trowbridge):

Residents of Highfield Crescent – Correspondence undated:

*“We are writing with reference to the application to register land adjacent to Middleton Road, Winterslow for village green status. While we do not want to see any development here we do want to correct the wrong information you have clearly been given.*

*We are Winterslow born and bred and have lived in Highfield Crescent overlooking this field for 40 years so know exactly what happens here and for much of that time it was cultivated. It was only when it was left fallow or set aside that certain people thought it their right to use it as a dumping ground for their rubbish, a dog walking area and as a short cut even though the area is adequately served with footpaths.*

*It has not been used as a sports field and the statement saying that it has been used by “a significant number of inhabitants as a right of lawful sports and pastimes” is a complete puzzle to us and as far as we are concerned is at best stretching the truth or worse, complete lies. Winterslow has sufficient areas for sports and other pastimes namely the Recreation Ground and the large area known as Barry’s fields.*

*People continued to trespass in the field even when the landowner put up notices stating it was not public land. They tore them down and even cut the fence the council put up on the boundary with Highfield Crescent so they could gain access to the field.*

*We have seen how people have wilfully treated this area, abusing the farmer’s tolerance and even walking through the field when it was planted with crops.*

*As previously stated, we do not want to see this land built on but we do defend the landowners right to stop people trespassing on what was always an agricultural field and for it not to have village green status forced upon it.”*

This correspondence is signed by 19 residents of Highfield Crescent, 1 resident of The Flood, 1 resident of Weavers Close, 1 resident of Middleton Road and 2 residents of Southbourne.

L E Rogers – Correspondence dated 16<sup>th</sup> April 2013 –

*“I have lived in Winterslow all my life and I am now 97 years old.*

*In my lifetime the field has always been cultivated with various crops. The Copse has always been worked for hazel for hurdles and spars.*

*Until the set aside came in a programme which lasted several years. Only in the last couple of years has it been ploughed and planted.”*

The landowners Mr and Mrs Sheppard also copied to the Council several letters which they had written on the matter:

Statement from Mrs P Sheppard to the Chairman of Winterslow Parish Council (undated). I understand this to be a presentation to the Parish Council meeting –

*“Mr Chairman*

*I just wanted to take this opportunity to say a few words regarding “The Land” that is on the agenda for discussion tonight.*

*Many in this room will know The Land is owned by my husband, Richard Sheppard and I.*

*Many years ago part of The Land was made available for “the original council houses”. In addition to that, in 1992 land was gifted for “the village hall” we’re standing in, “tennis courts” and “extensive car park”.*

*Plans were then drawn up in our home by several of the doctors for the Dr Surgery, again on land provided by us. I’m sure you would all agree these are tremendous assets for the village.*

*There are some that call themselves villagers who should be ashamed of themselves for suggesting we have any intent of spoiling the village we love. Many of these are here today and gone tomorrow...unlike us.*

*If and when a planning application is received there is a due process to be followed. It cannot be pre-determined at this stage.*

*Considering the evidence which has now been produced regarding the past use of this land, I think it would be very unwise for the parish council to take sides in this matter.*

*We have instructed solicitors to review this evidence and will pursue through the courts if necessary.*

*We are not asking for special treatment, just a fair hearing as all the other developments receive.”*

Letter from Mrs P Sheppard to Councillor Devine – Correspondence dated 14<sup>th</sup> January 2013

*“As you are aware there is an action group called WOOD, I understand that you support this group?*

*At this week’s PC meeting I made a speech and so there is no ambiguity I enclose a copy of it for you, I have also sent a copy to the Clerk so that there is no misunderstanding as to what I said on behalf of the family.*

*I also attach a copy of the letter that has been sent to Wiltshire Council by 20 residents who live around our field. It is self explanatory and confirms, as we have and will continue to maintain, that at no time has anyone used the field for recreation purposes, nor has permission ever been given.*

*From our own point of view we are aghast at the attitude of people who believe they have a right to try and take our land. You may know historically that we have been generous benefactors to Winterslow donating free of charge land for the village hall and car park, the tennis courts. We also made the land available for the doctors surgery. Please therefore consider this, what right does this action group, who have collectively contributed nothing to the village, have to create a pack of lies saying our land has been used for other*

*purposes when it has not. The PC are not supporting this group, and we would like you to consider your own position on this. Anyone who supports this group is in effect supporting a pack of lies with regards to use of our land, and those in authority should, in our opinion, play no part in this sorry saga. I am sorry to have to write to you in this way but all we seek is fair play, this action from WOOD is skulduggery, appointed Councillors should not be associated with it, indeed they should be against such spurious and unethical actions. An example has been set by those who live around the field and see it daily, they recognise fair play, yes they have their own views on development but they are honest people.*

*Should any planning application ever go to Wiltshire Council for this field there is legislation under the planning system to deal with it, the land was earmarked not by my family but by the old regime of SDC in the SHLAA for 150 dwellings. No number has been suggested by us. There is a proper arena for such a debate on planning matters, it should not be taken over by a small but loud group of instigators who are out to cause as much trouble as they can for us.*

*There are few people in Winterslow that have the links to the village and the commitment to it that we have shown over many decades. We are private and honest people and seek good relations with everyone, to this end it is reasonable of us to expect you to be neutral at worst but you should be supportive of us because we have shown our good will and generosity to this village over such a long period of time and will continue to do so.*

*I will copy this letter to both the PC, the Chief Executive of WC and John Glen MP.”*

Richard and Patricia Sheppard – Correspondence to Councillor Devine dated 22<sup>nd</sup> April 2013 –

*“This is to inform you that we have submitted our defence to the spurious claim to Wiltshire Council from the WOOD action group.*

*You will know that the Sheppard family have contributed massively towards the facilities and housing for Winterslow, yet we have been forced to spend £5000 to defend ourselves and our land.*

*We are aghast that we have been forced into this position by actions we consider are based on a fabrication of the facts by a small group of people who consider they represent the masses, they do not, they are not elected and should not be given any credence whatsoever.*

*When we read the 63 (witness) forms we were saddened by the amount of fabrication and lies used in an effort to try and take our families land from us, this cannot be right or just. They refer to Brownies using the field, yes with our permission, Bonfire night, again with our permission, they try to weave a picture saying these events were regular. This is simply not the case, we know the history of our land better than anyone, particularly the newcomers to the village, these instigators are wrong. We still cannot believe that people accepted our generosity in allowing them to use our land, but then on the back of this, claim rights over it.*

*A large amount of the 63 forms are from people who have only lived in the village for a short time, one is even from a 7 year old child!!! It is interesting that they all say that they have used the land as a short cut walk from one end of the village to the other. We do not dispute this. There is a statutory declaration to cover this use which has been in place for many years. This was made between our family and Wiltshire Council allowing an unofficial footpath link. It is not a piece of common land that they can simply come along and take, it is our land and that is a true fact.*

*Had we known this was going to happen we would never have entered into the statutory declaration and would have stopped everyone using our land for this use. Interestingly, quite a few people recognise there were "No Public Right of Way" signs erected as our photographs prove, but others say that there were never any in place. You and many others know there were signs in place, the land is private and they know the proper and honest history. There*



*has never been any public use of this land in the way this action group is trying to pretend there has been.*

*As you indicated in our phone call to us, we would appreciate your further support to ensure this application is not registered. We would be grateful if you could let us know the position of Wiltshire Council on this matter.”*

*(Copy to John Glen MP).*

John Glen MP – Correspondence to Mr and Mrs Sheppard dated 24<sup>th</sup> April 2013 –

*“Many thanks for your recent letter appraising me of the recent Village Green application in Winterslow. I was extremely dismayed to read of the difficulties you have experienced at the hands of the village green system.*

*It may interest you to know I recently helped take the Growth and Infrastructure Bill through Parliament that seeks to amend the village green application system to address the problems it presents to legitimate landowners – who are understandably distressed at experiences like yours. Unfortunately this will only apply to new applications once the Bill receives Royal Assent. Village Greens are an important tool within the planning process to designate a space valued by the community, but they are not the only one. They are also, sadly, frequently abused – approximately 48% in 2009 were triggered by a planning application or inclusion within a local plan: as a result, only 40% are successful.*

*When the National Planning Policy Framework was introduced, a new Local Green Space designation was introduced within it. The intention is to try and rationalise two very separate systems, so sites that could perhaps be designated village or town greens could be safeguarded within local plans – removing the overlap and associated bureaucracy of a separate application system you discuss.*

*We have no intention of undermining legitimate spaces people wish to protect for a whole variety of reasons, and we have indeed introduced new mechanisms to do so. However, the current system does not work with a grain*

*of the planning system and is too often used for spurious purposes. I personally would rather see greater use of the provisions within neighbourhood planning than the village green system. Your experience highlights to me how important such reforms are. Whilst I have no direct influence over the matter, I will happily discuss the matter with Cllr Devine and Wiltshire Council and ensure your views are taken into full consideration."*

E-mail from Councillor Christopher Devine dated 13<sup>th</sup> May 2013 –  
*"As a resident of Winterslow from 1992 until 2005 I was well acquainted with the usage of the footpath in question and the area referred to as the `common`. In relation to the questions posed I reply as follows:*

- *Q: For what purpose was the land used by people?  
A: Almost exclusively as a footpath from the village hall to the village shop/recreation ground or for dog walking.*
- *Q: What numbers of people were using the land and how frequently?  
A: It was used regularly, but, often the area was empty. Normally only a single person would be seen at any one time.*
- *Q: The number of years that use has continued over the land?  
A: During my period in the village, 1992 to 2005.*
- *Q: Were people using the land as of right, i.e. without force, without secrecy and without permission?  
A: Yes, although it was generally acknowledged that it was private land, but, the owner would not object if it was used as a short cut.*
- *Q: Was use of the land by local residents or by people from outside the area?  
A: I only ever saw local residents use it.*
- *Q: How the land was managed, e.g. was it cropped, was any signage erected etc?*

*A: During the period I was a resident, the land was left fallow and cut regularly, but, signage was erected at regular intervals, which stated it was private land with no right of way.”*

Additionally the landowner submitted a large bundle of evidence in objection to the application, (too large to include here), but available to be viewed in full with the Rights of Way and Countryside Team, Newbury House, Trowbridge. The objectors main grounds for objection are summarised as follows:

- The burden of proof in satisfying the registration authority that the application land is eligible for registration as a town or village green, lies with the applicant, the standard of proof being the balance of probabilities. With regard to the standard of proof, Lord Bingham advises in *R v Sunderland City Council, ex parte Beresford* [2004] 1 AC 889 “As *Pill L.J* rightly pointed out in *R v Suffolk County Council, ex parte Steed* [1996] 75 *P&CR* 102,111: “It is no trivial matter for a landowner to have land registered as a town green...”. It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met.” The applicant must prove all the necessary elements for registration of the land as a town or village green.
- No sufficient user by local inhabitants. The application land was known by the objectors to be used as a crossing point but was not in general use as a destination in itself for informal recreation and any proven user for these purposes would have been occasional or trivial anyway and thus non-qualifying.

- Such use as there had been would not have brought the existence of the claimed right to the attention of the landowner – a number of villagers have even written to the Council challenging the user relied on by the applicant
- Such user did not constitute lawful sports and pastimes in that the overwhelming majority of users were purportedly exercising only public rights of way on tracks crossing the application land. The pending application to modify the definitive map and statement of public rights of way to introduce new public rights of way over the application land, offer a strong evidential basis for the contention that a reasonable landowner could not have believed that users were exercising a public right to use land beyond the tracks for lawful sports and pastimes and the same would apply in the case of walkers who casually or accidentally strayed from the tracks without deliberate intention to go on other part of the field.
- The application land is being used as a short cut from one side of the village to the other, instead of using Middleton Road and that such user will not be referable to use as a green.
- Any proven user is not “as of right”, being at times over the relevant 20 year period, by force, stealth or with express or implied licence of the landowner.
- User is by force and thus non-qualifying in the case of access obtained through the fencing or the boundary with Highfield Crescent, which was cut in order to facilitate access onto the application land. It is irrelevant that those taking advantage of the damaged fencing were not themselves responsible for damage, it would be wrong and not in the public interest that people should be rewarded with rights whose acquisition is only made possible by unlawful activities of others.

- Use by force is not confined to physical force. It includes use which is contentious and a landowner may render use contentious by erecting prohibitory signs or notices in relation to the use in question.
- In R (Oxfordshire & Buckinghamshire Mental Health Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council and others [2010] EWHC 530 (Admin), (Warneford Meadow) the court rejected a case where a challenge to the registration of land as a town or village green was made on the grounds that “No Public Right of Way” signage had been erected over the land. However the facts of this case are distinguishable from the Winterslow case and in the Warneford Meadow case there had been a finding that the landowner had no objection to recreational access to the land, but objected to the creation of public rights of way.
- The objectors contend that the signs erected in 2009 cannot be said to relate solely to the nearby paths and there is no reason why they should not be taken objectively to refer to recreational use of the whole of the application land where the land had not been used for such purposes and where the whole of the application land was covered by a Section 31(6) Highways Act 1980, statutory declaration.
- The fact that the 2009 signage did not refer to the wider user of the application land was unnecessary in that users knew, or ought to have appreciated from the notices that the landowners were objecting to and contesting their use of the land and is consistent with the following matters:
  - (i) there is an absence, or virtual absence of any general recreational user in this case which was not the position in the Warneford Meadow case;



- (ii) the size of the application land where limited signage at both ends of the field was more than adequate to cover a prohibition affecting the entire field as were the deposits under Section 31(6) of the Highways Act 1980;
  - (iii) the collective view of those who lived close to the application land and who signed a letter to Wiltshire Council whose view it was that “people continued to trespass in the field even when the landowner put up notices stating that it was not public land. They tore them down...”;
  - (iv) the response of the locals to such signage which was torn down, and
  - (v) the objectors subsequently ploughed the field and erected more robust prohibitory signage which is unlikely to have happened if all they had intended by erecting the signage in 2009 was to prevent new rights of way claims;
- In any event and without prejudice to the foregoing, any user of the paths after 2009 must be discounted in the accrual of either the lesser burden on the application land (i.e. use of paths as public rights of way) or the greater burden involving user of the application land as a new green.
  - The objectors also reserve the right to argue that any objection on their part to a lesser burden on the land must have by implication and without more included objection to the greater burden notwithstanding what was said about this in the Warneford Meadow case.
  - The claim based on the claimed user gave rise to an implied license.

Comments from Wiltshire Council as landowner:

E-mail from Barbara Coombs, Principal Legal Executive, Legal Services, Wiltshire Council, dated 18<sup>th</sup> November 2013 –

*“It seems that part of the land is owned by Wiltshire Council and is not considered to be Public Open Space. I suspect that it is what might be called ‘housing amenity land’ – open areas of land on a Council housing estate. I do not have any details about whether our ‘housing’ colleagues accept that this area of land has been used by the public as of right for lawful sports and pastimes for the relevant period of time.”*

E-mail from Sarah Holloway, Technical Officer, Environment and Leisure, Wiltshire Council, dated 23<sup>rd</sup> October 2013 –

*“The land was not included in the District Council Open Spaces Study, nor is it on the list to be surveyed as part of the Current Open Spaces Study. Therefore it appears it is not Public Open Space.”*

Wiltshire Council as a landowner have made no objection to the proposals and no correspondence regarding the proposals has been received from Scottish and Southern Electric Plc as the additional landowner.

9.5. As part of the statutory procedure (Regulation 6(3)), where objections are received, they must be forwarded to the applicant allowing reasonable opportunity for dealing with the matters raised. Therefore on 22<sup>nd</sup> May 2013, the applicant was forwarded the following documents:

- 1) Objectors response to village green application from Mr Richard Sheppard – dated 11<sup>th</sup> March 2013
- 2) Letter with enclosures to Wiltshire Council from Mrs P Sheppard – dated 14<sup>th</sup> January 2013
- 3) Letter with enclosures to Wiltshire Council from Mr Richard Sheppard – dated 27<sup>th</sup> April 2013

- 4) Letter with enclosures to Wiltshire Council from Mr Richard Sheppard dated 30<sup>th</sup> April 2013
  - 5) Petition letter from residents of Highfield Crescent – undated
  - 6) E-mail from Councillor Christopher Devine – dated 13<sup>th</sup> May 2013.
- 9.6. Officers allowed the applicant a reasonable opportunity to respond to the objections and comments received, in writing not later than 5:00pm on Friday 5<sup>th</sup> July 2013. No further comments regarding these matters were received from the applicant and the matter now falls to be determined by Wiltshire Council as Commons Registration Authority.

## **10. Main Considerations for the Council**

- 10.1. Under Section 15(1) of the Commons Act 2006, it is possible to apply for the land to be registered as a town or village green 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 at least 20 years and in this particular case, under Section 15(3) of the Act, where use of the land has ceased not more than two years prior to the application date.
- 10.2. It is important to understand the previous management of the land in order to understand how the public may have used it. We have evidence from L E Rogers, of Coppice View, in his letter dated 16<sup>th</sup> April 2013, that the land was always cultivated with various crops and the copse was also worked for hazel for hurdles and spars. After that the landowners Mr and Mrs Sheppard provide evidence that the field was set aside in 1988. In 2009 signs were erected on the land stating that there was no public right of way. On 4<sup>th</sup> April 2011 the land was rough ploughed, ploughed again on 23<sup>rd</sup> January 2012 and sown with linseed on 16<sup>th</sup> April 2012. “Private Property – Please Keep Off” signs

were erected on 11<sup>th</sup> June 2012 and the linseed crop was harvested in October 2012.

### **The evidence**

- 10.3. The legal tests set out under Section 15(1) and (3) 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. The burden of proof lies in the balance of probabilities, i.e. the Registration Authority is not required to prove beyond reasonable doubt that rights exist, just that it is more likely than not. 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 Registration Authority to further investigate the claim.

### **Significant number of inhabitants**

- 10.4. The meaning of the word “significant” has never been defined, but was considered at the High Court in R (McAlpine) v Staffordshire County Council (2002). 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.
- 10.5. In this case the Council received 63 completed witness evidence questionnaires from individuals who claim to have used the land. All but 4 of the witnesses are residents of Winterslow and those 4 are former residents. The witness evidence questionnaires also make reference to use of the land with family members and others being seen using the land. They also refer to community events such as bonfire night celebrations, part of the village fete on the land and organised events being carried out over the land by the

Rainbows, Brownies, Guides, Cubs, Scouts, pre-school children and the Duke of Edinburgh Award, however the landowners claim that use for community events was undertaken with their permission only and therefore this evidence may not be taken into account.

- 10.6. Officers consider that given the size of locality identified (Winterslow parish, which covers approximately 4,800 acres and has a population of 2,300 (Winterslow Parish Plan 2010)), the number of witnesses and their evidence of use with family members and others seen using the land for lawful sports and pastimes, are sufficient to suggest general use by the local community.

**Of any locality or of any neighbourhood within a locality**

- 10.7. A town or village green is subject to the rights of local inhabitants to enjoy general recreation activities over it. The “locality” or “neighbourhood within a locality” is the identified area inhabited by the people on 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 this identified locality or neighbourhood who will have legal rights of recreation over the land if the application is successful.
- 10.8. The definition of “locality” and “neighbourhood within a locality” were reiterated in the recent case of Paddico (267) Ltd. v Kirklees Metropolitan Council (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, such as a housing estate.



- 10.9. In this case the applicant has identified “Winterslow Parish” as the “locality”. There is no map of the identified locality included with the application, however this is not necessary where an administrative/geographical area is identified by name. Winterslow parish qualifies as a “locality” as an administrative district with legally significant boundaries.
- 10.10. This identified neighbourhood is supported by witnesses, all of whom, apart from 3 former residents and 1 non-reply, consider themselves to be local inhabitants in respect of the land. Please note that 1 resident of Salisbury, Lucy Clark, is a former resident of Winterslow, but considers herself still to be a local inhabitant in respect of the land. 60 of the witnesses are resident of Winterslow (please note that Evelyn and David Houghton have jointly completed one evidence form).
- 10.11. When asked what recognisable facilities are available to the local inhabitants of the locality, witnesses included: School catchment area; local school; pre-school; Residents Association; Community Centre (village hall); local church or place of worship; sports facilities; cricket pavilion and pitch; recreation ground; local shop; area policeman; doctors surgery; community activities; neighbourhood watch; a central feature; scout hut; post office; 2 pubs; social and recreational events; copse; plantation and open spaces/fields in and around village.
- 10.12. In his representation, dated 13<sup>th</sup> May 2013, Councillor Christopher Devine confirms that whilst resident of Winterslow from 1992 – 2005, he only ever saw local residents on the land.
- 10.13. The applicant has successfully discharged the burden of proof with regard to identifying a “locality”.

## Have indulged as of right

10.14. Use “as of right” means use without force, without secrecy and without permission. In the Town/Village Green case of *R v Oxfordshire County Council Ex p Sunningwell Parish Council* (2000), 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.”*

10.15. Lord Hoffman rejected the necessity for subjective examination of the state of mind of the users (i.e. did they believe they were exercising a public right).

*“My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J. in Hue v. Whiteley has led the courts into imposing upon the time-honoured expression “as of right” a new and additional requirement for which there was no previous authority and which I consider to be contrary to the principles of English prescription.”*

10.16. This was considered in the Supreme Court Judgement *R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another (Respondents)* (2010), Lord Brown concluded:

*“I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by*

*local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather as Lord Hope, Lord Walker and Lord Kerr make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user.”*

10.17. As Lord Kerr clarifies on this point, there is in his opinion:

*“...no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test...If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants’ use of the lands.”*

10.18. Therefore there is no requirement upon the determining authority to consider, as part of their examination of use “as of right”, the state of mind of users, or how use would appear to the landowner, i.e. was use sufficient that it would appear to a reasonable landowner that a right was being asserted against them, in order for the landowner to challenge such use. The main focus should be on how the land has been used by local people and the quality of the user evidence.

### **Permission**

10.19. The witness evidence questionnaire asks users if they have ever been given permission to use the land, or requested permission to use the land during their period of use. The following responses were given at Appendix 1 to this report.

10.20. The majority of use has taken place without permission. Only 2 users claim to have sought or been granted permission to use the land. Jeanette Soloman sought permission for activities on the land from the owner, between 2009 and 2011 (the witness gives no explanation for this, however it does coincide with the landowners claim that they erected notices on site saying “no public right of way” in 2009 and the ploughing and cultivation of the land in 2011). Felicity Rickard was given permission to collect straw from the land, but no dates for this are given.

10.21. Some users believed that they did not require permission to use the land and that the area was already open to the public. Several users state that the landowner did see them using the land, but at no point did the landowner advise them that permission was required to use the land.

10.22. In a letter to Councillor Devine, dated 22<sup>nd</sup> April 2013, the landowners Mr and Mrs Sheppard make comment on the 63 completed user evidence and state that: *“They refer to the Brownies using the field, yes with our permission, Bonfire night again with our permission...”* It would appear that some of the pastimes over the land had been carried out with permission, in particular the organised/community events and therefore these events should be disregarded as evidence.

### **Without force**

10.23. None of the users claim to have used force to enter upon the land, although the landowner claims that in the case of access obtained through the fencing on the boundary with Highfield Crescent, the fence was cut in order to facilitate access onto the land. Their contention is that it is irrelevant that those taking advantage of the damaged fencing were not themselves responsible for causing damage as it would be wrong and not in the public

interest that people should be rewarded with rights whose acquisition is only made possible by the unlawful activities of others.

10.24. It is the Officers view that it would not be necessary for users of the land to enter by force, for example breaking down fences or damaging locks, as the land is accessible from several points and is not fenced against the public footpaths to the north and the south perimeters. In evidence none of the witnesses make reference to stiles or gates (locked or unlocked), when accessing the land.

10.25. The landowners in their evidence make the point that use by force, does not just mean by physical force but also where use is deemed contentious, for example by erecting prohibitory signs or 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.”*

10.26. The landowners did erect signs over the land in 2009, but this referred to use of linear routes across the land and stated “No Public Right of Way” rather than referring to the wider public recreational use of the land.



### **Without secrecy**

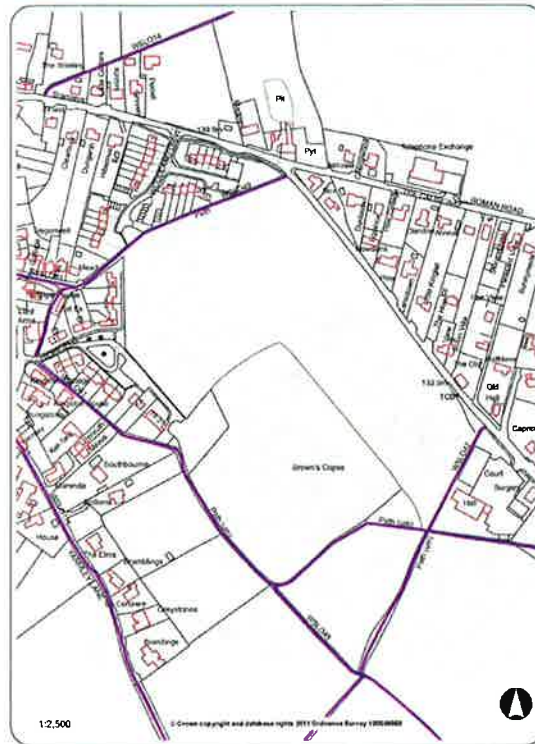
10.27. 13 witnesses claim to have been seen by the landowner whilst using the land, however, on these occasions the landowner/s either said nothing to them or just passed the time of day. At no point did the landowner advise that the land was private (see table at Appendix 1). However it is not clear from the evidence what activities were taking place when they were seen by the landowner/s. They may have been using linear routes, the use of which the landowners appear to have been aware of, as evidenced by their deposition with the Council of a plan and statement and subsequent statutory declarations under Section 31(6) of the Highways Act 1980 and erecting “No Public Right of Way” signage over the land in 2009.

10.28. In conclusion Officers are satisfied that, based on the evidence, use of the land has been as of right.

### **Have indulged in lawful sports and pastimes**

10.29. The lawful sports and pastimes claimed to be engaged in upon the land are included in the table attached at Appendix 2 to this report. In practice, use of the land for dog walking, childrens play and general informal recreation will normally suffice as qualifying user under Section 15 of the Commons Act 2006.

10.30. Further, in order for the land to be successfully registered as a town or village green, it must be established that there is use of the land generally rather than use being concentrated on a linear route/s across the land, which could give rise to a claim for public rights of way rather than a town or village green. There are no recorded public rights of way directly over the land, however there are several rights of way on the perimeter of the site, please see plan below (footpaths are recorded as purple lines):



10.31. Many of the witnesses make reference to their use of the land as a through route on their way to the shop, village hall, doctors surgery, pubs, to take the children to school/pre-school etc, avoiding traffic on Middleton Road. Use for these purposes suggests the use of linear routes rather than more extensive use of the land. When aerial photographs are examined a number of unrecorded routes over the field can clearly be seen (photograph taken 2005/2006, when the land was in the set aside scheme).



10.32. Simultaneously with the claim to register the land as a village green, an application was made to Wiltshire Council to claim several public rights of way over the land, based on evidence of user for a 20 year period. This claim was defeated as the landowner had deposited with Wiltshire County Council a statement and plan dated 30<sup>th</sup> April 1998 and subsequent statutory declarations dated 16<sup>th</sup> June 1998 and 5<sup>th</sup> August 2008, under Section 31(6) of the Highways Act 1980. The landowners recorded within the plan all admitted public rights of way over their land (Weston Hill Farm). The plan and statement had the effect of negating any claim for new rights of way over the land based on user evidence, by demonstrating the landowners non-intention to dedicate any new rights of way over their land within the duration of the plan and statement and subsequent renewals, being in effect. 29 of the witnesses who have submitted evidence in support of the rights of way claim over the land, have also submitted witness evidence forms in support of the village green claim over the land.

10.33. Wiltshire Council are also in receipt of a petition letter signed by mainly residents of Highfield Crescent, Winterslow, which overlooks the land in question, in which they state:

*“It was only when the land was left fallow or on set-aside that certain people thought it their right to use it as a dumping ground for their rubbish, a dog walking area and as a short cut even though the area is adequately served with footpaths.*

*It has not been used as a sports field and the statement saying that it has been used by “a significant number of inhabitants as a right of lawful sports and pastimes” is a complete puzzle to us and as far as we are concerned is at best stretching the truth or worse, complete lies.”*

10.34. As at paragraph 10.22 some events such as those organised by the Brownies etc. and the Bonfire night celebrations, must be disregarded as the landowners have advised that they gave permission for these events to be held on their land and therefore they cannot be “as of right”.

10.35. The witness evidence from all parties regarding use of the land for lawful sports and pastimes, is at odds and it is very difficult to reach a conclusion when all this evidence is taken together. Although there is a large amount of evidence that users may have simply used linear routes over the land to reach a specific destination, as a shortcut, or to avoid traffic on Middleton Road (which is not qualifying use in a village green claim), there is evidence that a number of other activities were taking place over the land such as sledging, bird watching, berry picking etc (please see activities table attached at Appendix 2), when the use relating to linear routes across the land and use for community events which have taken place with permission, are removed. Additionally residents of Highfield Crescent refute that any qualifying activities have taken place at all. Councillor Devine supports this view in his statement dated 13<sup>th</sup> May 2013 and states that between 1992 and 2000 the land was

almost exclusively used as a footpath from the village hall to the village shop/recreation ground or for dog walking.

### **On the Land**

- 10.36. All witnesses who have completed evidence questionnaires have confirmed their use of the land by attaching and signing a plan outlining the area in question. However, it would appear that the witnesses have not individually marked on this map the areas of the land which they have used, (they have marked the location of their own properties). A public inquiry could bring out the areas of the land which individuals have used, through cross-examination.
- 10.37. This application is made under Section 15(1) of the Commons Act 2006 and also Section 15 (3) which applies where use of the land has ceased but the application is made within 2 years of the cessation of use. Use of the land appears to have ceased in 2011 when the land was rough ploughed, before being ploughed again in 2012 and then being sown with linseed. The landowners, in their statement, advise that the land was rough ploughed on 4<sup>th</sup> April 2011 to deter trespass. Prior to that the land had been in set aside since 1988. Many of the witnesses make reference to 2011 as a cut off point after which they were prevented from using the land due to ploughing. The “Private Property – Please Keep Off” signs were erected in 2012, after public use had ceased.
- 10.38. The landowners have claimed in their evidence that the grass in the field was topped once a year. “Topping” is the process of chopping and mulching everything growing in a field, using a topper, a piece of machinery which takes everything down to a certain height. It is usually carried out at times of the year before the weeds go to seed. It is also considered that during the period of set aside, 1988-2011, a policy of less intervention over the land was undertaken by the landowner as part of this scheme. It is considered that the



process of topping would not have been sufficient to prevent the public undertaking lawful sports and pastimes over the land (save for the day on which the process of topping the land was undertaken).

10.39. The wooded area also appears to have been subject to public use. 12 witnesses walked to the local copse (some of these to view the bluebells), 1 witness would cycle in the copse which now has well defined cycle routes and the same witness has built dens and rope swings in the woods with his son. 2 further witnesses make mention of playing in Browns Copse. However, although 12 witnesses mention walking to the local copse, they do not elaborate on whether they entered the wood or just viewed the bluebells from the edge of the wood. Only three witnesses mention entering the wood. This appears to be insufficient evidence to register the Browns Copse part of the application land and it is recommended that if the application is successful, Browns Copse should be excluded from the registration land.

10.40. It would appear that part of the application land is not in the ownership of Mr and Mrs Sheppard. Wiltshire Council own a small part of the application land to the west of the area claimed. Notice was served upon Wiltshire Council who made no comment on use of the land by the public for recreation purposes and made no objections to the proposals.

10.41. It was found that Scottish and Southern Electric Plc owned an electrical substation at the east of the application land. Notice was served upon Scottish and Southern Electric who made no comment on the use of the land by the public for recreational purposes and made no objections to the proposals. However, Officers conclude that it is unlikely that the public would have accessed the electricity sub-station to carry out lawful sports and pastimes over this area of the application land. Therefore if the application is successful it is recommended that the sub-station should be excluded from the registration.

### **For a period of at least 20 years**

10.42. To satisfy the 20 year user test, with use ending in 2011 when the land was ploughed and cultivated, the period of user in question is 1991 – 2011, with application made no later than two years following the cessation of use (in this case the application is dated 3<sup>rd</sup> February 2012). During this period the land was in set-aside with no crops over the land. Please see user evidence chart at Appendix 3 to this report.

10.43. 24 users have used the land for the whole of the period in question. In order to qualify it is not necessary for the land to have been used by all of the witnesses for the full 20 year period in question, rather the evidence may have a cumulative effect.

10.44. It is the Officers opinion that the applicant has satisfied the 20 year user test.

### **11. Comments on the objections**

11.1. The landowner had made a number of objections as outlined at section 9 of this report. Officers would like to make the following comments relating to the landowners main points of objection:

#### **1) Burden of proof – The applicant must prove all the necessary elements for registration of the land as a town or village green.**

Officers would agree with this statement, in order for an application to register land as a town/village green to be successful all the component parts of the legal test as set out at Section 15(1) and (3) of the Commons Act 2006, must be satisfied and the burden of proof lies with the applicant.

**2) No sufficient user by local inhabitants – i.e. the land was used as a crossing point (this is accepted by the objectors), but was not in general use itself as a destination in itself for informal recreation:**

The facts of the case in this matter are disputed in evidence submitted by users and objectors.

**3) Such use as there had been (i.e. occasional or trivial and thus non-qualifying) would not have brought the existence of the claimed right to the attention of the landowner:**

This is disputed by the witness evidence. Wiltshire Council are in receipt of a large number of statements from members of the public, giving evidence that activities such as children playing, picnicking, sledging, picking blackberries etc. were being undertaken during the 20 year period of user in question and this amount of evidence, cannot be viewed as “trivial” or “occasional” activities (in the opinion of Officers).

13 of the witnesses also claim to have been seen by the landowner when using the land. However, they do not state what activities were being undertaken when they were seen by the landowner at that moment in time and as we have seen a great deal of the use appears to have been associated with use of linear routes across the land to get from A to B. It is possible that the landowners were not aware of the wider use of the land for recreational purposes, but were aware of use of linear routes, as in 2009 they erected signage stating “No Public Right of Way”.

The facts of the case in this matter are again disputed in the evidence submitted by users and objectors.

**4) Such user does not constitute lawful sports and pastimes in that the overwhelming majority of users were purportedly exercising only rights of way on tracks crossing the land:**

It is agreed that aerial photographs do show a number of tracks over the land and many of the activities undertaken over the land do relate to the

use of linear routes rather than recreational use of the whole of the land, however, once activities of this nature are removed, and community activities for which permission was sought from the landowners, Officers consider that there are a number of other activities which are claimed to have been exercised over the land which satisfy the test of legal sports and pastimes.

Where users have casually or accidentally strayed from the tracks without deliberate intention to go onto other parts of the field, Officers would agree that this does not constitute the exercise of lawful sports and pastimes on the land.

Wiltshire Council are also in receipt of a petition from local residents claiming that lawful sports and pastimes have not been exercised over the land.

The facts of the case in this matter are disputed in the evidence given by users and objectors.

**5) The application land is being used as a short cut from one side of the village to the other, avoiding Middleton Road and that such user will not be referable to use as a village green.**

Please see above. Again the facts of the case in this matter are disputed in the evidence given by users and objectors.

**6) Any proven user is not “as of right”, being at times over the 20 year period, by stealth or with express or implied licence of the landowner.**

Please see paragraphs 10.14 – 10.22 of the report regarding use “as of right”. Again the facts of the case in this matter are disputed in the evidence given by users and objectors.

**7) User is by force and thus non-qualifying in the case of access obtained through the fencing or the boundary with Highfield**

**Crescent which was cut in order to facilitate access onto the application land. It is irrelevant that those taking advantage of the damaged fencing were not themselves responsible for damage, it would be wrong and not in the public interest that people should be rewarded with rights whose acquisition is only made possible by unlawful activities of others:**

In evidence the witnesses make no reference to the use of force to access the land and it is the Officers opinion that the use of force would not have been necessary in order to access the land, as it is open to public rights of way at its northern and southern perimeters.

**8) Use by force is not confined to physical force. It includes use which is contentious and a landowner may render use contentious by erecting prohibitory signs or notices in relation to the use in question:**

The landowners erected signage advising the public that there were no rights of way over the land (other than the routes at the edge of the land recorded on the definitive map of public rights of way) in 2009. This does not address the use in question, i.e. wider recreational use of the land.

Whilst this protects the landowner against rights of way claims, it does not protect against a town/village green claim i.e. the act of erecting signage to advise the public that there was no right of way, does not bring home to the public that their right to use the land for recreational purposes, was being challenged.

However, the action of erecting this signage may also suggest that whilst the landowners were aware of the use of linear routes over the land, they may not have been aware of the wider use of the land for recreational purposes, i.e. use was insufficient to bring it home to the landowners that rights were being asserted against them and subsequently they did not erect signs prohibiting all access until June 2012, following the application to register the land as a town or village green dated 3<sup>rd</sup> February 2012.



**9) Recent caselaw rejected a challenge to the registration of land as a town or village green on the grounds that “No Public Right of Way” signs had been erected, however the Oxfordshire case is distinguishable from the Winterslow case.**

Please see above.

**10) The fact that the signs erected in 2009 did not relate to the wider user of the application land was not necessary as users knew or ought to have appreciated that the landowners were contesting their use:**

Please see above.

**11) The claimed user gave rise to an implied license:**

Please see paragraphs 10:14 – 10:22 of the report regarding use “as of right”. Again this fact is disputed in the evidence given by users and objectors.

11.2. Where there are so many points of dispute regarding the evidence, it is prudent to hold a public inquiry where there is substantial dispute of fact which is likely to be resolved by the inquiry process through witnesses giving oral evidence and through cross-examination.

## **12. Risk Assessment**

12.1. None.

## **13. Environmental Impact**

13.1. None

## **14. Legal Considerations**

- 14.1. If the land is successfully registered as a town or village green, the landowner is able to challenge the Registration Authority's decision by appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965, which applies where Section(1) of the Commons Act 2006 is not yet in place, i.e. outside the pilot areas (Wiltshire is not a pilot area). The case of Piper Land Development (Solihull) Ltd v The Rhondda Cynon Taf County Borough Council and Richard Jones (20<sup>th</sup> December 2011), is the first known example of a landowner employing Section 14(1)(b) of the 1965 Act where they are disappointed by a decision to register land. Importantly, an appeal under Section 14(1)(b) of the 1965 Act is not just an appeal, but enables the High Court to hold a complete re-hearing of the application and the facts of law. There is no time limit to bringing these proceedings following the registration of the land, it may be years after the decision and could lead to the de-registration.
- 14.2. Alternatively where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, however the decision of the Council may be challenged through judicial review, for which permission of the court is required and application must be made within three months of the decision. Likewise, judicial review proceedings are also open to a landowner where the land is registered as a town or village green.

## **15. Equality Impact**

- 15.1. None.

## 16. Financial Implications

- 16.1. Presently there is no mechanism by which a Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs are borne by the Council.
- 16.2. It is possible for the registration authority to hold a non-statutory public inquiry into the evidence, appointing an Inspector to produce a report and recommendation to the determining authority. There is no clear guidance available to authorities regarding when it is appropriate to hold an inquiry, however it is the authority's duty to decide an application reasonably and fairly and the authority's decision is open to legal challenge, therefore a public inquiry should be held in cases where there is serious dispute or if the matter is of great local interest. Even where a non-statutory public inquiry is held, there is no obligation on the authority to follow the recommendation made.
- 16.3. The costs of holding a non-statutory public inquiry are estimated as follows:

Description of work	Estimated Time	Fees
Initial read and drafting Directions		£1000.00
Ad hoc advice & directions		£125.00 per hour – for a maximum of 10 hours work
Site Visit		£1000.00
Preparation for Inquiry and first day	Time estimate 1-2 Days	£4000.00 based on three days prep
Preparation for Inquiry and first day	Time estimate 3-5 Days	£6000.00
Refreshers		£1000.00
Writing Report (1-2 days)		£2500.00
Writing Report (3-4 days)		£6000 for up to 50 hours work
Expenses	Hotels capped @ £100.00 per night	Mileage @ 45p per mile

- 16.5. Based on the rates quoted above (12 College Place, 2012), the costs of holding a non-statutory public inquiry are estimated at between £11,100 (for a 2 day inquiry) and £15,800 (for a 5 day inquiry). The costs of holding a non-statutory public inquiry in the Winterslow case, will be met from the usual budget available for statutory public inquiries.
- 16.6. The costs of a successful legal challenge to the Council's decision could greatly exceed this amount and could be in the region of £40,000 - £100,000.

## **17. Options to Consider**

### 17.1. To:

- (i) Grant the application to register the land if it is considered that the legal tests for registering a town or village green, as set out under Section 15(1) and (3) of the Commons Act 2006, are met fully, or
- (ii) Refuse the application if it is considered that the legal tests for registering a town or village green, as set out under Section 15(1) and (3) of the Commons Act 2006, are not fully met, or
- (iii) Hold a non-statutory public inquiry, appointing an independent Inspector to hold the inquiry to examine the evidence and to provide a report and recommendation to the determining authority.

## **18. Reasons for Recommendation**

- 18.1. In the Winterslow case, the evidence of whether 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 at least 20 years, is in dispute. It is the duty of the determining authority to determine the application in a fair and reasonable manner, it is therefore

considered prudent to hold a public inquiry where there is substantial dispute of fact, which is likely to be resolved by the inquiry process through witnesses giving oral evidence and through cross-examination, particularly where the authority's decision is open to legal challenge. It is open to Wiltshire Council to appoint an independent inspector to preside over the inquiry and to produce a report with recommendations to the determining authority. There is no obligation upon the determining authority to follow the recommendation made.

## **19. Proposal**

- 19.1. To hold a non-statutory public inquiry into the evidence, appointing an independent Inspector to preside over the inquiry and to provide a report and recommendation to the determining authority.

Janice Green

Rights of Way Officer, Wiltshire Council

Date of Report: 31<sup>st</sup> January 2014



**Decision Report**  
**Commons Act 2006 – Section 15 (1) and (3) - Winterslow**

**APPENDIX 1**  
**Use as of Right – Permission and Secrecy**

	<b>Name</b>	<b>Permission given or requested (Q 28 &amp; 29)</b>	<b>Ever seen by landowner (Q 26)</b>
1	Rachel Andrews	No	Yes more than likely – said nothing
2	Mrs Carol Andrews	No	Probably
3	Michael Andrews	No	To the best of my knowledge “no”
4	Philip Beagle	No	Yes – said nothing or just a general time of day greeting
5	Paul Bookham	No	Yes – said nothing
6	J Briggs	No	Yes – said nothing
7	Colin Campbell	No	Not known
8	Malcolm Cassells	No	No idea
9	Lucy Clark	No	N/A
10	Jan Clarke	No	No
11	Helen Coombe	No	I don’t know
12	Jeremy Coombe	No	Not known
13	Anna Crossland	No	Don’t know
14	Lynne Crossland	No	Don’t know
15	Tim Crossland	No	Don’t know
16	Luke Day	No	No
17	Oliver Day	No	Possibly, I am not aware though
18	Sarah Day	No	Not sure
19	Simon Day	I have never thought we needed any consent for use of the land. Until recently I fully believed that it was public, common land.	Not to my knowledge although he must drive past the land on frequent occasions – I have never had any comment from him on my use of the land
20	Alastair Dunlop	No	No
21	Chris Fisher	No	No
22	Penny Fooks	No	I doubt it - no
23	Susannah Fountain		I am presuming the owner has ploughed the field

**Decision Report**  
**Commons Act 2006 – Section 15 (1) and (3) - Winterslow**

**APPENDIX 1**  
**Use as of Right – Permission and Secrecy**

24	Paula Gibson	No	Don't know as don't know the owner
25	Janice Gong	No	Not as far as I am aware
26	Michael Gong	No – thought it was common land	Don't know
27	Lynda Green	No	No
28	Michael Green	No	No
29	Roberta Head	No	Yes – said nothing or just general greeting
30	Claire Hoare	No	I don't know
31	Jonathan Hoare	No	I don't know
32	Evelyn & David Houghton	No	?
33	Julia House	No	Not known
34	Anne Jones	No	No
35	Anthony Levitt	No	Don't know
36	F J Marsh	No	I am not aware if he has
37	P D Marsh	No	No
38	R Maylin	No – but unwritten understanding that it was a public area	No
39	Claire McDonald	No	Do not know
40	Ian McDonald	No – permission assumed	
41	Carolyn Morgan-Jones	No	Yes – nothing said
42	Michael Morgan-Jones	No	Yes – nothing said
43	Peter Nightingale	No	Do not know – never been spoken to
44	Paula Page	No	Don't know
45	Rick Page	No	Don't know – said nothing if seen
46	G Paton	No	?
47	Jan Paton	No	Unsure
48	Sue Phillips	No	Yes – said nothing
49	William Phillips	No	Yes – passed time of day
50	David Platt	No	Not that I am aware

**Decision Report**  
**Commons Act 2006 – Section 15 (1) and (3) - Winterslow**

**APPENDIX 1**  
**Use as of Right – Permission and Secrecy**

51	Kay Putman	No – but I didn't know any was needed	Don't know
52	Jean Radnedge		
53	David Rickard	No - accepted	Yes
54	Felicity Rickard	No permission sought for activities on the land. Yes permission given to collect straw	Yes - waved
55	Susan Rieden	No	No
56	Doreen Rivett	No	Do not know
57	L E Rogers	No	No
58	Jeanette Soloman	Yes – permission sought for activities on land from the owner 2009-2011	Yes – just passed the time of day
59	Mrs C Stevens	No	Don't know
60	Deborah Sykes	No	Unknown
61	Christopher James Waters	No	Yes – said nothing
62	Lesley Waters	No	Probably
63	Sandra Cassells	No	Probably

**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

<b>Activities Undertaken</b>	<b>Witness</b> <i>(Please note the witness evidence forms have been numbered 1 – 63, the number relates to the witness evidence form)</i>
Walking dogs	1,2,4,5,6,7,8,9,11,13,14,15,21,22,25,26,29,30,31,32,34,39,40,41,42,44,45,48,51,55,58,60,61,62,63
Sledging	1,2,3,5,14,15,19,21,24,35,42,51,53,60
Walking to local copse (to view bluebells)	1,3,9,12,14,18,19,32,38,40,51,59
Walking various other FP's	1,4,59
Local recreation ground	1,11
Playing with friends (early 90's)	1
Walking	1,2,3,4,5,10,12,13,14,16,18,19,20,21,22,23,24,26,27,28,29,35,37,39,41,42,44,45,46,47,50,51,53,54,59,62
Nature spotting/wildlife	1,14,19,21,32,34,36,42
Open space	4,29,32,33,37,39
Wood	4
(Safe) Route to shop	4,13,24,33
Berry gathering	4,29,59,62
Running	5,11,14,26,44,46,50
To access pub	13,19,48
To access pub/shops/school/sports field	5
To access school	13,19,25,30,31,33,36,37,44,46,47,48,49,60,63
To access shop	25,29,30,31,32,33,44,46,47,48,62
To access tennis courts	38
Kite flying	5,21,51,62
Football	5,19
Rugby	5
Cricket	5
To get to doctors surgery	6,19,32,34,38,39,41,42,50,51,59
To get to village hall (safe access)	6,12,13,14,18,19,25,27,28,33,38,39,41,42,44,50,51,59,63
To access local shop avoiding road	7,25,62
To access recreation ground	25
To take children to school (in past)	8,20
To use path to cross field	9
To play as a child	9
As a (safe) shortcut	9,26,40,41
Shortcut to the other side of West Winterslow avoiding road	10,22,54
To get to Saxon Leas visiting friends	11
Circular walk	12
Cycling	13,14,15,16,46
Access to different parts of the village	14
As safe path around village (circuit)	17,43,45,56
Drama club (in the past)	17

**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

Scouts (present)	17
Frisbee	19
Cycling in copse – now well defined cycle routes	19
Den building and rope swings within copse (with son)	19
To get to mobile library	19
To get to Methodist Hall (used for cubs/scouts)	19
Children playing	19,45,48
As a visitor to enjoy local village environment	20
Jogging	22
Cycling	23,26,45
Fitness Class	23
General exercise	25
Part of Village walk	26
Ball games	26
Regularly used FP's	29
Watching the children whilst playing	30,31
To reach pre-school	32,33
To avoid traffic and pavement free road	32,37,61
Safe route to visit friends	33,51
To access village facilities (safe access)	34,35
Walking across car free space	36
Safe walk to the Causeway	39
Bird watching	40,50
Recreation	42,49
Access to neighbours	46,47,59
Pleasure/Leisure activities	46,47
Access to common	50
Bat watching	50
Skiing	53
Well known common land	60
<b>Family Activities</b>	<b>Witness</b>
Walking dogs	1,2,4,5,7,9,13,14,15,21,29,30,31,34,39,40,42,45,55,60
Sledging	1,2,3,5,6,14,15,19,21,24,35,42
Walking to local copse (to view bluebells)	1,9,14,18,36,38
Walking various other FP's	1,4
Local recreation ground	1
Walking	2,4,5,10,14,16,18,19,21,23,24,29,34,35,41,42,44,45,46,50,53,54,62
Open space	4
Wood	4
Route to shop (post office)	4,33,46,47,61
Berry gathering	4,29
Running	5,10,14,25,46,50,54
Kite flying	5,11,21,54
Football	5,19

**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

Rugby	5
Cricket	5,48
Playing	6,19,30,31
Kite flying	6
To play in Browns Copse	6,51
Access to shop avoiding road	7,22,29,30,31
Walking to village hall (safe access)	8,14,18,19,38,39,51
To cross the field	9
To play as a child	9
As a shortcut	9,61
When at Brownies used the field for walking and other activities	11
Used as access during Duke of Edinburgh activity	11
Exercises connected with work for particular Brownie badges	12
Cycling	13,14,15,16,19,46,62
Walking to Village facilities	13,19,22
Access to different parts of the village	14
Viewing nature	14,19,21
Safe path around village	17
Den building etc	19
Frisbee	19
Cycling in copse – now well defined cycle courses	19
To access school	19,20,22,30,31,37,46,47
To access village hall	19,22,40,51,59,63
To access village pubs	19,51
To access doctors surgery	19,38,40,51
To access tennis courts	38,39,40
To access mobile library	19
To access Methodist Hall (used for cubs / scouts)	19
In winter walking home from events at Village Hall avoiding Weston Lane	25
Safe walking off road	26,61
Recreation	26
Enjoying open space	26,29
Regularly used FP's	29
To visit friends	33,51
Bird watching	40
(Safe) exercise	40,41
To visit neighbours	46,47
Pleasure/Leisure activities	46,47
Rounders	
Social and recreation purposes	59
<b>Community Activities</b>	<b>Witness</b>
Walking dogs	1,4,5,25,26,29
Sledging	1,3,4,5,14,22,29,35,47,50,52,58,59,62



**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

Walking to local copse	1
Walking various other FP's	1
Local recreation ground	1,41,42
Playing with friends (early 90's)	1
Walking	1,5,14,35,41,42,59
Nature spotting	1
Children playing	4,14,29,45,52
Running	5,14
Kite flying	5
Football	5
Rugby	5
Cricket	5
Occasional use as part of village fete	8
Brownie camps	4,29
As a Brownie/Guide organised groups visiting the copse and using paths from 1988 onwards	9
Brownies/Cubs/Scouts (Walking) and Duke of Edinburgh (Orienteering)	11,38
Cycling	14,59
Viewing nature	14
Nature walks by pre-school	14,30,31,33
Bonfire night celebrations	16,17,18,19,32,46,47,50,51,62
Local scouts/cubs hiked across it	21,51
Ramblers	23
Walks organised by village hall	26
Picnics	26
Pony rides during village fete	33,61,62,63
School children "Walking Bus"	38,47
Informal games	45
Brownies & Rainbows visit Browns Copse to see bluebells, look at trees (Nature study)	51,54
Overflow car park for village hall	61
<b>Seasonal Activities</b>	<b>Witness</b>
Walking all year round	1,2,10
Sledging	1,2,3,4,5,8,9,10,14,16,17,18,19,21,22,24,29,30,31,35,36,37,38,47,50,51,52,58,60,61,63
Running	1,14
Walking	3,5,14
Horse riding	3,14
Kite flying	5
Bonfire night on Nov 5 <sup>th</sup>	8,46,47,63
Wildlife and flower spotting (spring)	16,17,18,19
Snowballing	25,37,38
Building snowmen	26,37
Summer walks	26

**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

Picking blackberries	32,53
Picking sloes	32,53
Nature study	53
<b>Activities Seen</b>	<b>Witness</b>
Children playing	1,2,3,4,5,6,7,9,10,11,12,13,14,15,16, 17,18,19,20,21, 22,23,24,25,26,27,28,29,30,31,32,33,3 4,35,36,37,38,39,40,41,42,43,45,46,47, 48,49,50,51,52,53,54,55,56,58,59,60,6 1,62
Dog walking	1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,17, 18,19,20,21, 22,23,24,25,26,27,28,29,30,31,32,33,3 4,35,36,37,38,39,40,41,42,43,44,45,46, 47,48,49,50,51,52,53,54,55,56,57,58,5 9,60,61,62,63
Picking blackberries	1,2,3,4,5,6,8,9,11,13,14,15,17,21,22, 23,24,26,27,28,29,30,31,32,33,34,35,3 6,37,38,39,40,42,43,46,47,48,49,52,53, 54,55,56,57,58,59,60,61,62,63
Picking sloes	60
Bird watching	1,2,3,4,5,9,12,13,14,18,19,21,22,23,29, 33,34,36,41,42,43,45,46,47,48,50,51,5 2,53,54,56,58,59,60
Picnicking	1,9,13,19,21,36,45,49,53
Kite flying	1,2,3,4,5,6,9,10,11,13,14,15,19,21,23,2 5,27,28,29,32,34,36,38,39,40,41,42,45, 46,47,49,50,51,53,54,58,59,61,62
People walking	1,2,3,4,5,6,8,9,10,11,12,13,14,15,16, 17,18,19,20,21,22,23,24,25,26,27,28,2 9,30,31,32,33,34,35,36,38,39,40,41,42, 43,44,45,46,47,48,49,50,51,52,53,54,5 5,56,58,59,60,61,62,63
Bonfire parties	1,2,3,6,8,9,14,27,28,33,34,36,37,43,46, 47,50,51,53,54,61,62
Bicycle riding	1,2,3,4,5,6,8,9,11,13,14,15,16,17,19, 20,22,23,25,26,27,28,29,31,35,38,43,4 4,45,46,47,49,51,53,54,56,58,59,60,61, 62,63
Fishing (only when flooded)	2
Drawing and painting	5,21,34,36,41,42,50,60
Team games	5,16
Community celebrations	5,36,47
Football	5,16,19,21,34,36,38,48,58
Cricket	5,48
Sledging	9,32,41,42
Nature study	9

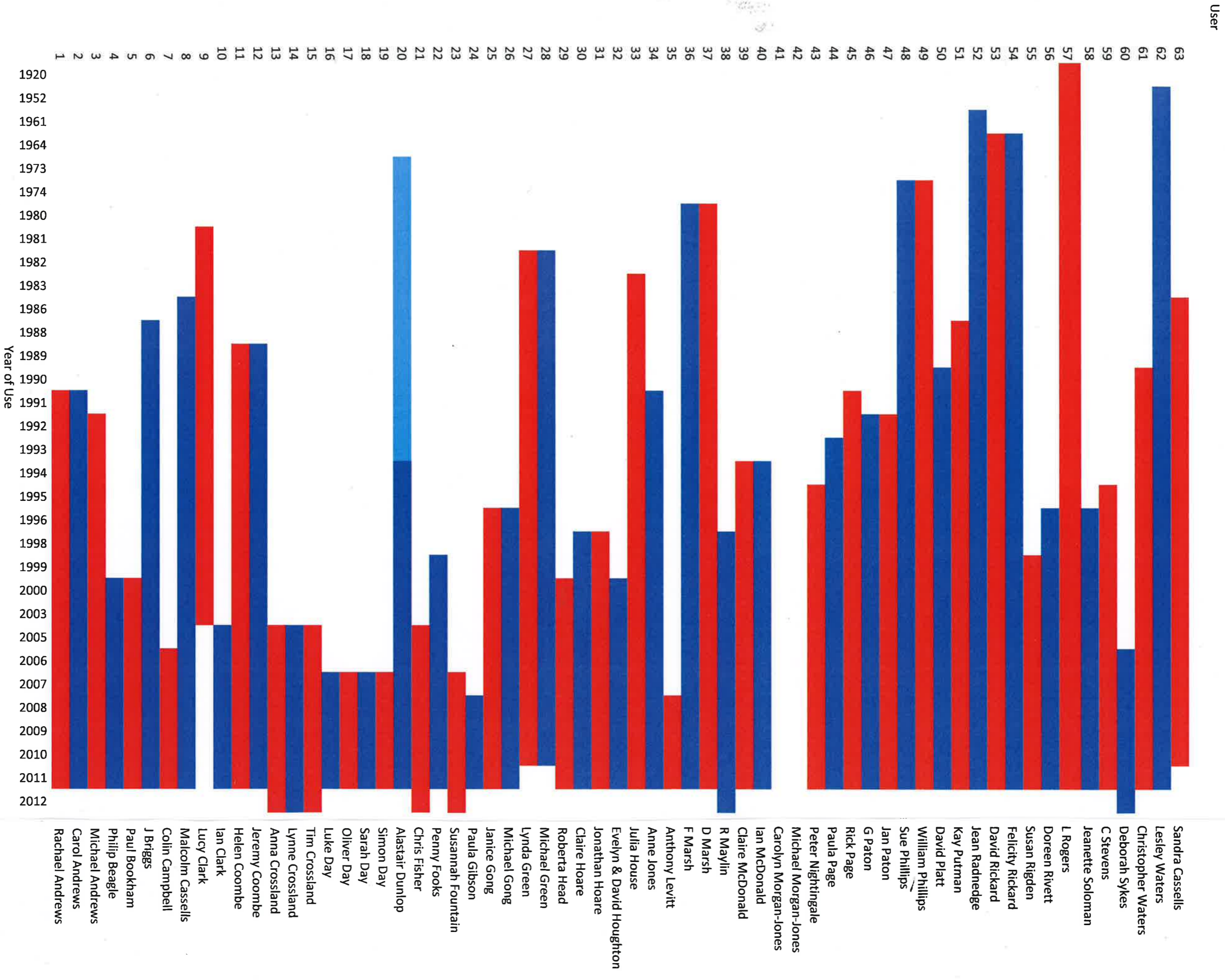
**Decision Report**  
**Commons Act 2006 – Section 15(1) and (3) - Winterslow**

**APPENDIX 2**  
**Activities Undertaken**

Frisbees	10
Running	11
Rounders	30,31,36,48
Photography	32
Fetes	33,38
Pony rides	33
Horse riding	58
Sledging	38
Snowball fight	38

Note: 32 = x 2 Witnesses

52 = Missing page – Q9 -17



**APPENDIX E – INSPECTOR’S REPORT (MR STEPHEN MORGAN, LANDMARK  
CHAMBERS - 10 MARCH 2015)**

**APPLICATION (REF: 2012/5) BY WINTERSLOW OPPOSED TO OVER  
DEVELOPMENT (WOOD) UNDER SECTION 15 OF THE COMMONS ACT  
2006 TO REGISTER LAND KNOWN AS THE COMMON/BROWN'S  
COPSE FIELD/BLUEBELL WOOD FIELD/VILLAGE HALL FIELD/THE  
FIELD, WINTERSLOW AS A TOWN OR VILLAGE GREEN**

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**INSPECTOR'S REPORT TO THE COMMONS  
REGISTRATION AUTHORITY**

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**Commons Registration Authority  
Wiltshire Council  
County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN  
Ref: JG/PC/255 2012/5**



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## **SUMMARY**

- S1.** The Applicant, Winterslow Opposed to Over Development (“WOOD”), seeks registration of Brown’s Copse Field (“the Application Land”) as a town or village green (“TVG”) under section 15(3) of the Commons Act 2006. The Applicant has to demonstrate on the balance of probabilities that the land has been used for lawful sports and pastimes (“LSP”) in a way that satisfies the criteria within section 15(3).
- S2.** The Application is objected to by the owners of almost all of the Application Land, Richard and Patricia Sheppard.
- S3.** The relevant 20-year period is that ending on 4 April 2011. The Objectors do not dispute that Winterslow CP is a qualifying locality.
- S4.** The Application Land consists of readily accessible agricultural land that was in “set aside” throughout the relevant period. It is concluded that the main use of the land has been for transiting on foot to and from different parts of the village. The main use of the Land for LSP has been dog walking on the field and there have also been other qualifying uses.
- S5.** However, the Applicant has not demonstrated sufficiency of qualifying use for the Application Land as a whole throughout the 20-year period. That applies overall, taking into account the evidence of LSP as well as the degree of use of the Application Land that was clearly not for LSP and also that which it would have been difficult for a reasonable landowner to interpret as an assertion of village green rights. Moreover, there is also a particular concern with regard the earlier part of the 20-year period.
- S6.** That conclusion is reached taking into account the LSP use that has clearly taken place in the Copse. It is concluded that the Copse has been an attraction and destination in its own right. Sufficiency of LSP use of the Copse itself as of right has been demonstrated throughout at least the relevant 20-year period. The only exception to this relates to the north-west corner, which is in separate ownership to the Objectors and appears to have been fenced off and separate from the remainder of the Copse.

- S7.** The two signs put up in 2009 did not in the circumstances make any use of the Application Land for LSP contentious. The breaches of the Highfield Crescent fencing, relied upon by the Objectors, have no direct bearing on the overall assessment and the other conclusions reached.
- S8.** Accordingly, this Report **concludes** that the Application satisfies the criteria within section 15(3) of the Commons Act 2006 only in respect of the Copse but not in respect of that part of the Copse in the north-west corner owned by Wiltshire Council.
- S9.** The **recommendation** to the Registration Authority is, therefore, that WOOD's Application to register the Application Land as a TVG should be approved only in so far as it relates to Brown's Copse, with the exception of that part of the Copse owned by Wiltshire Council.

## **1. INTRODUCTION**

- 1.1 This Report relates to a piece of agricultural land and adjacent copse within the attractive village of Winterslow in Wiltshire. The land was “set aside” (in terms of the Common Agricultural Policy of the EEC) in 1988. There is a dispute over the future use of the land that has divided opinion in the village and there have been conflicting accounts of how the land has been used since that time.
- 1.2 Against this background, I am instructed by Wiltshire Council in its capacity as the Registration Authority (“the RA”) for the purposes of the Commons Act 2006 in respect of the application by Winterslow Opposed to Over Development” (“WOOD”) under section 15(3) of the Commons Act 2006 (the Application). The Application was made on that group’s behalf by Mr. Timothy Richard Crossland. It was dated 3 February 2012 but accepted by the RA as complete on 29<sup>th</sup> August 2012 (as reference no. 2012/5).
- 1.3 By the Application WOOD seeks to register land, stated in the application form to be usually known as “The Common/Brown’s Copse Field/Bluebell Wood Field/Village Hall Field/The Field, Winterslow,” as a town or village green (TVG). The names are given in the alternative but I will refer to it either as the Application Land or where appropriate Brown’s Copse and the field, as it includes both the Copse and adjacent field. The Application Land extends to about 7¼ hectares (about 18 acres).
- 1.4 My instructions from the Registration Authority were to hold a non-statutory public inquiry to consider the evidence and submissions relied upon by the Applicant and the Objectors and to report on these with a recommendation as how to determine the Application.

### The Inquiry

- 1.5 Accordingly, I held an at Inquiry Barry's Fields Sports Ground, Weston Lane, West Winterslow on 25<sup>th</sup> to 28<sup>th</sup> November 2014. The Inquiry reconvened at the same venue on Tuesday 16<sup>th</sup> December for Closing Submissions and the accompanied site visit.
- 1.6 Directions were provided prior to the Inquiry, giving guidance on the submission of evidence and documents and on the procedure proposed for the Inquiry. The parties provided the evidence (including supporting documentation) in advance of the Inquiry, for which I am very grateful. Some additional documents were provided by each party at the Inquiry.
- 1.7 The Applicant was represented at the Inquiry by his Alexander Greaves of Counsel. Mr. Greaves called 15 witnesses in support of the Application. The Applicant also relied upon other witness statements and documents, as detailed in section 3 of this Report, which I have taken into account.

### Objections

- 1.8 The Application was objected to by Mr. and Mrs. Sheppard of Weston Hill Farm, Winterslow, the registered owners of all but three small areas of the Application Land. Other representations in response to the Application were also received and I have taken those into account.
- 1.9 The Objectors were represented by William Webster of Counsel. Mr. Webster called 11 witnesses, as detailed in section 4 of this Report. He also relied upon other witness statements and documentation, which I have taken into account.

### Site Visits

- 1.10 I visited the site and the surrounding area prior to and during the Inquiry. As indicated above, I carried out an accompanied site visit after the close of the Inquiry on the afternoon of Tuesday 16<sup>th</sup> December 2014.

### The Statutory Basis of the Application

1.11 The Application was made under section 15(3) of the Commons Act 2006 and the claimed use as of right was stated to have ended on 4<sup>th</sup> April 2011.

1.12 The statutory framework is dealt with more fully in section 5 of this Report. However, at this stage it should be noted that section 15(1) provides (as applicable to this application) that:

**Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.**

Subsection (3) (in the form that applies to this Application) applies where:

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

### The Scope of the Inquiry and this Report

1.13 I am very aware of the very strong feelings of both sides in this case. That is often so, particularly where the land is being considered for development, as in this case. However, as I made clear at the Inquiry, a TVG Inspector's role is to consider whether the Applicant can demonstrate on the balance of probabilities that the statutory criteria within section 15 of the Commons Act 2006 are met. The relative merits of the claimed use relied upon and the possible development of the site are not relevant to whether section 15(3) is complied with and I have not taken such matters into account.



- 1.14 My role is therefore limited to considering the evidence and submissions against the statutory criteria and making a recommendation to the Registration Authority as to the determination of the Application.

The Structure of the Report

- 1.15 The remainder of this Report is now set out as follows:

2. THE APPLICATION & APPLICATION SITE
3. THE CASE FOR THE APPLICANT
4. THE CASE FOR THE OBJECTORS
5. ASSESSMENT AND CONCLUSIONS
6. RECOMMENDATION

I have provided a Summary at the outset and I hope that this will assist with the reading and understanding of this Report. I stress, however, that the Summary needs to be read and understood with the remainder of the Report. The Report is of necessity somewhat lengthy, given the extent and nature of the evidence and issues.

- 1.16 However, before addressing those matters, I would like to record my thanks to the advocates and witnesses. I am grateful for the way in which they all conducted themselves, presented their cases and their evidence and the courtesy shown, and the unstinting assistance given, to me by all. In addition, the parties and I were very greatly aided by the RA, which was represented by Mrs. Sarah Marshall, a solicitor with the Wiltshire Council and Miss Janice Green and Miss Alison Roberts, who are both Rights of Way officers employed by the Council. Their assistance to all of us was very much appreciated and greatly assisted in the preparations for, and efficient running of, the Inquiry.

## 2. THE APPLICATION

2.1 The Application (reference no. 2012/5) was made on behalf of WOOD by Mr. Timothy Richard Crossland pursuant to section 15(3) of the Commons Act 2006.

2.2 The Application was made on Form 44, dated 3<sup>rd</sup> February 2012 and it is stated in Section 4 that the claimed LSP use as of right ended on 4<sup>th</sup> April 2011. It is also stated that there was a period of statutory closure during the foot and mouth outbreak in 2001 that has to be disregarded in accordance with section 15(6) of the 2006 Act.

2.3 In section 5 of the Form, it is stated that the name by which the land is usually known is:

*“The Common/Brown’s Copse Field/Bluebell Wood/Village Hall Field/The Field”*

Its location is given as:

*“Adjacent to Middleton Road, Winterslow”*

At the Inquiry the Applicant clarified that the Application Land did not include any of the adjacent metalled footpaths or the grass public footpath along the edge of the village hall.<sup>1</sup>

2.4 Section 6 of the Application Form asks for the locality or neighbourhood within a locality in respect of which the application is made. This is given as:

*“Winterslow Parish”*

A Plan of the Winterslow CP, showing the Application Land in relation to it, is found in Tab 2 of the Applicant’s Bundle of Evidence) (this is what I have referred to below as Applicant’s Bundle A – AB/A Tab 2).

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<sup>1</sup> The footpaths in the area shown on the map of Winterslow CP in App/A Tab 2 and the Plan with the s.31(6) Statutory Declaration at Ob/A Tab 7 p.28M. See Applicant’s Closing Submissions at paragraph [7] p. 3.

2.5 The justification for the Application is set out in Section 7, which states:

*“Indulgence by a significant number of inhabitants of Winterslow as of right in lawful sports and pastimes for a period of at least 20 years and 5 months under section 15(3) of the Commons Act 2006, as witnessed by the 63 enclosed signed statements showing use for activities including dog walking, picking blackberries, kite flying and bicycle riding by a total of 63 people over a period extending from December 1990 to April 2011.”*

2.6 Section 8 of the Application gave the owners of the land as “Mr. Richard Sheppard and Wiltshire County Council”. In fact, the position is as follows:

- (1) The registered landowners of almost all of the Application Land are Mr. Richard and Mrs. Patricia Sheppard. This is subject to three exceptions.
- (2) An area in the north-west corner of Brown’s Copse is owned by Wiltshire Council. The Council, in its capacity as land owner, wrote to the Applicant on 29<sup>th</sup> October 2014 asking them to exclude their land which is held for housing purposes from the Application.
- (3) There is a small triangle of land that abuts the north-eastern end of the Council’s land that is unregistered. There is a much smaller area abutting the north-western corner of the Council’s land that is also unregistered.
- (4) In the south-eastern corner of the Application Land is an electrical sub-station owned by Scottish Electric.

2.7 In addition to the objections from Mr. and Mrs. Sheppard, three representations were received by the RA. The letter (signed by 24 residents) from residents of Highfield Crescent stated that whilst they did not want to see any development on the Application Land they did want to correct information the RA had been given. They stated that the land not been used as a sports field and that Winterslow has sufficient areas for sports or other pastimes. It was, the residents further said, only when

the land was left fallow or set aside that certain people thought it right to use it as a dumping ground for their rubbish, a dog walking area and as a short cut though the area is adequately served with footpaths. There was also correspondence from L E Rogers, several letters from the Objectors and a letter from John Glen MP. In addition, there was an email from Councillor Christopher Devine. Although, an email from Wiltshire Council's Legal Services was received, there was no objection from them as landowner and no correspondence from Southern Electric Plc.

2.8 The Applicant was provided with, and given the opportunity to comment on, the objections and related correspondence. However, no further comments were received from the Applicant.

2.9 The Application was considered by the RA in a decision report dated 31 January 2014.<sup>2</sup> This stated that it is the RA's duty to determine an application in a fair and reasonable manner and where there is a serious dispute, or if the case is of great local interest, it is open to the authority to hold a non-statutory inquiry held by an independent Inspector, who would then prepare a report with recommendations. The decision report recommended that course of action accordingly. The report (on p. 6) contains a useful plan showing the land ownership of the Application Land (referred to in paragraph 2.6 above).

### **3. CASE FOR THE APPLICANT**

3.1 The Applicant provided two bundles of documents and a bundle of legal authorities. The first bundle of documents, which I shall refer to hereafter as "AB/A" (Applicant's Bundle A), included:

- (1) In respect of each of the witnesses to be called at the Inquiry:
  - (a) A signed and dated statement;
  - (b) An evidence questionnaire; and

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<sup>2</sup> Applicant's Bundle B Tab 11 – AB/B Tab 11

- (c) Supporting photographic evidence, where applicable.<sup>3</sup>
- (2) Signed and dated statements and questionnaires of 7 others relied upon but called as witnesses. <sup>4</sup>
- (3) Other Evidence questionnaires relied upon.<sup>5</sup>

3.2 The Applicant provided an Outline of the Case and Opening Speech. The matters referred to included:

- (1) The statutory test and how the Application meets it.
- (2) The nature of the Application Land and that agricultural land and the Copse can be registered, as there is no requirement that it resemble a traditional village green.
- (3) It is not in dispute that the vast majority of the claimed user is from inhabitants who live, or have lived, within the locality during the relevant period.
- (4) Sufficiency of use does not require that LSP be carried on sufficiently frequently throughout daylight hours or at all times of the year.
- (5) Furthermore, it is not necessary for the local inhabitants to have set their feet everywhere on the Application Land. The fact that LSP is predominantly confined to areas which are most readily accessible does not prevent the registration of the whole land. In this respect, it is clear that the natural state of land may cause its accessibility to fluctuate during the relevant period.
- (6) Assertion to a reasonable landowner of a right to engage in LSP is not necessarily inconsistent with the user predominantly taking place on informal paths.<sup>6</sup>
- (7) Qualifying use must “as of right”. LSP that is by force is not qualifying use. Use by force is not simply confined to physical force

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<sup>3</sup> AB/A Tab 4

<sup>4</sup> AB/A Tab 5

<sup>5</sup> AB/A Tab 6

<sup>6</sup> See paragraphs [19]-[22] on pp.7-9 of the Applicant’s Outline Legal Submissions.

and use will be by force where the landowner had made it clear that such use is contentious.

- (8) The facts of this case are on all fours with *R (Oxfordshire and Buckinghamshire Mental health Trust) v Oxfordshire CC* [2010] EWHC 530 and the wording of the signs is identical.
- (9) The fencing relied upon by the Objectors that was put up at the top of the field by Highfield Crescent, was put up by the Council and not the landowners. In any event, the vast majority of the Application Land remained entirely open and accessible.
- (10) The statutory depositions under the Highways Act have no effect on whether user was “as of right”. More importantly, those depositions would not have been communicated to the reasonable person exercising LSP over the Application Land.
- (11) It is clear from the evidence questionnaires and detailed statements that qualifying user occurred throughout the relevant 20-year period.<sup>7</sup>

3.3 The following witnesses gave evidence at the Inquiry in support of the Application:

Glyn Paton

Philip Beagle

David Rickard

Dr Ian Flindell

Julia House

Simon Day

Penny Fooks

Christine Stevens

Paul Hardiman

Jeanette Solomon

Tim Crossland

Elizabeth Page

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<sup>7</sup> See paragraph [37] on pp. 13-4 of the Applicant’s Outline Legal Submissions. See also the Applicant’s Closing Submissions at [11]-13] on pp.5-6.

Dr Kay Putman

Barry Clark

Michael Yates

3.4 I now summarise the key points of the oral evidence of each of these witnesses. In doing this, I use the following abbreviations:

EQ: Evidence Questionnaire

In-chief: Evidence given in-chief

XX: Cross-examination by the opposing advocate

Re-ex: Re-examination by the witness' advocate

### **Glyn Paton<sup>8</sup>**

Mr. Paton moved to The Flashett, near the telephone box on Middleton Road, in 1992. He said that he was aware of the Application Land as soon as he moved in, as he would go across it to the shops. His two daughters were 3 and 10 years old when they moved in (and thus 2 and 9 in 1991, as pointed out in xx of Mr. Paton). His main access onto the land was from the entrance in the south-east corner (OB-A Tab 5 at p.23H) or from the path behind the village hall (but not 23G)

#### His and his family's use of the Application Land

They used the land as a recreational area and not just for walking the dog, which they had between 1999 and 2008 (he had originally said 1994 to 2002). He used the area between Middleton Road and Brown's Copse to train the dog. The children crossed the land to school but not with him as he was working (as confirmed under xx but in comparison to his answer to Q.15 on his EQ). At the weekends, he used the land as a route to the village shop (to pick up the papers) and to go to the pub and as a place of recreation and enjoyed the wildlife – e.g. bluebells, anemones and celandines. Most of the time they would have the dog with them.

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<sup>8</sup> AB/A Tab 4 p.124



The wildlife was predominantly in the Copse but certain areas didn't have bluebells. There was not one area of the wood that they would use regularly but would tend to use the part towards the centre. There were many ways they would get into the Copse – at least 4 ways from their house. When the land had been ploughed up, they still used the Copse. He said that from time to time they would have family walks and that most weeks they would visit the Copse, except when they were away on holiday. Mr. Paton said the paths accounted for around 5-10% of the Copse. In re-ex, Mr. Paton said that there was a main path in the Copse but there were also lots of paths diverging off – there was a diagonal path that was slightly wider. He also explained in re-ex that since 2011 the Copse was more trodden on as people can't use the field and the main path was wider than in 2009/10. He said that the Copse was predominantly hazel coppice and there were shrubs throughout.

Mr. Paton said that he would spend about 10 minutes on the land, if just crossing but may stop for a chat. But if going into the Copse they could be there for up to 1hr. he said that there were dens in the Copse.

He had used the paths around the outskirts of the land – he used those to get onto the land. He also used the path along the eastern edge of the Copse and had accessed the Copse from that path. He said that (referring to the aerial photo at OB-A Tab 9 p.71) there were at least 7 tracks across the land.

The children used the land until they were teenagers. He said that when his youngest daughter (born in 1989) comes home she regularly goes for a walk in the Copse.

Under xx, M. Paton said that they had used a variety of paths from Middleton Road, depending upon how muddy the land was, to go to and from the school. He also accepted (under xx) that his main/predominant use was (besides dog walking) of the land was to transit and most people would say that it was used for transit. He said (under xx that he recalled that the tracks were pronounced, as shown on the aerial photos at OB/A tab 5 at pp. 23/23A.

### Use of the land by others

Mr. Paton referred to dog walking and said under xx that this was not just dogs running off. He said there had been a bonfire on the land. He also referred to others sledging – he said they didn't have a steeper field elsewhere.

He said that he would bump into people on the Land – neighbours and friends – he mentioned the Hendersons, who had a dog and who they would regularly meet. He also mentioned the Ryans, Phil and Mandy and the Glovers, Sue and her husband, who had now sadly passed away.

He said that it was not just small children that use the woods and he saw dens in the Copse all the time.

### Challenges and Signs

Mr. Paton said that he didn't know who the landowners were. He had never been challenged on the land and there had been no interruptions in his use. He didn't think that he needed permission to go on the Land.

He hadn't seen any signs until the big ones were put up in 2011. He said that he would have gone past the earlier signs as he went onto the land where post 2 is. He said that he didn't have a dog in 2009 (when the two posts were erected) but did go on the land on Saturdays and/or Sundays having come from the village shop.

Under xx, when referred to the two 2009 posts (position seen on photograph in OB-A at Tabs 9 & 10 pp. 71-3), he confirmed that he couldn't remember the signs. He said he would have gone past the post 2 position but not post 1. He didn't see the post at the top of the field but repeated that he had go that way every week.

## **Philip Beagle<sup>9</sup>**

Mr. Beagle lives at the Old Post Office on Middleton Road. He first became aware of the Application Land in 1999/200 when he visited. He parked in the village hall car park and saw people using the field. He moved to his current property from Salisbury in 2000.

### His and Family's Use of the Application Land

Mr. Beagle said that he would walk his dogs on the land at least twice a day – this would begin at 7.30 am or earlier in the summer. He also ran on the land. He had dogs from 2000 onwards. He now has 2, the youngest is just over 3 years old. He had 3 dogs for a short period. When running they would do circular runs and the dogs would go with them. They would walk the dogs as well.

He would access the land from Middleton Road by the telephone box – as shown on the photograph at p.23i of OB/A Tab 5. He used that entrance before the field was ploughed. He amended the plan showing the tracks over the path submitted with the modification order application, showing more tracks.

When walking the dogs they would go onto the land by the telephone box and either go up the field along the inside of the hedge along Middleton Road towards the top corner or go straight across from the telephone box entrance into the Copse. The Copse was hazel with thinnest bushes. It was regularly cut – every year or twice a year. There were bluebells with kids doing things – rope swings in the southern part. He remembered a blue nylon rope swing and swings are a fairly regular feature – he would say they were there 80% of the time. It is the point where children stop off at on the way home from school. On the dog walking route they would usually come out onto the path and possibly go up to the water tower and around or back along Yarnley Lane and through the village.

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<sup>9</sup> AB/A Tab 4 p.31

He trained each dog for about 6-9 months (3 different ones over the years). This was done on the eastern part of the land as it was less steep and shielded from the Road.

They used to collect sloes from adjacent to Middleton Road and blackberries that grew on all perimeters of the field including the eastern side of the slope, east and north of the Copse and east and north of the field, including the southern corner.

Under xx, Mr. Beagle accepted that whilst the grass was growing it was not as easy to walk through – in June/July it would be 1ft and 2ft tall by September. Mr. Beagle said that the grass lay down when it rained, when it was suggested to him that it was 2ft when not even standing up straight. He said that there were flatter areas and it was not fair to say that anyway in May to June. When it was put to him that people would not be able to walk through the grass, Mr. Beagle said that may be so for 4-6 weeks of the 52 weeks, but it may be less than that. When it was suggested to Mr. Beagle that there would have been thistles and brambles, he said that might have been so in one or two places.

#### Activities By Others

He saw children using swings in the Copse. He saw Chris Waters (his neighbour) walking his dogs. He saw others walking and training dogs - Bill and Mandy – they had a golden retriever and used to meet up with another lady with a border terrier and with others. Kids would ride their bikes on the paths. When there was snow, there were snow ball fights and sledging. He saw someone flying a kite once. He saw blackberrying.

Mr. Beagle said it was an open field with some very prominent tracks (2m wide) and some less prominent. Many people used the land. He said there were a dozen tracks from the centre of the field. However, people didn't stick to the tracks – they walked on the grass, which was at various times fairly short. If the ground was wet, one would tend not to stray off the tracks.

He said that there were other activities almost everywhere – sledging on the top steeper end of the field; showmen almost anywhere; bikes were ridden along the bottom and along eastern edge of the Copse. He had seen a bench, which was not useable, in the bushes that had been on the pavement.

It was suggested to Mr. Beagle that the aerial photographs showed no other signs of activity, other than the tracks of LSP. He didn't agree that this meant there was no LSP taking place as he said there would be a "dispersal" effect – you wouldn't see the tracks from children on bikes that had gone across the ground once or twice and these would not show on a satellite photograph. Mr. Beagle said (in re-ex) that he had walked over virtually every inch of the land and the transit routes would not affect his use.

It was also put to Mr. Beagle under xx that the land was between important destinations in the village – in the SE the village hall, doctors' surgery and in the NW the shop, pub and school. Mr. Beagle said the children going to the nursery would be just as likely to go down the tarmac path (to the west of the Copse) as across the field. He also said that he didn't use the Surgery and people tend to get out of a car when visiting that facility. With regard to the village hall, it was suggested to Mr. Beagle that the activities included the Badminton Club, dance classes, functions, parties, and the Truffles Coffee Shop was open on Mon-Fri 10am-12 noon. He said in re-exam that most people came to the village hall on foot, with a percentage by car. He said that the Hall was fairly busy.

### Challenges and Signs

He saw no signs but did see post on the ground. He said that there was no post by his entrance onto the land or on coning out from the Copse. He saw a post on the ground near the village hall – he saw that once or twice but it was not there long. His use during the relevant period was not interrupted.

He had met the landowners on the land once or twice and just said hello. There were pleasant greetings. He didn't know who they were at the time. They never said anything to him about using the land. He met then coming out of the top end of the Copse.

Under xx, it was suggested to Mr. Beagle (referring to point 7 on photograph at p.23F at Tab 5 of OB/A) that the post at the southern end (Post 1) was only 20 yards from where he entered the field. He said that it was "maybe 30 yards". It was suggested to Mr. Beagle that the post would have been there on at least 28 occasions when he entered the field. He said that he might have been away in Feb and March 2009. He said that he didn't recall seeing the posts sticking up. He saw post in the bushes lying down. Mr. Beagle said that when entering and going across the land he would not go past the post – he would turn right along the hedgerow or go straight across to the Copse. The evening walk would have been in the dark and in the morning, it would have been low light. In re-ex, Mr. Beagle said that the 4 current signs in neon red were fairly hard to miss unlike the initial 2 posts.

Photo 23B (OB/A Tab B) showing the broken fence in the north-west corner of the Application Land was put to Mr. Beagle, who said that his access onto the land was in the south-east corner by the village hall.

**David Rickard<sup>10</sup>**

Mr. Rickard has lived opposite Middleton Road since 1964. The land was cornfield when they moved in until it was set aside in the 1980s. Since then, the field has been left idle. There is no disincentive for people to wander through into the field to enjoy the wildflowers etc. The obvious entrance was from the right of way near to the Village Hall.

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<sup>10</sup> AB/A Tab 4 p. 142

### His own and his family's use of the Application Land

He has used the land with his children (born in 1966 and 1969) and his 4 grandchildren who are in their teens now but visit regularly. He has used the land to cross from the Village Hall car park up towards the shop going into Woodlands Drive to avoid using path around the Copse and it is a more interesting route to view wildflowers and to avoid Middleton Road. They paths used varied but mainly go on a path up through the middle of the land but children, he said, don't stick to the main path. They would bring kites and radio controlled aircraft onto the field – they would travel about 20 yards at the most and usually end up in tree.

In the Copse, they would swing from the trees using a rope. They would use one of the big trees not in the centre but more to the field side of the Copse. There has been a rope swing there for the last 20 years.

Under xx, it was pointed out to Mr. Rickard that he said in answer to Q.15 of the EQ that he used the land “occasionally”. He said that he would go across 2 or 3 times for shopping or wander over there with family or friends. He confirmed that his children would have been 25 and 32 in 1991 and had left home by then. (being in Birmingham and near Andover). He described Middleton Road (in his Statement (AB/A Tab 4 p. 142) as “incredibly dangerous”. He agreed under xx that although in some case he did actually carry out activities on the land he did mainly use it to get from one side of the field to the other. In re-ex, Mr. Rickard said that when he went into the Copse he was not using it to cross and he occasionally saw others; other children. It was almost a public amenity, he said.

### Use of the Application Land by Others

Children always wandered into the Copse and played there.



### Challenges and Signs

Mr. Rickard said that nothing prevented him using the land. He was not aware of any signs until 2011. He only really accessed the land from the car park (point 5 on photo at p. 23F – OB/A tab 5) and he didn't see signs or posts in that area. He confirmed that he was aware of the current signs – assaying the land was Private.. The land had been set aside and not fenced.

### **Dr. Ian Flindell<sup>11</sup>**

Dr. Flindell has lived in the village since 1994. He has 4 children born in 1979, 1984, 1987 and 1989. It is only the two younger children who have used the field. He lives at the other end of the village and has no direct view of the land.

### His and his family's use of the Application Land

He personally didn't use the land other than to cross to the village hall. He did take the dog onto the land in 1997 and met several others doing so, which was good for socializing the dog. Under xx, he said that this was not a regular occurrence – it was during the summer and once a week then. They had quite a large garden but their dog didn't meet others there. They went anywhere on the land. That was for 5 years or so.

They went into Copse and took pictures of the bluebells. The younger boys go to the Copse in the Summer and build dens. From time to time boys sledge on the land and met other children. On occasions, they had gone there everyday for a couple of weeks. They also go to Plantation Woods on the other side of the village, which has a footpath through it. In the Copse, there are paths all around; they exit through the Copse onto the field (having entered the Copse from the footpath on the west side).

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<sup>11</sup> AB/A Tab 4 p.74

He could remember the brambles in the west corner of the field by Highfield Crescent between there and Woodland Drive.

### Signs and Challenges

Dr. Flindell said that he had no concerns about his children going onto the land as he had assumed that it was public amenity land. He didn't know that it belonged to Mr. Sheppard. He wasn't aware of any indication that he shouldn't be on the land. He didn't remember seeing any notices. Under xx (taken to pp.72 & 73 of OB/A Tabs 9 &10), Dr. Flindell confirmed that he had no recollection of seeing the post during the 2 weeks in Feb 2009. He said that possibly the bottom post was there but he never saw it. With regard to the bottom post (referred to photo on p. 75), he said that could possibly remember the rubbish but not the post – that was the area where the brambles are.

He saw the remains of the fence along Highfield Crescent, with there being wire on the ground (see photograph on p.51 of AB/A Tab 4). He didn't remember the tree shown in that photograph though. Under xx (taken to photograph 23B in OB/A Tab 5), Dr. Flindell said that he believed that there were bits of old rusty wire at that point in the broken fence from 1995/6/7. In re-ex, he gave the date as between 1993-2000. He didn't recall the fence being reinstated – there was a gap in the posts as well. He said that his impression was that there had been a boundary there at one time but it had not been maintained. He didn't remember any fencing between the Copse and the field. There were possibly a few posts between the copse and the adjacent footpath.

With regard to the gate on the southern boundary (at point 5 of photograph 23F – OB/A Tab 5), he could see no other reason why the gate was there other than to allow access onto the land.

## **Julia House<sup>12</sup>**

Mrs. House lives at Gunville Hill. She has a daughter and a son born in 1989 and 1992. She has known the Application Land since 1993. She said that she didn't know the copse and the field were part of the same land – she hadn't realised that the Copse was privately owned, although she knew that the field was.

### Her Use of the Application Land

She used the land from 1993 until 2003 at least once per week when child minding. Her use after 2003 was more intermittent/occasional. She entered the land from the south – by the tennis courts through the gate or by the telephone box.

She looked after 6 children at a time, who were mostly local. There had been about 25 from Winterslow over that period. They walked up to school in the village not using the field and then back using the field and going to the Village Hall. They would alternate the route for out and back. Under xx, Mrs. House said that they would go up to school on the bus and walk back but depending upon the weather and also what the children wanted to do. After lunch, they had between 1-3. They would sometimes go into the Copse – entering at the top. She used to look after quite young children. They would play on the path on the field where the grass was shorter. They would play hide and seek in the longer grass. Boys under 3 like to hit with sticks. The girls prefer craft –they play pickup acorns in the copse rather than on the field. The older children liked the woods and the younger ones liked the short grass.

Asked under xx about what they did in wet weather, Mrs. House said that “it was ok with wellies as it was nice for the children to go into the muddy wood”. She said that if it was dry, they would go on the field and if muddy go into the wood. This was about 3 times per week. On Wednesday, they always walked back because of the hour-long activity.

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<sup>12</sup> AB/A Tab 4 p.96

### Use of Application Land by others

She used to regularly meet friends, including those who are dog walkers including Lizzie Dixon, Caroline Henderson, Kate Church, Gill MacKay, Linda Mace – they are all from Winterslow.

They would meet other children when child minding. 2 of her friends (Kate Church and Linda Mace) were child minders so they would sometimes go together.

Under xx, Mrs. House said that people would always be playing in the woods and that it was used more for activities than the field. The field was used for chatting, dog walking and playing. When it was suggested to her in xx that the main use of the field was walking across it, she said that was so for adults but children would play on the field as it was a nice open space. When it was put to her, again in xx, that there were no photos of children playing on the land, she replied that she wouldn't think of taking photographs. She added however that there were photographs of sledging and that it snows regularly and there are one or two periods when the snow settles but not every year. She remembered the first year when the field was packed with sledgers. The last time she could remember her daughter using the field for sledging was in 2010 for 3-4 days. She also referred to the wildlife on the land at different times of the year.

### Signs and challenges to use

She saw the sign on the post near to the Village Hall; but as everyone else was using the land, they just carried on, as it was causing no harm. She didn't know how long the sign was there. She read the wording, which said no right of way. She imagined that it was not an official route.

She didn't realize that the Copse was part of the same land. She considered that the sign was referring to the field and not the Copse. There was fencing only by the Village Hall. There was fencing on the periphery by Highfield Crescent and hedges along the road.

Under xx about the posts, she said that she understood that they meant this was not an official route – so it is not a footpath but she could wander around the field. She did not accept that “No ROW” meant “I don’t want you on my field”. She said no it meant that it was “just not official”. Mrs. House stated that the sign was not saying no access but just that there was no right of way. She said that she was unaware that the signs had been removed by force on 203 occasions, as was put to her under xx.

### **Simon Day<sup>13</sup>**

Mr. Day lives with his family at Middleton and has lived in Winterslow since 2007 (at Garlands from July 2007-2008 about ¼ to 1/3 of a mile away. When they moved to the village, their children were 5 and 8 years of age and learning to ride a bike.

#### His and his family’s use of the Application Land

For the first couple of years they used the land 2-3 times a week. Under xx, Mr. Day said that the children walked back and forth during term time and had quality time in the field if walking back. Their mum would stop and talk, but you would see less fathers doing that. On Thurs/Friday, it was Mr. Day who would go with them to school and they would stop and play on the land. In the later years, it was more that purpose every few weekends. If parents or friends came down or children wanted to play in the woods, they would go there. As the children got older, they would let them go into the woods on their own. Mr. Day said that he would walk around the field (with friends or parents) and end up walking through the woods. Under xx, he said that he is on the land now every third weekend – mainly in the summer/drier times. The children would go on their bikes in the wood even in the wet weather. The copse was more used than the field. When they were younger, he saw a lot more people in the field and people milling around.

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<sup>13</sup> AB/A Tab 4 p.64

So initially, they used the land to cross over to the school. They went from the SE corner and up the path. 3 times a week he would go from the shop through the field. They would sometimes go into the woods and play there with bits of wood they would find and make dens. In the woods, the children would play with friends. Quite a lot of children were taught to cycle on the field.

In the summers of 2009, 2010 and 2011, Mr. Day and his wife used the tennis courts by the Village Hall (usually on a Sunday) and the boys would play in the field where they could keep an eye on them.

He referred to playing football occasionally in the field, as well as Frisbee even when the grass quite long.

His use of the field stopped when the field was ploughed.

Under xx, Mr. Day was referred to his answer to Q.14 of his EQ where he stated "This piece of land is integral to all the main village facilities...". He accepted that the Village store had a lottery terminal and an off licence and that it opens longer (until 8pm) since 2005 and is well stocked.

#### Others' use of the Application Land

Quite a lot of children were taught to cycle on the field. Mr. Day referred to his marked photograph (AB/A Tab4 p.73) and the blue box area shown on that.

If they saw friends on the field, they would have a kick about normally in the blue area (on the p.70 aerial photograph) where the grass was shorter.

Mr. Day said "now and again" they would see people walking dogs and it was nice to meet them and to get chatting.

Mr. Day did say "It is mainly people and dog walkers crossing that you see." He didn't remember a bonfire on the land.

### Signs and challenges on use

Mr. Day didn't recall any signs. He thought that this was public land and it does not, he said, appear to be privately owned. There is no physical barrier to entering the land. There is fencing only along the road and the village hall. However, there is an access point in the fence by the village hall, which is a fence for the village hall and not the field.

When asked (in-chief) whether he had seen the recent signs, Mr. Day replied "not really, no".

### **Penny Fooks<sup>14</sup>**

Mrs. Fooks has lived at Saxon Leas since May 2007, having moved to Winterslow in 1990 at the top of Gunville Hill (having moved from Suffolk in that year).

### Use of Application Land by her and her family

Mrs. Fooks used the land going to the Village Hall, shops and to visit friends. It is a good way of accessing other parts of the village. There were a lot of things going on in the Village Hall. When living in Saxon Leas, crossing the Application Land was the main route to the shops, friends etc. Her son was more interested in nature – picking things up and taking them home. He said that he would play in the Copse – making dens; playing hide and seek. There were rope swings in the Copse in that corner. At the weekend's her son would go down there but not her.

Her son, who was born in 1995, went to a nursery school out of the village and to the primary school in the village when nearly 5 in 2000 until 2007. When he started primary school, they had to make the trek to school on other side of the village bus sometimes and sometimes she cycled with him on the back of her bike at first up Middleton Road (because the road was dangerous, as she said when xx). Sometimes they walked. In the average week, they would sometimes walk three times and sometimes

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<sup>14</sup> AB/A Tab 4 p.75



more – they would often walk home. When going to school he was not recreating. On the way back, he would like going into the Copse. When asked under xx whether he would play in the field, Mrs. Fooks said “more in the Copse”. He was 12 years old in 2007 and went to secondary school out of the village but he still went to the woods – he is very passionate about the woods and other woods too.

She said in he written statement that she has a friend’s dogs after that friend had had a stroke – a couple of times per week for a period of 4 months December 2009- March 2010.

#### Use of the Application Land by others

Mrs. Fooks has seen children playing in the Copse and spilling out into areas around.

There was a walking bus from the Village Hall to the school but she was not sure what route that would take.

She saw dog walking, people going for walks; she also saw an archer. It was just people who live in the village - they would walk around the land. You were very likely to bump into or see 1 other person – you could see someone using one or other of the paths. There were 7 or 8 paths, and tracks into the Copse – going up to rope swing.

#### Signs and challenges

Access was prevented in 2011. She saw stakes without signs for a week. She has no idea what they were for; there was one at the top end and another one in the south-west corner. There was a stake in the south-east corner. The other sign was green and there for a week. She said that she remembered not understanding what it was. She continued to use the land when the steak was there but didn’t use the land when the other signs were erected. She had understood that Mr. Sheppard had given he land to the village, as he had done for the Village Hall.

Under xx Mrs. Fooks said that she could not remember what the green sign on the posts said. She said in her written statement that she remembered being very puzzled and surprised when access to the field was prevented in 2011. She confirmed that she couldn't believe that she no longer could walk across the land. When pressed she accepted that she must have read the sign (with the wording as shown at p. 5 of OB/A). When it was put to Mrs. Fooks did it not convey to her that the landowner did not welcome her on that land, Mrs. Fooks answered "I imagine so".

### **Christine Stevens<sup>15</sup>**

Mrs. Stevens moved into Winterslow Parish in the early 1980s (1983/4). Sometimes they would walk into the village from Latcombe Corner. She has lived at 11 Woodlands Drive since August 2009. From that property, she has a lovely view, she said, overlooking the land with the Copse on the rights. Previously she had lived 2 miles out of the village. She has two sons born in 1977 and 1979 who went to the local primary school in the village. She was recovering from a life-threatening illness in 1995

#### Use of Application Land by Mrs. Stevens and her family

They accessed the land from Daddy King's Path, by the Village Hall or by Woodlands Drive. The children would play on the field in 1986/7. She didn't know whether there were crops then. Under xx, it was put to her (by reference to OB/A Tab 8 p.51) that there was barley and wheat on the field in 1986/7. Mrs. Stevens said that her sons said to her recently that there was a hole in the field. She said that they all used the Copse. They used to come into the village regularly. Sometimes they would walk and sometimes drive to the village and then walk – sometimes on the Copse and the land. It was a delight – the bluebells, other wildflowers, wildlife including woodpeckers and owls. There is a primrose bank along the Middleton Road side. There was a bank of wild orchids in the middle of

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<sup>15</sup> AB/A Tab 4 p.160

the field. There was a flatter area to the east. They moved into Woodland Drive and used the field and Copse.

They used the land much more (“almost on a daily basis”) after 2009, once they had moved into Woodland Drive.

Under xx, Mrs. Stevens said that before they moved into their current address they used the land possibly twice a week – she said they went into the Copse (cf. Q15 of her EQ – AB/B Tab 4 p.164 – in re-examination when asked whether the Questionnaire allowed her to distinguish periods, Mrs. Stevens said that she didn’t think so). However, with regard to the field she said that she really couldn’t remember whether twice, three times or four times – it was going back too far to remember. She said that she walked around the perimeter and across the field. When asked whether that was sticking to the established tracks, Mrs. Stevens said that she often used to but she also walked along Middleton Road side, where there was the bank of flowers. She also picked blackberries and sloes – the blackberries were along the edge of the Copse. In re-ex, Mrs. Stevens said that she picked sloes at the end of autumn for about a month (August-September) before there was a frost.

She was asked about her answers at Q. 14 of her EQ (AB/A Tab 4 p. 164) in comparison to her oral evidence. Mrs. Steven answered, unconvincingly in my view, that there is a limit to what you can say in small boxes.

#### Use of Application Land by others

She saw children on bikes (3 -4 times a week) – they were on the tracks but not all the time. People walked across the field. She saw children sledging, mostly from the top end of the field. There was the newspaper delivery across that would cut across the field.

### Signs and Challenges

There had been nothing to prevent their use. There were no fences – she had never seen a fence on that field – there was something along Highfield Crescent side.

There have been signs in the last 2 seasons after the land was rough ploughed –then Private Property signs went up (OB/A Tab 11).

She was aware that Mr. Sheppard owned the land, as she was on the PC but she had never been told not to use it. She saw Mr. Sheppard in the Copse once and she asked him whether she could gather some sticks and Mr. Sheppard said ok if done from the school path.

### **Paul Hardiman<sup>16</sup>**

Mr. Hardiman moved to Woodland Drive in 1999, having lived outside the village before that. His house is end-of-terrace and gives him a full view. Mr. Hardiman is a retired police officer who had worked shifts, which included doing 7 consecutive nights. His partner had 2 children (then 4 and 6 years old) he had 3 of his own children (DoB 1988, 1991, 1994) who came to visit him regularly – most weekends and in the week. That relationship ended in 2006 but he still lived there in 2010-2011 in an alternative address in the villa in Gunville Road. They did brownies, guides and scouts in the village. That was 2 evening a week and every other weekend. The Brownies met at the village hall; the Scouts and Guides met at the Methodist Hall, on the Common by the Lions Head public house. Mr. Hardiman is a Cub leader. To his knowledge, there had been no formal cub use of the land.

### Use of Application Land

They entered the land from the steps in Woodland Drive (see photo 4 on p.74 of OB/A Tab 10).

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<sup>16</sup> AB/A Tab 4 p. 85

The children used the land as an adventure playground – it had rough terrain and was wild like Dartmoor. They liked getting dirty and rushing around on bikes. They played there with other friends from the village. It was their play area. They used it in the dark. The Copse was the children’s regular playground. They played hide and seek and run around and explore.

He used the entire field and on occasions ventured into the Copse to see the bluebells etc. He sometimes went with the children into the Copse and sometimes they were unattended.

Under xx, Mr. Hardiman appeared to accept (when he answered “You are making a point”) that when the children were older they were not using the land as a destination in itself.

#### Use of Application Land by others

Although it was less when raining, there were generally people on the land most days. There was use throughout the seasons but greater use in the summer and during lighter evenings.

Under xx, when it was suggested that the predominant use of the land was as a place of transit and that Middleton Road was “nasty”, Mr. Hardiman said that there was a mixture of transit and recreational use of the land but and that you wouldn’t choose to use Middleton Road to go to and from the village. He said his use was 50/50.

There was dog walking on the land most times of the day/evening and people chatting. There were school children going home; joggers (across the land); walkers. There were berries around the Copse – sloes and blackberries along the Middleton Road side – hazel saplings in Copse and blackberries grow everywhere.

It was put to Mr. Hardiman in xx, and he agreed, that for most of the period ending in 2011 there were well worn tracks across the field. He also agreed that it was a convenient crossing point. In re-ex, Mr. Hardiman said that there remained substantial groups he used the field

(and not just the tracks), which was (he clarified to me) quite regularly. He said it was used for chatting, a gathering place, dog walkers, children on their bikes, going into the woods.

### Signs and Challenges

He saw the signs in 2011 (the Private property ones in OB/A tab 11) when he moved back. He noticed that the field had been ploughed. He saw no other signs before then. He saw the rubbish pile (of garden waste) in photo 4 of OA/A Tab 10 – that was always there, he said. However, he never saw the post on that waste.

Under xx, he said that he would go onto the land 4 times a week. He was taken to the post and sign that was there in Feb 2009 (OB/A Tab 10 p.73) – it was pointed out that this was very close to his home. He was also referred to Mr. Sheppard saying that the posts were torn out and re-erected on 2-3 occasions and after 2 weeks he gave up. Mr. Hardiman said that he saw no post. He said that some of journeys (across the land) were in darkness – when going to the Scouts. He was referred to the wording (on p.5 of OB/A) which said “No Public Right of Way” and in xx it was said this is what the “very small sign says. WCC put the sign up.” Mr. Hardiman was also referred in xx to what Penny Fooks said about the sign – people were puzzled, she said, when they saw the signs. It was suggested to him that he was bound to see it.

### **Jeanette Solomon<sup>17</sup>**

Mrs. Solomon has lived in the area for 59 years, having gone to the local Primary School in the village. She used to live in Weston lane but moved away and then back in 2006 to her current address in Livery Road. However, in her EQ at Q.36 (AB/A Tab 4 p.157) she stated that she had carried on the activities on the land for 14 years.

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<sup>17</sup> AB/A Tab 4 p.151

### Use of Application Land

She entered the land from the footpath next to Bluebell Wood. She cut into the field just before the railings to the Village Hall. She did a circular route around the wood – diagonally to NW corner and back onto the blue footpath.

In her EQ (at Q.15) Mrs. Solomon said that she walked her dog on the land at least once a day. Under xx, she said that it was at least twice a day but her dog died in 2011. It was suggested to Mrs. Solomon that she had embellished and exaggerated her evidence. She denied this saying that she was busy. She went through the EQ quietly.

After she moved back in 2006, she parked by Bluebell Wood in Highfield Crescent. The circuit took about 20-25 minutes unless she met someone and had time to talk to them. She did this 2-3 times a day. If she had plenty of time, she would walk from home but the majority of the time she drove. She did an evening walk too as she felt safe there.

### Use of Application Land by Others

She met people but couldn't remember their names. A person with 3 dogs; a lady with 2 black Labradors; gentleman with Springer spaniels – Mr. Beagle. Children built wigwam in the Copse. She saw coppicing in the wood – 4 or 5 times from 2006. She saw children going through or playing in the wood. By playing, they were running around, especially when leaves had fallen as they would kick up the leaves.

### Signs and Challenges

In about 2009, she asked the owner whether she could collect wood for her then new Jet Master Fire. He was happy, she said, for her to do so. She didn't ask permission to go in the wood, as people were going into the wood. She assumed that it was a right of way. There were no signs and she collected small bundles of wood (kindling not logs as she clarified

under xx) from near where she parked her car in Highfield Crescent. Under xx, she said that she did this perhaps once or twice a week.

Nothing stopped her use. There was only a fence by the Village Hall but that didn't affect her at all. The only sign was pick up dog mess but that was not on the land. She has seen the recent signs (see OB/A Tab 11), which are very visible at both ends, she believes. On being shown photo 23B (OB/A Tab 5), Mrs. Solomon said that she remembered seeing fencing but she imagined it had been like that for some time. She didn't recall seeing any repairs there. On being shown a picture of the northern post (OB/A Tab 10 p.74), she said that she did not remember seeing it when she walked. There was nothing on it. She didn't recall the other (southern) post (p.73) either – but she didn't walk that way – she walked where the white (snow) is around the edge of the Copse.

Under xx, she said that she didn't recall anyone telling her about what the 2009 signs said. She said that she wasn't sure whether she had seen the sign. She then said she might have seen it but there was nothing on it as far as she could tell. She said that was plus the fact that people were still walking I there. Mrs. Solomon went on to say that she can assume that it said perhaps that you should not be walking on there.

### **Tim Crossland<sup>18</sup>**

Mr. Crossland made the Application on behalf of WOOD. He moved to Winterslow, to his current address in Middleton Road, with his wife and two daughters (who are now 17 and 13, having been born in 1997 and 2000) in August 2005. There some of his photos of his daughters with the application form. He was advised by the Open Spaces Society that designation would protect the land from development. The land can be seen from his property. The person they purchased it from told them that it was common land.

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<sup>18</sup> AB/A Tab 4 p. 52



### Use of the Application Land

They have used the land from when they moved in. They walk the dog there twice a day. They enter the land on the FP at the corner of Middleton Road and the Causeway (Point E shown on photo 23E at OB/A Tab 5) and walk across the field to the Copse and the dog runs about there. They went both straight across the land and diagonally across. The dog ran around – they would throw balls. The children ran about. This was around the area to the East of the Copse. He would walk the dog either after work or during the lunch break. His wife walked the dog in the morning and he did later.

The children ran around to the east and north-east of the Copse. He taught his elder daughter to ride her bicycle alongside the Copse – that was when she was 9 years of age, in 2006. They sledged on the north-west part of the land. They picked blackberries along the northern footpath and north-east corner of the Copse.

At the weekend he would go to the village shop and pub as well as stopping and doing things on the land.

### Use of the Application Land by others

Mr. Crossland referred to walking his 2 dogs on the land – the dogs ran about. He regularly saw people on the land from his house – it was, he added, normal to see people on the land – their use of the land varied – at the start and end of the school day people would walk through the land. There also people walking dogs, flying kites (see the photograph on p.63 of OB/A Tab4) and occasionally kicking a football around. In response to my question, Mr. Crossland said that he saw kite flying not frequently – 2 to 3 times a year. Under xx, Mr. Crossland was asked whether he was sure that the photo did not show snow.

Mr. Crossland said that the main activity on the land was people walking dogs – not just walking through the land but stopping and walking around. Under xx, he accepted that people walking through the land

would stick to the paths to avoid the grass. He said that when the grass was long (in June and July certainly) most people kept to the tracks. He said that the longer grass did not worry him. Mr. Crossland also said that he had said all along that the majority are traversing and are going to and from sites but I also said people are using it for recreational purposes. In re-ex, Mr. Crossland was asked how substantial the remaining recreational use on the land was. He replied that that regularly took place on the land rather than just walking through – it was primarily dog walkers like themselves and they would go into the longer grass.

Referring to the School Calendar photograph on p.54 of AB/A Tab 4), he said that the bluebells were fairly seasonal (Mr. Crossland was a Governor of the School at the time).

### Signs and Challenges

He said that nobody stopped him using the land and nothing prevented access to it. It was ploughed on 4<sup>th</sup> April 2011 and people stopped using it then. He said the fence by Highfield Crescent was there when he moved to the village – he referred to a concrete post, metal, wires.

He didn't know when the more recent "Private Property – Please Keep Off" signs had appeared. He said that he understood those to mean that he should not go onto the land – no entry. The earlier 2009 signs meant, he said, that the owner does not want a footpath put onto his land.

He was referred to the plan of the tracks (p.30 of OB/A tab 8) under xx and asked which track he thinks the landowner was referring to in his 2009 sign. Mr. Crossland said he didn't know and one would have to ask the land owner but he would say the track between B & F or E (both through I). It was then suggested to him that on his approach the owner wanted to stop that but was happy for people to wander over his land. Reference was made to Penny Fooks saying that people were puzzled by the sign and he was asked whether he had been puzzled. Mr. Crossland said he didn't know why the sign was put up. When it was said that Mrs. Fooks said that the effect of the sign was that trespassers in the field were

unwelcome, Mr. Crossland disagreed with that interpretation. When it was put to him that he was saying that the landowner was permitting this, he replied that the owner could have put a fence up.

**Elizabeth Page<sup>19</sup>**

Mrs. Page has lived in Livery Road since 1986 and before that in Middleton Road from 1976.

Use of the Application Land

During the relevant period her main use was when her son William (who was born in 1989) was at his first 3 years of school starting in 1994 – he was minded by Julia House (who also gave evidence to the Inquiry as recorded above) from 1996 to 1997 for one day a week whilst she was working. She sat with Mrs. House in the field near the Copse while her son played in the wood for 3/4 hr while Mrs. House’s daughter had a ballet class in the Village Hall. He would play with dens in the wood that others had made as he was too young then to actually make a den.

Under xx, Mrs. Page confirmed that it was only early years that she would meet up with Mrs. House on the land and pick her son. In re-ex, she said that she had been on the Village Hall Committee since 2007-2011. She said there were people on the land until it was ploughed to the same extent as before. She didn’t think the use changed (from the early years). When xx on this answer Mrs. Page accepted that she would only have a view from the table tennis room of the Village Hall and also from the car park. She said that she did see people throwing balls for dogs.

Use of the Application Land by others

People would walk across and people would exercise their dogs. It was a good space in the middle of all of the houses. It was a good place to throw

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<sup>19</sup> AB/A Tab 4 p.114

things for dogs to run after rather than just go along with a dog on a lead. This would mainly take place near the Village Hall where the land was flatter. There were people walking through – there would be a stream coming back from school. They would come from Woodland Drive along the eastern side of the Copse or diagonally across the land into the corner by the Village Hall.

### Signs and Challenges

Mrs. Page knew it was Mr. Sheppard's land but it was just used as common land. She never saw the owners on the land.

Sometimes the fence was breached by Highfield Crescent. She was not sure how long the fence had been there. It was there 5-10 years ago and in a better state but she couldn't say before that. There was fencing around the Village Hall too but not elsewhere.

### **Dr. Kay Putman<sup>20</sup>**

Dr. Putman moved to Winterslow in 1988. She lives near to the village shop on The Flood.

### Use of the Application Land

She uses the land weekly (cf. Q.15 of her EQ – AB/A Tab 4 p. 136 “several times a week”) to go to the Church or collect prescriptions from the Doctors' Surgery. She uses the diagonal path to cross the land. She enters the land from the path shown in photo p.74 (OB/A Tab 10) but not using the steps.

She used the Copse when her son (DoB 1990) was small. When he was a little older, he would go into the Copse. There were dens there but he would make his own. Her son used the land from when he was 9 years old

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<sup>20</sup> AB/A Tab 4 p.133

(1999) to 2012 when he was 12 years old perhaps but it was difficult to recall. Her use continued until the land was ploughed in 2011.

Once it was obvious that there were paths, she would take her son across the field as she is interested in flowers. What was of interest depended upon the time of the year? From May to June, most flowers were out. There were brambles in the autumn; on the hill towards the shop was where there were most. Low growing brambles were found by the diagonal footpath in the north-west part of the field. Some years it was full, others not. It was quite wet at the bottom of the field. Someone said they had seen an orchid, she had not.

They did blackberrying in the north-west corner on the northern boundary of the Copse in most years and she made jam in the autumn

#### Use of the Application Land by others

She met people on the land who she knew to be local. It was mostly dog walkers – including people playing with dogs. There were ball games and children cycling bikes. The area used would vary as people moved around.

Under xx, Dr. Putman said “certainly when snowing a lot of people would use it”. It was then put to her that there were 3 main snow events – Feb 2004; Jan/Feb 2009; and Jan 2010. Dr. Putman said that they would sometimes get a day of snow. It was further suggested in xx that snow was an exceptional event. Dr. Putman said that the first year there (1988) they had heavy snow. Then they had bad snow when her son was 3 in 1993/4; there was one snow event at Christmas 1997/8 when he was 7 (5 snow events).

Under xx, Dr Putman accepted that most people kept to the tracks when the grass was growing.

### Signs and Challenges

She assumed that they could use the land as there was nothing to say that they could not. She did remember the pile of garden waste, which varied in height. She did not recall seeing the northern post shown on p.74 of OB/A Tab 10 even though near to her access point (point 2 on 23A of OB/A tab 5). When asked in-chief whether she was still using the field at that time (Feb 2009), Dr. Putman replied “probably”. Under xx, she said that she may have been away. With regard to the southern post, Dr. Putman said that she tended not to go out at that point as she went into the Village Hall along the side of the Copse. When asked in-chief about the wording of the 2009 signs (p.5 of OB/A) she said that would suggest the path had been closed. Under xx, she agreed that if she had seen the sign it would have suggested to her that trespassers were not welcome anywhere in the field. In re-ex, she said that she thought the copse was separate from the field.

### **Barry Clark<sup>21</sup>**

Mr. Clark has lived with his 2 sons (DoB 3/11/94 & 21/04/97) in Middleton Road since February 2008. He has always had a dog apart from for a short period. When he visited before purchasing the property, he was aware of the field straight away, as his dogs need exercising everyday. Mr. Clark was the Applicant in January 2013 for the modification order to the Definitive Map and Statement.

### Use of the Application Land

He uses the land at least once a week and sometimes everyday. He enters the land from the metalled footpath behind the Village Hall and goes in to the field into the Copse. He also walks across the field going in at point 1 (having parked at Highfield Crescent) photo 23A – OB/A Tab or at 23B (there being a gap there during the time he has used the land). Under xx,

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<sup>21</sup> AB/A Tab 4 p. 41

Mr. Clark said that he mainly enters the land by the Village Hall but would have used all the entry points 1-4 at one time or another.

He varies the route for the dog walk so the dog doesn't get bored. He goes all over the field with the part bordering Middleton Road that he used the most. Other uses included playing in the snow (see photo of 4 Feb 2009 at AB/A Tab 4 p. 51B) – but that was not often – in the north-western corner. Under xx he said that his walking of the dogs was not just as part of a trip to the shop - it was not incidental to that, although he might combine the two sometimes.

Mr. Clark said, under xx, that he would often be off the tracks on the field – to recover the training aid he used for the dogs or just walking across. He also said under xx that he did not remember the grass as being 2-3 ft long. He said he would seasonally see the grass longer but not to 2-3 ft. He further said that when the grass was dense he wouldn't trample on it but the dogs would. He said also that when it was wet he would wear boots or wellingtons.

Under xx, Mr. Clark was asked about his reference to keeping his dogs under control on the Application Land given his conviction for his dog, Kasha, not being under control and biting someone in Newquay in Cornwall (see OB/A at Tab 13 p.98B). As a result, the dog was put down. In re-ex he said that had never happened before and he was very conscious of safety as he had been bitten by an Alsatian when he was in his twenties. When it had become obvious what the problem was, the dog was put down. I make it clear that I have not considered this aspect relevant to my assessment of Mr. Clark's evidence.

#### Use of the Application Land by others

Mr. Clark said that he would almost always another person or people using the field and the Copse – typically with a dog or dogs and sometimes with children. He say Mrs. Kay, Mike Taylor. He would recognise other faces but not know their names.

He said that there was not much playing when people were crossing the land on the way to school but they were more relaxed on the way back home. The main route used for that was diagonally from the south-east corner to the north-west corner by Highfield Crescent.

He said that the use was predominantly for dog walking but there were some other activities – people playing with children in the field and the copse. He considered the copse and the field all one of the same area. There were several exits from the Copse – including the end nearest Highfield Crescent. The Copse had hazel; there were hide outs but he was not sure whether his own sons made any of these.

When I asked Mr. Clark about the split of use between the field and the copse, he said in more relaxed time there would be as many in the field as in the wood – you would often see youngsters in the field who might have been in the copse.

### Signs and Challenges

No permission was ever given and no one ever approached him to say that he shouldn't be on the land. He didn't see any signs until those that said "Private Property" (see p.76 of OB/A Tab 11). When asked in-chief what he would have thought if he has seen the wording on the 2009 signs (OB/A p.5) he said that he would have understood it as the landowner not wanting it to be used as a route. He said that he thought it might relate to quad bikes given the noise they make – if it becomes an unrestricted byway it can be used for all sorts of mechanized vehicles which chew up the ground and cause noise problems. However, he accepted (in answer to my question) that there had been no problem with quad bikes.

Mr. Clark was taken in xx to the photos on pp.73 and 71 of OB/A Tabs 9 & 10. He confirmed that he never saw the posts which were it was said up for 2 weeks in Feb 2009. "X marked the spot" (as Mr. Webster put it) on the photo on p.71 where Mr. Clark would walk closest to the post at the southern end of the field but he said that it was not his view point and that it was difficult to prove a negative. He was also taken to the



photographs (on p.75 of OB/A Tab 10) of the waste with post 2 (the northern post) and said that his mental picture would have been green waste. It was further suggested to him that the posts were prominent and unusual but he had said that he was not looking at it like a policeman on patrol. In re-ex (referred to photo at p. 74 of OB/A Tab 10), he said that he entered the field via the steps at that point and photo 2 (p.73) shows the sign is not visible to all in the field.

#### **4. CASE FOR THE OBJECTORS**

4.1 As indicated above (in Section 2), two Objections and three representations regarding the Application were received by the RA:

- (1) Undated petition from residents of Highfield Crescent
- (2) Letter with enclosures from Mrs. P Sheppard dated 14 January 2013.
- (3) Letter with enclosures from Mr. R Sheppard dated 27 April 2013
- (4) Letter with enclosures from Mr. R Sheppard dated 30 April 2013
- (5) "Objector's response" from Mr. and Mrs. Sheppard dated 27 February 2013.<sup>22</sup>

4.2 From the Objectors' Response on behalf of Mr. and Mrs. Sheppard<sup>23</sup>, I summarise the key points of objection as follows:

##### Right of Way and not LSP

- (1) The Objector's "primary contention" is that the Application Land is being used as a short cut from one side of the village to the other and that such user will not be referable to use as a green.<sup>24</sup>
- (2) The Application Land has been used extensively as a short cut (avoiding Middleton Road – which has no pavements) from one side of the village to the other. The locations of the Village Hall, the

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<sup>22</sup> AB B at Tab 14

<sup>23</sup> AB B at Tab 14 p.1.

<sup>24</sup> AB B at Tab 15 p.10 at (d).

Doctor's surgery, the two pubs (the Lord Nelson and the Lion's Head), two places of worship close to the Lion's Head and the village shop should in particular be noted.<sup>25</sup>

- (3) However, in 1998 and 2008 statements, maps and statutory declarations were deposited under section 31(6) of the Highways Act 1980. The effect of this was to preclude within the periods mentioned in the section the existence of public rights of way over their land other than those currently noted in the Definitive Map and Statement ("DMS").
- (4) Further, on 20 January 2012 those applying to register the land as a TVG applied under section 53 of the Wildlife and Countryside Act 1981 to the County for an order modifying the DMS to record a number of new footpaths crossing the Application Land.
- (5) The village has other open spaces.
- (6) Brown's Copse at around 7 acres (2.83 hectares) is not physically part of the land, although it is included in the Application Land. The public's use of this wood is negligible.
- (7) On the advice of the Council in around February 2009, the Objectors erected two signs notifying that there was no public right of way across the land. The signs stated:

**WILTSHIRE**  
**COUNTY COUNCIL**  
**NO PUBLIC**  
**RIGHT OF WAY**  
**THANK YOU**

These signs could not fail to be seen by those walking across the Land. Unfortunately, the signs were forcibly removed within days and were found lying some distance away from their original locations. The posts were re-erected on 2 occasions.

- (8) On 4<sup>th</sup> April 2011 the Objectors ploughed the Application Land in order to make it more difficult for locals to trespass on the land – the ploughing was deliberately rough and only the most determined of walkers could use the field. The field was ploughed

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<sup>25</sup> See Objectors' annotated aerial photograph at AB Tab 15 p.27.

again on 23 January 2012. On 16 April 2012, it was sown with linseed.

- (9) The Farm has been arable since the war and the last crop of wheat was in 1988 when the Application Land was placed in the set aside scheme. It was in that scheme until ploughed in 2011 and sown with linseed in 2012, as noted above.
- (10) The character of the land bears little or no resemblance to the ordinary perception of what one might consider to be a typical TVG and local inhabitants would be under no illusion of this.
- (11) The RA should consider the correspondence including the Residents' Petition which refers to the Land being used by certain people as a dumping ground for their rubbish, dog walking area and as a short cut even though the area is adequately served by footpaths.
- (12) At the Parish Council meeting on 4 April 2013 5 individuals (including 2 Parish Councillors) said that they saw the "no right of way" signs in place in 2009 and the comment by Councillor Devine that because of the signage "his officers" would not be supporting the Application.
- (13) With regard to the statutory criteria, the Objectors contend:
  - (i) There has been no sufficient user by local residents. It would not have brought the existence of the claimed right to the attention of the landowner – a number of villagers have even written to the RA challenging the user relied upon by the Applicant.
  - (ii) In an event, the overwhelming majority of the users were purportedly only exercising public rights of way on tracks crossing the Application Land as shown on the aerial photographs and the application to modify the DMS.

User not been "as of right"

- (14) Use following access obtained through the fencing on the boundary with Highfield Crescent is non-qualifying as it is user by force. It is irrelevant that those taking advantage of the damaged fencing were not themselves responsible for causing the damage.
- (15) The user by force exclusion also applies where the use has been made contentious by the landowner erecting prohibitory signs or notices. This is the case with the signs erected in 2009, referred to above. Any notices must be sufficient to make clear that any use of the land was not consented to and would be regarded as a trespass – see *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250. The facts are readily distinguishable from *R (Oxfordshire & Buckinghamshire Mental Health Foundation Trust and Oxford Radcliffe Hospitals NHS Trusts) v Oxfordshire County Council and others* [2010] EWHC 530 (EWHC) (the Warneford Meadows case) In that case there had been a finding that the landowner had no objection to general public recreational access to that land as a whole – his objection was to the creation of public rights of way. The Objectors refer in particular to paragraphs [17]-[57] of the Judgment in that case.
- (16) On no sensible analysis of the facts, could the signs be said to be directed solely to the paths nearby and there is no reason why they could not be taken objectively to refer to recreational use of the whole of the Application Land, where the whole of the Land is affected by the section 31(6) deposits anyway. The notices only make sense if they refer to the Land as a whole and the fact that they were damaged by, it must be assumed, certain local inhabitants is very arguably indicative of the fact that such persons considered such signs to relate to more than just rights of way on the paths. The land owners ought to have appreciated from the

notices that the landowners were objecting to and contesting their whole use of the Application Land.

- (17) The Objectors reserve the right to argue that any objection on their part to a lesser burden on the land must have by implication and without more included objection to the greater burden notwithstanding what was said about this at [55] in the *Warneford Meadows* case.
- (18) The Objectors also argue that the claimed user gave rise to an implied licence.

4.3 The evidence provide by the Objectors to the Inquiry (found in Objectors' Bundle A – OB/A) included:

- (1) Plan showing existing public rights of way, informal tracks, housing policy area in relation to the Application Land: OB/A Tab 3. The wider rights of way in the Parish are shown on the plan at OB/A Tab 4.
- (2) Aerial and ground photographs of the Application Land: OB-A Tab 5 pp.21-23. Photograph showing local amenities: OB/A Tab6 p.24.
- (3) Section 31(6) Declarations: OB/A Tab7
- (4) Application by Barry Clark for a Modification Order under section 53 of the Wildlife and Countryside Act 1981
- (5) Aerial photograph showing the position of the two posts and the 4 signs erected by the Objectors: OB/A Tab 9 p.71
- (6) Photographs of the posts: OB/A Tab10 pp.73-75.
- (7) Photographs of the 4 signs: OB/A Tab 11 pp.76-80
- (8) Minutes of meetings of Winterslow PC: OB/A Tab 12
- (9) Statements of Objectors' witnesses attending the Inquiry: OB/A Tab 13
- (10) Statements and letters from witnesses not attending the Inquiry: OB/A Tab 14.

4.4 The Objector called the following witnesses:

John Fry  
Rosemary Hazard  
Steven Dixon  
Sally Loader  
Clive Broadly  
Michael Yates  
Janet Fry  
Angela Sillence  
David Read  
Richard Sheppard  
Patricia Sheppard

I now summarise the main points from the evidence of these witnesses.  
As for the Applicant's witnesses, I use the following abbreviations:

EQ: Evidence Questionnaire  
In-chief: Evidence given in-chief  
XX: Cross-examination by the opposing advocate  
Re-ex: Re-examination by the witness' advocate

### **John Fry<sup>26</sup>**

Mr. Fry of Nestyn, Middleton is a retired builder and funeral director who was borne in West Winterslow. He owned the Lion's Head Public from 1991-2007 (but only lived there to 1994). As a teenager, he lived with his parents at his current address. He said there was a butcher's shop on the corner of Middleton Road and the Causeway until about 1995. Under xx, it was suggested to him that none of the addresses that he had lived at (having been in the village all of his life) overlooked the Application Land. Mr. Fry agreed that was so during the relevant period. Mr. Fry stated that he was against the taking of people's land.

### Knowledge of the Application Land

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<sup>26</sup> OB/A Tab 13 p.100/101

He was very familiar with the field, he said. He was involved in development. He moved the post office 2004/5 from Middleton Road (near to Stern Close). He did all the maintenance for the Parish Council and the Church.

Mr. Fry said that there was always a fence across the field at Highfield Crescent. The Village hall was completed in 1991. Sometimes he would walk across the field – under xx, he accepted that although he knew it was private land he saw others doing it. He said that use (by him) was not very frequent. He was aware that he was trespassing as was everyone else in the village. From Middleton Road he would walk up to Woodlands Drive. Referring to the aerial photograph at OB/A Tab 5 p.23, Mr. Fry said that the land was wet in the winter; there was a watercourse that went straight through the middle to the Village Hall – there was often a watercourse on the other routes which was like a rive and unable to walk them. So, he would normally use the diagonal route, as that was the driest. Now and again he would take his dog to the land.

Under xx, he said that the land had always been known as private property. He didn't particularly find using it was a short cut and it was easier in the dark to use the path. He said that his most common route was along Middleton Road to the pub in the car. It was suggested to him that the view from Middleton Road was not good, given the thick hedgerow. He said that he also walked down the school path behind (to the west of) the copse. He said he had glimpses of the field but he didn't pay particular attention. He said there might have been one or two people on the land. When asked whether it could have been more, Mr. Fry replied "No". He did see children playing in copse but not on the field. There were ropes up in the trees in the Copse for years but no one ever trusted them – they have not been used for years. He said at least 2 were put up. He said that he walked alongside the copse but didn't go in unless it was dry.

With regard to the Village Hall which he locked up that closes at 10 pm at the latest, when there is no dance. It often closes earlier – sometimes at 5 or 6pm (on 2 nights) or 8pm (on 2 nights).

Under xx, he clarified that he walked the dog more now as he had more time. Up until 2011, he did not do so very often – probably only once a week. He would only go onto the field in 1 in 20 walks, as he knew he was trespassing and it was wet.

Mr. Fry referred (in-chief) to a 1990s' meeting, saying that he was one of the few that stood up for Mr. Sheppard when there was a planning application for 25 houses in the bottom right hand corner of the field by the telephone box. Mr. Fry said that he spoke up not for the housing but it was common knowledge that this is a development village. That was decided in the 1950s. Highfield Crescent Council Housing was built in the 1950s. Mr. Fry again emphasized that everyone knew that it was private property. He said that 2/3 of the village trade was in his pub for drink and food and everyone knew.

When the land was set aside, Mr. Fry said, the grass was wispy but grew to about 2-3ft high. It was not for hay/silage. He said the paths were always there, although he was not sure when photo on p. 71 (OB/A Tab 9) was taken. – he was told that it was about 2007. He said that he was building a garage at that time to the west of the copse and he had to remove footings. He asked Mr. Sheppard if he could he go across his field with his dumper truck to the Village Hall. So, he went into Yarnley Road then into Highfield Close, through the gap in the fence (see photo 23B in OB/A Ta5) – down the field along the front of the copse then through the gap behind the Village Hall.

The wood was coppiced regularly. Different parts were done but there was something (in terms of coppicing) going on in most years. It was complete about every 10 years.

#### Use of the Application Land by others

Before 2007-2011 it was basically a dog toilet used by very few people. Some people used it all the time; it was used regularly by very few people. Others would walk across it with their dogs.



Under xx, Mr. Fry accepted that people walked across the land on the paths. He said that all he was disputing was that they knew that they were trespassing.

Mr. Fry said, under xx, that if the dogs got to the fields they used it as a toilet and most did it in the Village Hall. It was suggested to him that people were using the land for dog walking and most people would park in the Village Hall car park to do so. Mr. Fry replied "Yes – to let them go to the toilet." When it was put to him that there was nothing wrong with that, Mr. Fry said that they were driving to the Village Hall, letting the dog out and back into the car and off they would go.

Mr. Fry was asked about the dog bin on the edge of the field by the Village Hall. He said that had been pulled out of concrete. It was put there because of dog mess up the path.

Mr. Fry agreed, under xx, that he had seen children playing on the fields. He said some had probably been on the bikes. He said that he had seen them a couple of times over 20 years. It was put to him that this was despite only walking his dog on the field 1 in 20 times (not going very often) and that it was reasonable to assume that at other times there would have been bikes.

It was put to Mr. Fry that even though the land was private it was still used by people knowing that Mr. Sheppard tolerated it. Mr. Fry said that Mr. Sheppard was too nice a person and he (Mr. Fry) would say to him that he should get some pigs to stop people using the land. He was too nice a person to approach people to stop them.

Mr. Fry said that was only one informal path initially, in 1991.

### Signs and Fences

Mr. Fry said that around the area there were plenty of signs all over. He was referred to the photographs showing the 2009 posts at pp. 71-74 of OB/A Tabs 10 & 11. He said that he saw the posts. When asked in-chief whether he looked at the sign he replied "Not particularly. I didn't need

to. It was obvious what it said – Keep Out or Private Property. I knew that.” He said further that the posts were prominent but the Notice was not. He didn’t bother to read it or, if he did, he couldn’t remember what it said. He said that you couldn’t miss the post. Mr. Fry also said that these were not the first signs and that there were always signs. They were always torn up, he said, after a short time. However, when referred to the picture of the 2009 post in the waste heap Mr. Fry said that he did not know anything about that but could remember seeing it in the rubbish.

He was asked about the larger more recent “Private Property” signs (see p.76 of OB/A Tab 11) and said that there had been concern about the wording on the bottom, which referred to chemicals having been applied to the land, so that part was obliterated.

He accepted that there were no fences save for the one by Highlands Crescent.

Under xx, it was suggested that he had said that he had seen both posts even though he only went on the land rarely and the signs were only there weeks. When asked about what he thought the 2009 signs said, he confirmed that he thought they said Keep Out/Private Property. He said that he was sure that he saw the posts and that he also saw the signs in the rubbish.

When asked in xx about the other signs that he had seen, Mr. Fry said that was after 1991. It was put to Mr. Fry that Mr. and Mrs. Sheppard do not say they put up any signs other than the 2009 ones and the later Private Property signs. Mr. Fry reiterated that there had been several signs over the years. He said that there had always been a lot of talk about development on this land. He said there were White signs saying Private Keep Out in the woods and on the land. He said that a man who had 3 Dulux dogs and who had lived next to the track near the steps. He said the signs were pulled up within a matter of days – he didn’t know how long they were up. Kids came into the pub, Mr. Fry said, and laughed about it. It was then put to Mr. Fr that the recent Private Property signs were still there and he replied that they were certainly a lot better than before.

### **Rosemary Hazard<sup>27</sup>**

Mrs. Hazard lives at Highfield Crescent – 4 houses up from the location of OB/A Tab 5 p.108. She worked part-time from 2000 as a caretaker for the PC.

#### Knowledge of the Application Land

With regard to the fencing near her home, there has always been fencing – sometimes it was filled and sometimes broken. The rest of the fence was sometimes broken but repaired by residents. Mrs. Hazard said that she walked through the gap in the fence in 1987 but she couldn't be sure whether wire up or down. She couldn't remember from when the fence was permanently open but it was a long time ago, say 10 years. She said that in 2004 there probably was a fence and before then it had been in place – probably after when Mr. Fry went through with his dumper truck. There is a fence now but you can't walk through because of brambles. She said that it was probably when the field was set aside and people went through. She said that she imagined that people forced their way through. She said it was in tact in 1988.

Under xx, Mrs. Hazard said she couldn't remember whether there were two strands in 1987 when she climbed through. She reiterated that she thought the gap was open from when the land was set aside as people were coming and going in and out, including the walking bus.

Mrs. Hazard said that she used the land to walk her two dogs after 1991. She entered through the gap, when she worked at the Central Stores, and walked straight across the land. Under xx, she said that she worked there for 36 years (from 9-12, 1-5 for 4 days a week; she looked after her grandson on Fridays). She walked down the side of the copse and back up on the tarmac path (to the west of the copse). When the field went back into cultivation, she went down the school path and into another scrubby

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<sup>27</sup> OB/A Tab 14 p.108

field. She never saw anyone cutting the fence (and was working until 2008). It was put to Mrs. Hazard in xx that the fencing was to fence off the Estate and not the field. Under xx also, Mrs. Hazard said that she wouldn't go through the Copse – she would however go in from the school path onto the land and other people went into the wood too. She said that some come from other areas to see the blue bells. She said that you get a nice view from the path; she said at the top end was beech trees – and oak, holly, ash and some hazel. She said that it was very pretty and people go in and enjoy the clearings. There was other wildlife, she agreed, such as celandines, anemones and primroses and also wild raspberries and crab apples. She said there always rope in the woods but she said not a swing – she said it is not very often that it has sticks at the end. She said that more often than not the “bigger kids” (teenagers) throw the rope back up into the tree. Teenagers and younger children would use the swings. She said that she didn't see people picking blackberries but they obviously would – it is clear that people are picking these (in dog pooh corner).

She was referred in her xx to her statement where she states that the land has not been used for sports and pastimes. She accepted that people walk dogs; she never saw any kite flying or blackberry picking, as said above. It was not a very big area – corner piece. She said that she only sees children playing in the field on her day off. She added that right opposite the School is a playground with a roundabout, swings – hundreds use that and fly kites. You wouldn't do that in a field when you don't know what was in there, she said. It was then put to Mrs. Hazard that she would have been at work.

Under xx, Mrs. Hazard said that she walked the dog in the morning. She said that she was using it on a daily basis until 2011. She would have used it on occasions (but not often) to go to the P.O. and the Doctor's Surgery.

### Use of the Application Land

Mrs. Hazard was referred to the tracks on photo 23 (OB/A Tab 5 p.23) and was asked whether that was the way people walked. She answered "that is where people came in".

Under xx, she confirmed that in one year local authority contractors came in from the bottom and did a wide, smooth diagonal path and up to Woodland Drive and Highland Crescent and did a swathe on the scrubby fields off the school path.

She agreed that there were lots of dog walkers. She said that they parked at the Village Hall and the dogs went off through gate into the field and always did "a quick job". There were 4 on a daily basis. They came specially to the land with their dogs. She said the grass could be long but others went through it, although she didn't because of the burrs and you didn't know what you were walking through. She also referred to the dip in the land along Middleton road – she it was quite a dip that got very wet. She said in the morning there were more people on the land as they would walk through the field on the way to school. Not everyone was with children so not all people were going to school. She accepted that some were just walking a dog on the field. In re-ex, Mrs. Hazard said people walking their dogs were mainly going up the middle of the field and possibly through the Crescent as nearest to the school – people were mainly using the tracks.

When asked whether there were lots of paths, she said that she didn't recall as many as shown the plan at AB/A Tab 8 p.40A.

### Signs

Mrs. Hazard recalled the post 1 at the bottom of the field (See p.73 bottom photo) but not the other post. She said that she didn't read the sign when it was in the ground but did when it was thrown into the bracken. When she was asked what she understood the sign to mean, Mrs. Hazard said "the same as everybody else" - no trespassers on this land. She knew that the Sheppards' own the land – friends –she has known him since they

were teenagers. She was asked whether she had seen the top post but she said that she didn't see it. She was also asked why she didn't read the wording on the other post whilst it was standing – she said that it was out of her way. It was suggested to her that it might be because of the small lettering. In re-ex, Mrs. Hazard said that that she thought that she was likely to see the post at the top end of the field, as it was a quite tall round post.

Under xx Mrs. hazard said that she did recall the post in the field for 3 days – it was put up and then disappeared. She could remember how long the post was up for the second time it is still where it is lying now. She said that she thought that the signs related to the whole area. The village, she said, is very likely to love that wood and I had been Richard I would have fenced it off. It was then put to her that he didn't fence it off and tolerated the use of it. Mrs. Hazard responded that he was a good man, a Christian and a gentleman. Then it was put to her that he did tolerate people playing on the ropes in the woods and Mrs. Hazard said "yes".

### **Steven Dixon<sup>28</sup>**

Mr. Dixon has lived in Winterslow all of his life, since 1962. He now lives in Livery Road and has done since 1991. He had been told by Mr. Sheppard that he had put signs up before (before the recent "Private Property" signs) but that they didn't last long.

### Knowledge of the Application Land

Mr. Dixon can't see the Application Land from his property. He passes the land most days. He had worked just past the Old Post Office a couple of times – 4 to 5 years ago – in say 2010. He had two jobs lasting one week in total. He parked in his drive. He could see into the field (see photo 23H in OB/A Tab 5).

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<sup>28</sup> OB/A Tab 13 p.103

He had topped Mr. Sheppard's field at their house every now and then and put a fence back up in the summer. He said that he would do it as Mr. Sheppard is such an honest and straight man.

#### Use of the Application Land

He only ever sees dog walkers on the field – they walk all over the place like the tracks that they had.

#### **Sally Loader<sup>29</sup>**

Mrs. Loader has lived at her current address in Highfield Crescent since 1989. Her house is directly opposite Mr. Crossland (on Middleton Road on the other side of the field), half-way between points 1 and 2 (photo on p.23A of OB/A Tab 5). She has been in the village since 1965. Her mother had lived in the village since then too. She walked to hers on the diagonal path from the Crescent – she wouldn't have gone through the fence.

#### Knowledge of the Application Land

She has a view from her kitchen window out onto the field and also views from front bedroom, landing and the front door. She was aware that it was agricultural land owned by Mr. Sheppard. Under xx, she acknowledged the conifer tree in front of her kitchen window and accepted that it was green all year round. She said that she can see either side of it and that it covers the middle third of the window. She said that she doesn't think that it was there 20 years ago but has been there for the last 10 years possibly. Under xx, also she said that she couldn't see what was happening in the Copse from her home.

The field had been in arable use when she lived in Hibernus in Middleton Road, which is close directly to what is now Woodland Drive, but was then just scrubland. She does not own a dog. Once a year she has walked her son's unsocial dogs as there is a fast route away. She was aware of

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<sup>29</sup> OB/A Tab 14 p.120

Mandy who had been referred to. She parked in the Village Hall and waked across the middle of the field at lunchtimes as she only had a lunch hour so it was not a long drawn out walk. She has also used the land as a shortcut going from the gap at 23B by the grit bin down to the gateway just below the telephone box in the other corner.

In the summer, the grass grew to at least 2-3ft. high.

Since 4 August 2014, she has worked at the Central Store in the village. In Feb 2009, she was working in Salisbury in a residential home for people with cerebral palsy. She left home at 6.30 am. One day she would leave at 2pm and get back at 10pm. She did alternate weekends. August 2008-Feb 2009, she was home. From March 1996 to August 2008 she had worked for Friends Provident in Salisbury; 7am to 3pm and home by 3.30pm. She had bank holidays and every weekend off. Before 1996 she worked for Cadburys for approximately 2 years and would leave home at 8.30am and be back home by 5pm generally for 4 days a week.

#### Use of the Application Land

She said her children were 10 and 8 years old when they moved into Highfield Crescent and would have been more likely to have been in the recreation ground, which now has a skateboard track. She said, in answer to my question, that in 1989/91 the recreation ground in the village had a roundabout and not much else and no skateboard track then but was flat and grassed and more suitable for cycling.

She was asked, under xx, about her statement that the land was never used for sports and pastimes. Mrs. Loader said that she didn't know what is included in lawful sports and pastimes. She said that the most consistent use of the land is for dog walking because you don't have to pick up the mess. She walked her son's dogs but she wouldn't come across small children but did frequently see other dogs. People both with dogs on and off the lead would stick to the paths, she said. She did see people throwing toys (fairly in frequently) for the dogs and by and large the dogs would retrieve those objects.



She said that it is the bottom by the doctor's surgery and Village Hall where the children played – it was flatter there and easier to use.

She said that she used the copse fairly infrequently but she would have looked at the bluebells. She had seen a rope swing in the wood – near the bottom end, which is the flattest part but she had not seen children playing in the copse. More recently she had walked with her grandchildren in the copse but had not seen anyone else.

There were blackberries along the northern edge of the copse but not on the eastern side and she was not aware of sloes on the field.

### Signs and Fencing

She didn't recall the state of the fencing at 23B in 1989. She started crossing the field probably from 1989 onwards. She said that she wouldn't have gone through the fence as she had a perfectly good footpath. What broke it was the number of people going under it.

There have been signs. They were never of any importance to her as she didn't think that she had any right to be in that field. She didn't remember reading post 1 on p.73 (OB/A Tab 10) and she suspects that she would not have done so. She would probably have read the post (photo 4) at northern end off Woodland Drive but it wouldn't have given her any surprises. She said that she assumed that it was saying something to the effect not a right of way. There is a difference, Mrs. Loader said, between no RoW and you will be prosecuted if trespassing. I suppose, she added, that it was just an acknowledgement that not a RoW and the public not supposed to be on the land. Under xx, she accepted that there is a difference between a sign that said no RoW and one that said no trespassing and since the latest set of signs she had not set a foot on the land. She would not have claimed a RoW, as she has always known the land as agricultural land belonging to a farmer. She accepted that the 2009 signs wouldn't have meant to her that the owner would not tolerate dog walking as had been tolerated before; and she didn't think the signs meant that people couldn't go into the copse and look at the bluebells. So

she and others continued to use the land as before until the Red Signs (2012 – Private Property) went up and by and large the usage has stopped.

**Clive Broadley<sup>30</sup>**

Mr. Broadley moved to the village in 1976 and lived there ever since, having originally lived just off The Flood in Middleton Road. His current address is in Youngs Paddock and he can't see the land from there. He said in his written statement that he had only heard the Application Land referred to as Richard Sheppard's Field and the woodland area as Brown's Copse or the Bluebell Wood or just the Copse.

Knowledge of the Application Land

He walked his dog in the field but, he said earlier in his evidence, not frequently (but see below). He had crossed the land on route to the shop or going to the recreation ground to play.

He said that they took their children to watch the land being harvested. He uses the land roughly monthly but he would have sight of the bottom end of the land because of the route he took. He also said that he used the land reasonably frequently primarily as a short cut. He used it as a shortcut going between the two posts put up in 2009.

Use of the Application Land

When asked under xx whether people used the land straight away after it was set aside, Mr. Broadly said that he could not remember. He did see others walking their dogs on the land when he went there. He walked his dog in the evenings and occasionally at the weekend but not normally. He did see people throwing balls and toys etc for their dogs. He said that there was not necessarily someone there evening times walking their

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<sup>30</sup> OB/A Tab 13 p.105

dogs. He didn't see those that park in the Village Hall and walk there dogs but they do now.

He would see children sometimes crossing the land to the wood but not playing football. He would see them occasionally (but not in an organised sense) fooling around in the field but they do that in many other fields in the village. When asked how frequent children tobogganing was, he said that he didn't know but he would have thought that was pretty rare. He said that it was a farming community.

He has only seen one rope in the Cope and that was periodically thrown up into the trees. At one point Mr. Broadley said that the rope swings were there more recently – in the last couple of years. Mr. Broadley said that he had seen them on one particular beech tree off the path. He said that there were now more pathways. He had seen dens in the wood but never seen children playing in them.

He said that it was different now as it used to be extensively coppiced. He said (under xx) that the coppicing of the wood had stopped in the last 4 years or maybe slightly earlier than that. In re-ex, he said that the coppicing opened up the woods.

He also said that the use has been broadly the same over the 20 years and that was pretty much confined to dog walking.

### Signs and Fences

Mr. Broadley said that Mr. Sheppard maintained (cut) the hedgerows and boundaries – the fence down the side of Middleton Road was badly dilapidated. He didn't personally see Mr. Sheppard putting up fencing. There are fence posts in Woodland Drive along the footpath. The fence had pretty much fallen into disrepair by 1988 – there were remnants – he never saw repairs from 1988 onwards, not that he could recall.

He saw the two 2009 posts when he was short-cutting across the land (as referred to above). He remembers the words “No Public Right of Way”. When put to him in xx, he said that he personally does not distinguish

between trespass and No PROW. He said, when asked again under xx, that after he saw those signs he did not continue to use the land but others did, he said. He was asked whether he had heard Mrs. Loader's evidence that people continued to use the land and her interpretation, Mr. Broadley said that was not his interpretation of the signs. He accepted that the 2012 Red signs were "certainly clearer – larger" – it was put to him that there were 4 such signs with larger, longer wording. Mr. Broadley said that the "No PROW" signs were clear too. When asked how long the posts were in situ, he said that he couldn't remember but he remembered them disappearing.

Mr. Broadley said that his own interpretation was that the 2009 signs applied to the field

Mr. Broadley accepted that it was toleration by the owner of people using the land uninvited.

### **Michael Yates<sup>31</sup>**

Mr. Yates was born in the village in 1947 and used to live in the Red Lion Public House. He currently resides with his wife in Highfield Crescent. Most of the time, he said, he was at work. When it was put to Mr. Yates, in xx, that the statement was his and his wife's, Mr. Yates said that was so and he told his wife what to put down – she would go to Woodland Drive to cut a lady's hair.

### Knowledge of the Application Land

He could see about  $\frac{3}{4}$  of the field from his home in Highfield Crescent. There were no trees in his view.

The Council cut the grass in Highfield Crescent 6-7 times a year.

His parents live nearby and he has walked over the land maybe 6 times. He said that he normally drives because he is lazy.

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<sup>31</sup> OB/A Tab 13 p. 102

When pressed on how long this went on for, Mr. Yates said he couldn't remember walking there that many times. It was put to Mr. Yates that he said that he was not there for more than a couple of minutes. He explained that he had worked (until made redundant in 2008/9) at Porton Down on its maintenance and he left the house at 6.30 am and home by 16.45 Monday to Friday. He didn't work very often on Saturdays other than for about an hour – so basically he saw the land at the weekend. He said that there has always been one main path through the Copse. He has seen rope swings in the Copse but no one was playing on them at the time. The kids have got to go somewhere in the summer holidays.

#### Use of the Application Land

In his letter, he stated that during the 20 years 1991-2011 the land has never been used for organized activities or pastimes. He also said in that letter that the land got used as a short cut for many people, when it was set aside. Most people that walked across the field were not born and bred in the village. Also most were dog walkers too lazy to pick up their dog mess.

He saw no one playing – no children. He saw people going straight down fields on bikes – but couldn't see the bottom. He has seen kids coming to and from the Copse with mattresses for their dens. He has been there several times. When Mr. Sheppard's father was about, he would just clip them on the ear; that is what it was like then, Mr. Yates added.

People walked dogs on there too. There were loads of dog walkers, Mr. Yates said (under xx – and clarified in answer to my question that was at weekends), but he never saw anyone throwing objects for them. Some people used to park in the Crescent to walk their dogs, notwithstanding the signs. He caught a couple of lads during the summer holidays with a bonfire, which he reported to the Council. He had noticed recently dog walking early in the morning (7am) and in the evening. There used to be a chain link fence, which was cut. Mr. Yates said that he could hear children

in the Copse but not on the field. They mainly play in the Copse in the summer time (when the mattresses were taken there) and he had never seen much outside that time. In the winter it would be wet and muddy.

He had seen blackberrying in the corner (the right hand side from where he lives). There are good years and bad years for this.

### Signs and Fences

Mr. Yates said that the field had a fence all the way along near Highfield Crescent in 1988 – used to be a fence on the north side of Daddy King’s Path. After then, it was cut by someone, but he didn’t know whom. Under xx, it was suggested to Mr. Yates that the fence at the top of Highfield Crescent, which was put in by the Council, was to stop people walking into the Crescent. He replied that it was also to stop people walking onto the field. It was then put to him that it was about keeping the Crescent tidy rather than keeping people off the field and he agreed. He agreed that he took pride in his garden.

The District Council used to come across the Common. They gang mowed the land about a year or a year and a half after the field was set aside. He wasn’t sure how soon this happened after the land was set aside but it may have been 1 year or 1 year and a bit. The gap in the fence was restored but within a few weeks it was torn down. They put a wooden post in. Looking at photo 23B he said that he had repaired it once himself with wire. He said that he had also repaired the fence outside his own property (which is about 100 yards from that gap) several times and still did.

He said that he had seen a sign by Woodland Drive (photo 4 on p.74 at OB/A Tab 10) but couldn’t remember one by the Village Hall. He said that it was not there for long and he didn’t read it. He said it doesn’t look as though there is anything on that post. When shown the photographs on p.75 of OB/A, he said that it looks like the same post. He had heard about what the signs say from other people. Several people talked to him about the posts. When asked (in-chief) what was common knowledge about the

posts, Mr. Yates said that he had no idea – it was just private land – people already knew that it was private land, he replied. Mr. Yates said, under xx, he took no notice of the signs on the posts, he knew that it was private property. It was only when the bigger ones went up that he took notice. When it was suggested to him that the Sheppards were allowing people to use the land (they were tolerating the use), Mr. Yates said “Yes, they are good people. I don’t know who took that decision.” He said that he rarely saw them, just now and again walking down the back path – “I couldn’t tell what he was thinking”, Mr. Yates added.

Under xx he said that there were little bits of rubbish when the post was there. He said that he still sees the post, although there were bits of waste – bottles etc. When it was suggested that perhaps his recollection was not that strong, Mr. Yates said that he can only remember seeing it maybe once. He reiterated that he did not see the post at the bottom of the field – he said the bottom ½ of the field he couldn’t – he couldn’t see the Village Hall.

He said that he knew the land belonged to Richard (Sheppard) and, if he had told him to stay away, Mr. Yates would have done so – “as simple as that”. When asked whether his impression was that they were tolerating the use, Mr. Yates said that people were still walking across the land. He never used the land once the 2012 Red Lettered signs went up – before that he said that he used the land about ½ dozen times a year.

### **Janet Fry<sup>32</sup>**

Janet Fry lives were her husband, who also gave evidence as recorded above, in Middleton Road. She has lived in Winterslow continuously since 1978. It should be noted that Mrs. Fry commented on the new photographs from the Applicant (63B-63F), which were withdrawn and are not now relied upon, so I do not record that part of her evidence. She

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<sup>32</sup> OB/A Tab 14 p.118

looked after the Village Hall for 2 years from 2007-09/10 and spent a lot of time there.

#### Knowledge of the Application Land

She is a dog owner and has walked around the land for the last 50 years. As she also says in her statement, since the land was set aside in about 1991 people have walked across it as trespassers and she has not witnessed any games or organised activities on the land.

She visited her parents in Highfield Crescent every day. She parked there (to take them out) on a fortnightly basis. She also drove for LINK, so went past that entrance regularly.

#### Use of the Application Land

She had never seen people throw toys for the dogs on the land. She said that she had walked across the land twice or three times but not with the dog. She went to open the Village Hall at 7.45 am and saw people letting their dogs out in the morning. They were only on the land for 10 minutes. 2 of those were regular in the main. Mrs. Fry said that you would see people in Highfield Crescent parking – only one car or person walked her dog religiously there.

She accepted that people were doing it on a daily basis and that Mr. Sheppard tolerated this but he was not very happy about it, she said, as they had had conversations about it.

She said that she had been into the Copse – she looked to see where the swings were and she saw one blue rope wrapped around a beech tree. She said that she hadn't seen swings in the past. She said that, if she walked through the Copse, she had gone through the main path. With the grandchildren, she went on the School path. She has not seen children playing in the Copse but she had heard them. She has seen the bluebells (out for 6 weeks). There was a different way in those days. When asked about dens in the wood, Mrs. Fry said that she had seen lots of rubbish – corrugated metal, pieces of wood. She didn't recall dens as Mr. Yates had



referred to. She would go into the Copse about every 10 days and walked the area probably 3 times a week.

She had seen sloe picking on the edge of Highfield Crescent over towards the north side of the Copse – they were white in the Spring. You could see this from the Highfield houses.

Under xx, Mrs. Fry said that people would have used the School path to go to school and, when it was put to her that lots of people had described going back and forth along the diagonal path, Mrs. Fry said that she would not describe it as lots. She said that no body would see anyone cross that field on a daily basis. She said 20 or 30 dog walkers a day (as was put to her in xx) was too high.

### Signs and Fences

She said that she would not have come across the post at the Village Hall end. She knew the top area very well. Her parents lived at 8 Highlands Crescent until her father died in 1994. When she had lived in the Causeway she would use Daddy King's Path. When shown photo 23B (showing the gap in the fence) she said that she knew exactly where that is, as she parked there if she collected her parents. She said that there was always a fence but it was cut through, although she never waked through there herself. She said (in chief) that she recalled it when it was closed up not long after seeing it open. She remembers it being cut again. Mrs. Fry said that it hade been left open for quite some time since then. Under xx, Mrs. Fry said that she couldn't remember from when it was open but that it was closed when the land was in cultivation. She said that she didn't think that people realised that it was set aside (which happened in 1988) for some years. From 1990, it was put to Mrs. Fry in xx, use of the land by people walking started. She said that she couldn't recall walking until later. Also under xx, she said that the Council mended the fence several times – she said that later she notice green wire but she couldn't say when that was – it was a long time ago to remember.

Under xx, Mrs. Fry said that she had seen other signs put up before the posts and bigger than the posts but not as big as the 2012 Private Property signs in red letters. When they were removed, she said that she did inform Mr. Sheppard. Everyone knew that it was private land and it was morally wrong, Mrs. Fry said. There was plenty of free space in the village and the land doesn't need to be used. She said that she was giving evidence for the owner and community, as that they don't all agree with WOOD – she didn't know who they were. She said that there was strong feelings in the village, as she did a lot of community work. People are reluctant to give evidence. When asked about the other spaces, Mrs. Fry referred to Shripplie Play Park (a large area she said), Stone Close, Barry's Field and the Tennis Court. It was put to her that you can't walk dogs on these areas – Mrs. Fry said that you could in the recreation ground. She also said that the Application land is not a dog walk – dogs walk 3 miles a day and people just used to let dogs go to the toilet.

She was asked about the wording on the 2009 signs. She said that it was obvious that you would be stopped if you went that way. She said that she only saw the southern post in the hedge and not standing. She agreed that it must have been removed within a couple of days otherwise she would have seen it, as she walked that way (p.71 Post 1). She agreed that the writing on the sign was very small. She said that what a landowner should do is put signs up regularly saying Private Land and Mr. Sheppard did that. It was put to her that it said "No PROW" and that was ambiguous – Mrs. Fry said "Is it? She was asked that given there so many paths, which one is being referred to?

### **Angela Sillence<sup>33</sup>**

Mrs. Sillence has lived in Bentley Way since September 2010. Before then she lived in Roman Road and has been part of the Winterslow Community

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<sup>33</sup> OB/A Tab 13 p.103

since 1963 when she moved to Winterslow with her parents. She moved back into the village in 2004 from Firsdown.

#### Knowledge of the Application Land

It is not land that she had walked on or used. She had no view of the land from her house but she drives past it every day both ways along Middleton Road. When it was suggested to her in xx that there is thick hedgerow, she responded that was in the Summer and it was quite open when all the leaves had gone and when winter comes. She accepted that it was pretty dense but that there were gaps, although she accepted that you couldn't see through into the field in the Summer. She said she could have glimpses into the field but accepted that she would not know what was going on the rest of the field.

She had not been into the Copse for many years or on the School path. 2 years ago, she said, she walked past the Copse and saw bluebells. She had never seen the Copse in such a mess – full of footprints – this was early in 2010. Before that, it was long before 1991 that she had seen it and the Copse was beautiful and well coppiced. She never went into the Copse. She saw hazel cut back and bluebells there. She couldn't remember large trees.

#### Use of the Application Land

She said there were no organised sports or activities on the land. She had never seen people dog walking even though she had driven by everyday for years. She couldn't remember people walking across the land. She said that Mr. Beagle mentioned Mr. Walters – he was always on the path with a dog. Mr. Walters lives next to where Mr. Beagle lived, just to the left of the old PO and set back on the bank.

#### **David Read**

Mr. Read lives in Titherley Road on the eastern outskirts of the village.

### Knowledge of the Application Land

Mr. Read said that he was very familiar with the field, although he had not used it at all himself. His father and brother had coppiced the wood. His father's employer bought the coppicing rights. It was last cut 6 or 7 years ago or possibly more by his brother. He would help – this was less than 20 years ago. He only recalls seeing one person coming through the wood. He would be there for 3-4 hrs or more during the day - probably from 9am onwards until probably mid afternoon – 2.30/3.00. Coppiced all year round. He said under xx that this could be 3-4 times a year maybe. They were largish trees but not large. When he was asked whether it was oak, beech and holly in the Copse, Mr. Read said that sounds about right. But very few oak and not many large trees at all – one or two largish. It is a Copse and not a wood.

Mr. Read was asked about his statement that it was a completely spurious claim and it was put to him that people have given evidence that they have seen people using the land. Mr. Read said that the spurious claim is stating that it is common ground. He said that he disagrees with the principle of taking away someone else's land. He had that with his own land years ago, twice.

### Use of the Application Land

He had not observed others using the land. He had not seen dogs on the land. He doesn't recall any dens on site. He hadn't seen any rope swings – he doesn't like those as eventually it kills the branch the rope is tied to.

### **Richard Sheppard<sup>34</sup>**

Mr. Sheppard lives with his wife in Weston Lane, Winterslow. He is a retired arable farmer. He finished farming and sold the farm in 1998 but still owns some of the Farm land, including the Application Land.

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<sup>34</sup> OB/A Tab 13 p.96

### Cropping Records

Mr. Sheppard referred to his cropping records for Brown's Copse field (OB/A Tab 8 p.51) and said that he has very good records, as these are required. These show the last crop (until recently) to have been of S.Wheat and sown in March 1988 and the land Set Aside 1989-98 and cut every year. The grass was topped annually had to be left there. In an average years this was done in September. He said that he didn't do that himself at that time. Some patches, Mr. Sheppard said, were more lush and up to 2-3ft. The average was 1½ - 2½ ft. over the field.

### Tracks and Soakaway

Mr. Sheppard said that after he drives over there each year to cut the grass he could see the paths. The main ones can be seen from each of the entrances – OB/A Tab 8 p.70 shows the main tracks. Mr. Beagle's plan (out in during the Inquiry to reflect his oral evidence) added some but they couldn't be seen on the ground. Those shown on the map on p.70 can be seen on the aerial photographs at OB/A Tab 5 pp. 21 &22. He also said that when they dug the soakaway on the boundary with the Village Hall, people walked further out as they could walk over that. The soakaway (a 2ft. 6 in. circular hole covered by mesh) is not fastened down and he didn't cut that area. The detachable weld mesh is still there (it is not a cover as such, Mr. Sheppard explained) – there was a steel grid there for a long time.

Mr. Sheppard said that the tracks got more definite over time. That is what instigated the need to sign the statutory declarations. When asked (in-chief) whether he had taken any action before 1998, Mr. Sheppard said that Mr. Fry was certain that he saw signs and he (Mr. Sheppard) could remember someone who worked for him who made them up. They were a foot square and hand made. The words were painted on plywood – red painted letters on the face of the sign. When asked whether he had seen any of these, Mr. Sheppard said that he must have done and he had a

mental picture of them now. He thinks that they would have been up near Highlands Crescent or near the post off Woodlands drive. He remembered seeing the sign in the grain barn. He thought that it just said "Private Land". They had bright red lettering on a silver background.

#### Section 31(6) Declarations

These were to protect their land from trespassers. The first in 1998 was for the period 1998-2008. During that period they were topping annually; cutting the hedges every year. They normally used a contractor at that time but the annual cutting he or his son did or if he was busy he would use someone who could come in and do it. He said that he did get a contractor in occasionally.

When asked (in-chief) what he understood the legal effect of the Declarations was (see OB/A Tab 7 pp. 28K & L), Mr. Sheppard said that it would stop any other footpaths being formed or claimed on that land. Mr. Sheppard said that he was concerned that the footpaths were getting longer, more defined so he took advice from Wiltshire Council's rights of way department.

Under xx Mr. Sheppard said that he had assumed that he was safe from rights of way being established. It was put to him that, if people continued to use the land he tolerated it, as he thought that he was safe. He said "yes". Asked whether the surveyors told him about village green law, Mr. Sheppard said "no". He said that he first knew of it when the TVG application was made. It was put to Mr. Sheppard, and he agreed, that therefore all that time he was protected against rights of way being established and didn't know about TVG so tolerated people using and walking over the land assuming that he was protected. He agreed that he knew people were using the land for walking dogs. He played tennis at the Village Hall courts (at various times – but not very early). Mr. Sheppard said that he never saw anyone parking and then walking their dogs but if the parking and dog walking took place before 9am, he accepted that he

would not necessarily have seen it. He went to the Doctor's Surgery normally between 10-11/12 noon.

#### The 2009 Signs on the two Posts

Mr. Sheppard said that when topping in 1988 he was aware of the tracks and that it took probably 2-3 years for the tracks to be formed and by 1991 there were tracks – several tracks. One or two of these were not here at the beginning. He said that he could see people using the land. With reference to the plan of the tracks at 40A (of AB/A Tab 4), Mr. Sheppard said that did not remember all the tracks that Mr. Beagle suggested.

He contacted Wiltshire to ask how he could keep people off his land and asked them what could he do? They said that they had signs and suggested that he put posts on his land. He received the signs in the post. He thought that people would think again before walking on the field – the whole field – that is why he put them at either end of the field. This was to protect from people walking on the land.

With reference to photos of the southern post on p.73 of OB/A Tab 10, Mr. Sheppard said that he took the photos on the 7 February 2009. The post was moved approximately a week later and he re-erected it straight away – he put them in deep and hard but not in concrete – about 2ft. 6in. into the ground and an ordinary person would struggle to remove them. With regard to the post at the top of the field near to Woodland Drive, he had to re-erect it a week later more deeply in the ground. Mr. Sheppard said that he didn't know quite know what to do and he did give up on the posts at that time. He had taken photographs as proof that they were there. Referred to the photograph of the post in the waste on p.75 (OB/A Tab 10 p.75), he said that he came across that post after the first or second time. He re-erected the post on 13 February and on the 16 February found in the rubbish. The top post was up for up to 9 days.

The bottom post erected was also on 7<sup>th</sup> February and removed at the same time. It was found then on the 13<sup>th</sup> February. Referring to p. 72

(OB/A Tab 9), he said that the first time it was removed it was found not far from the hole close to Middleton road. The second time it had been removed it was found in the Copse.

Mr. Sheppard said that when he was erecting the posts he saw a lady who always used the land. He said that he warned her quite strongly and she went off. He doesn't know that lady's name and she has not given evidence at this Inquiry.

Under xx, he was asked how people would distinguish Footpath Signs from private, as the signs didn't say that unfortunately. He said that he looked at the tracks on the ground – that is where most feet seemed to have travelled. It was suggested to him (in xx) that some people wouldn't think that it was prohibiting them from using the land. Most right thinking people, responded Mr. Sheppard, would understand that they were not allowed on the land – they had not been invited onto the land. It was put to Mr. Sheppard that possibly 50/50 of those would think this prohibits use. Mr. Sheppard said “possibly”. He also said that some who say they didn't see the signs must have, if using it as regularly as they say.

Asked under xx about the erection of the posts, Mr. Sheppard said that he erected them both (at both ends of the field) on the same day, 7<sup>th</sup>. February 2009. When he went back a week later, they had been pulled out of the ground. It was put to him that he didn't know then how long they were lying on the ground and he replied that he had kept an eye on the site – driving around the village every day. He then said that he went back to the site every day in between. He found one on the rubbish and subsequently the other one was in the Copse. They were re-erected on the 13<sup>th</sup> February. It was put to Mr. Sheppard that the posts were up for at most 9 days (and not as long as was put to Mr. Beagle in xx). It was also suggested to Mr. Sheppard that there was a difference between seeing a sign from 50ft away and seeing it in a photo. Mr. Sheppard replied that they were obvious to anyone entering the field – you couldn't fail to see them, he said - they were not next to the edge of the field. It was put to Mr. Sheppard that people walking at the back of the Village Hall and onto the



land wouldn't see the sign. Mr. Sheppard said that if they were on the tarmac path they would not. He reiterated that if someone was using the land regularly they would have notice the signs. It seems, he added, that a lot of people didn't go and have a look – most people would go and look at the posts. People who used the land in the summer may not have seen the signs.

When it was again put to Mr. Sheppard that people didn't know what the meaning of the signs was, Mr. Sheppard said people must have – otherwise, why did they pull the signs out of the land, he asked. It was then suggested to him that the majority of people wouldn't have understood. Mr. Sheppard didn't agree – he said that if people know there are signs they should know that they are not being invited onto the land. Why, asked Mr. Sheppard, would anyone put a sign on their land? It was suggested to Mr. Sheppard that the overall impression was that their use was tolerated and not objected to. Later in his xx Mr. Sheppard accepted that they could have been clearer signs.

Mr. Sheppard was referred to his statement (OB/A Tab 13 p.98) where he referred to discussions in 2012 leading to the putting up of the four signs. When asked, Mr. Sheppard declined (as he was entitled) to say who was advising him but did confirm that he was being advised on TVG. He was referred to pp. 444/5 of AB/B tab 15 which showed the cost of the 4 signs was £433.54 (£208.54 + £225.00). With regard to the earlier signs, Mr. Sheppard said that they were silver with red writing and he was referred to Mr. Fry saying that they were, as he recalled, black and white signs. Under xx he was asked whether it was possible that the signs were not put up. Even if they were put up, it was also put to him, he could not say how long they were up for. Mr. Sheppard said no he couldn't say but added that they probably went up when the footpath started to be established.

### Highfield Crescent Fencing

Referring to the fence shown on photo 23B (OB/A Tab 5), Mr. Sheppard said that he did not see it every day. It was there at the time of set aside in 1988. He wouldn't think that it was breached in 1988 as the land had been arable and people didn't walk over it. He didn't have animals on the land so there was no stock proof fence. The fencing was a boundary for the houses. Nearly every dwelling that he knows has a fence to indicate the boundary. Regarding Mr. Yates' evidence (re. breaching of the fence), Mr. Sheppard said that was as good an account as one can find. Mr. Sheppard said that at the time he put the signs up in 2009 he again phoned Salisbury DC or Wiltshire asking them to put new wire along there. The fencing was repaired by the District Council in 2009 and he saw that they had done a good professional job.

He walked across the land from time to time. It was breached after the Council had repaired it. He didn't take any steps to repair it. He said that he had to top the field right up to the fence. When asked (in chief) whether it was breached in 2009/10, Mr. Sheppard said that he wouldn't be surprised – he said that they would have cut it again even if it had been repaired. He said that, if he had re-erected the post (with the sign), it would have been dismissed as easily as the others.

It was put to him (under xx) that what we are concerned about is not knowing what he was trying to do but how it would have appeared to people using the land. Mr. Sheppard said that is why he put the signs up. He said, when asked, that he didn't put up fencing because it was very expensive – it would have cost thousands of pounds, which he didn't have. Under xx he was referred to his evidence that the fence was renewed in 2009. Mr. Sheppard agreed that the fence was put up to fence off the estate. He said that he was sure that it was some of the residents of Highfield Crescent who told him people were using the gap so he should do something about it. It was put to Mr. Sheppard (in xx) that users wouldn't necessarily think the repairing of the fence was an indication that they shouldn't be going onto the land. He replied "true".

Under re-ex, Mr. Sheppard said that the fence posts (in the north-west) were originally concrete. He said that the wire would have been under tension, when first put up. He thought that there were 4 strands – it was smooth and not barbed wire. They were robust to keep people in Highfield Crescent

### April 2011

He still found that this was happening – people coming onto the land. Whenever he met anyone on the land, he would tell them in no uncertain terms that they shouldn't be on the land. Sometimes they were peaceable, sometimes not. The main protagonist, was a Mr. Simpson. Mr. Sheppard didn't know whether he had anything to do with WOOD.

Mr. Sheppard said that he probably spoke to about 12 people over the years.

Mr. Sheppard said that he then decided to plough the land and did so on 4<sup>th</sup> April 2011. He said that he was “cheesed off” – “That is all you get for trying to do a kindness”, Mr. Sheppard said.

He also decided to put up new signs having spoken to Salisbury Planning Department. So he erected 4. When asked (in chief) why he had originally (in 2009) erected 2 and now 4, Mr. Sheppard said that because it became more and more clear that people were not taking notice of the 2 smaller signs.

### Communal Events

Mr. Sheppard said that the only time he gave permission for a communal event was for one afternoon for 2 years (between 1991-2011) for pony rides for the village fete.

### Bonfires

He said that it was only the burning of rubbish that he allowed. I person lived in the Crescent and 1 in Woodland Drive. He said that he probably

bumped into them when he was walking up there but he did give his permission on the understanding that they cleared up after.

### The Copse

He said that there are mid-sized trees. Hazel shoots have been coppiced over the years but he didn't know how far back this went. He thinks it started when he was a child but he was not sure. These were cut again at intervals of about 10 years. In any one year a ¼ of the Copse would be coppiced. It was never clear felled. When he had organised it, the guy advised that the already thick hazel should be taken out. Some got really big. That is how the cycle began. Between 1991-2011 there was coppicing every year but not recently. They would only really do it in winter, when there were no leaves and the sap was down. This has fallen away because the gentleman's wife was seriously ill and died and he decided to retire. So it needs a cut. It was last done about 5 years ago.

When Mr. Sheppard's father owned it, there was shooting there - that was in the 1960s. He died in 1970.

Mr. Sheppard said that he does walk past the Copse regularly. He goes along school path – about 4 times a week and he meets people on the path. He sometimes sees people in the Copse but not often.

Under xx, he clarified that the Coppice was coppiced until around 2009. He said that something was done most years and in some years they did a bigger patch. It was done during the winter months and early spring when, as he said in chief, no leaves or sap. He confirmed that there would not be coppicing in summer or the summer holidays. He accepted that there could have been playing in the Copse when coppicing probably not happening.

He said that he saw dens very occasionally and he had built them himself when he was a kid. He had seen a rope swing but he had seen it used. There had always been a few but not with any great frequency. He thought that his father put up signs in the 1960s. He accepted, under xx,

that he tolerated use of copse but said he told people in the Copse to get out who were cutting things down – he got cross. He made sure that they knew he was the owner and they had no right to be in there. Mr. Sheppard said that if he didn't recognise the person, he told them. When it was put to him that there were lots of people that he recognised and he didn't tell them, Mr. Sheppard said that he didn't need to, as they knew it. He said that he occasionally saw people walking on the field but not regularly.

He was asked, in xx, whether he thought about putting the posts up in the Copse. He replied that he was concerned about the field, even though there were tracks in the Copse.

#### Use of the Application Land

Under xx, Mr. Sheppard said that he didn't see people walking dogs on the land regularly. He did tell quite a number of people that they had no right to be on the land. He told them that they had no right to be on the land as it is private. I wasn't prepared to sit in a chair there 24 hours a day. He reiterated that he spoke to about a dozen people.

Mr. Sheppard accepted that if he had known about TVG law he would have taken a very different stance.

He was asked about the path along the north side of the Copse and blackberrying and sloes. Mr. Sheppard said that there was not an established pattern. People say that they walked everywhere but, said Mr. Sheppard, there was no proof. He said that there may have been tracks. Referred to photo 23, he acknowledged the faint line from the telephone box to the Copse

#### Note of Parish Council Meeting on 4 February 2013

The meeting was in respect of the Modification Order at Middleton Road (see pp. 90/91 in OB/A Tab 12). Mr. Sheppard was referred to the Note at p. 88 of OB/A Tab 12. He said that it was his note. He declared an interest in respect of the meeting. He was Chairman of the PC for 3 years. All said

that they remembered seeing the original signs in place in 2009. When asked whether the PC supported the TVG Application, Mr. Sheppard said that they will not get involved with WOOD.

**Patricia Sheppard<sup>35</sup>**

Mrs. Sheppard read her statement in which she states that she has lived in Winterslow for 48 years and that she had an intimate knowledge of the use of the Application Land. She can't see the land from their house in Weston Lane and it is impossible to keep watch all the time other the land. That is why they decided to erect the four further signs. Her husband was there however very frequently – but 24/7 was impossible.

Mrs. Sheppard said that she would drive around the village on most days. She would go to the Doctor's Surgery quite regularly as she had an elderly mother (who died in 2006) and an elderly Aunt (who died in 2011). She would go to Highfield Crescent once a week, on a Friday. She couldn't remember when that started - less than 5 years with Aunt and a bit longer with mother.

Mrs. Sheppard also used to visit a Mrs. Perry who died in 2006. She used to go and see her each Saturday afternoon – she would sit with her and talk. They used to sit near the window because Mrs. Perry's sight was not good. She never saw anyone using that access. On Sunday morning she would pick Mrs. Perry up for church and take her back home after.

Mrs. Sheppard said that she was not aware of anyone on the land. She did go onto the land and saw tracks. She did know people were using it. She did go into the Copse and see tracks that just meandered through the wood. She saw no dens abut did see a rope swing. When asked whether she ever did anything to stop people using the wood, Mrs. Sheppard said that they just felt people should have the experience of seeing the blue bells in there. It was educationally important that people had that opportunity. Yes, she therefore accepted that people used the Copse and

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<sup>35</sup> OB/A Tab 13 p.99

she personally took no steps to stop that. She explained further that it was not their mission to stop people going into the Copse as long as they went in through the top path and she had no objection to them going from the path.

She said that she (unlike her husband) didn't play tennis. When she was asked whether she saw dog walkers on bottom part of the field, Mrs. Sheppard said might have seen the odd one at the end nearest to the Village Hall. When she was asked whether that would be first thing, she said that it wouldn't be late and probably between 9.30/10am. She accepted therefore that, if people were walking their dogs before work, then she wouldn't have seen that. She was asked whether she would go there at lunchtime. Mrs. Sheppard replied that she would sometimes go out between 10.30/11 am – she would walk from the house and cut through Barry's Field. She said that they could cut through the bluebell wood, if they chose to. In the Copse she rarely saw anyone coming and going. She has observed in the afternoon a couple of mums rushing up to the school. If she was in the field, she may pass someone. She would say good morning but make the point that it was private land. She said this was very rarely- maybe 5 times or a bit more. She said that she never saw blackberrying in the field and she never gave permission ("certainly not") for anyone to be on the land apart from the donkey rides. Bonfires were organised once. She had heard brownies had used the land but she didn't see that and she did not personally give them permission.

With regard to the two posts in 1999, she accepted her husband's evidence on this. She did not know how long they were up. She said that they were removed within a couple of days. When asked under xx about that, Mrs. Sheppard said that she drove past and one day there were there – a few days later they were not. It could have been less than a week. When asked whether she was looking to see if the posts were still there, she said that she was as she could see past the Surgery as the view opens up there.

With regard to the Note on p.89 of OB/A Tab 12, she confirmed that was her husband's note.

It was said to Mrs. Sheppard (in xx) that they are aware that she had very strong feelings as she had made that clear. She was referred to her letter to Cllr. Devine and it was suggested that she was putting pressure on him to support her. (see OB/A Tab 12 p.85). She was referred in particular to the 4<sup>th</sup>. Paragraph of that letter. She said that she did not look at it like that (i.e. putting pressure on the Councillor). When it was put to her that she made it difficult for him to support the TVG application, Mrs. Sheppard replied that was a decision for him to make.

She was also asked about the petition. It was suggested that the Community was divided – some people supporting her and her husband and some supporting the Application. Mrs. Sheppard said that it was the minority who are supporting the Application. It was then put to her that some people don't want to give evidence as seen from some people not turning up.

## **5. ASSESSMENT AND CONCLUSIONS**

5.1 This section is set out as follows:

- (1) The Legal Framework
- (2) Assessment of the issues arising against that framework
- (3) Conclusions

### THE LEGAL FRAMEWORK FOR DETERMINATION OF AN APPLICATION UNDER SECTION 15 OF THE COMMONS ACT 2006

5.2 As noted in section 1 of this Report above, section 15(1) provides (as relevant to this Application) that:

**Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.**



Subsection (2) applies where-

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

Subsection (3) applies where -

**This subsection applies where-**

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

(It should be noted that since this Application was made the period in (3)(b) has been changed in England to 1 year – section 14(2) of the Growth and Infrastructure Act 2013, taking effect on 1 October 2013).

5.3 The burden of proof lies on the Applicant to demonstrate that the statutory criteria are satisfied. The standard of proof is the civil one – that is “on the balance of probabilities” or, put simply, that it is more likely than not. The approach of Pill JL in *R v Suffolk County Council, ex parte Steed* [1996] 75 P&CR 102, 111 is relevant:

*However, I approach the issue on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green and that the evidential safeguards present in the authorities already cited dealing with the establishment of a customary right (class B) should be imported into a class C case. Use, as of right, and as inhabitants of Sudbury, for sports and pastimes must be “properly and strictly proved”.*

This approach was endorsed by Lord Bingham in *R v Sunderland City Council, ex parte Beresford* [2004] 1 AC 889 at [2] who referred to Pill Ely’s words and continued:

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

I consider this endorsement is still relevant, although *Beresford* has been both distinguished and not followed or to be relied upon in *R (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31.

5.4 From section 15(3)(a) and the relevant case law, it can be seen that an application has to satisfy the following elements:

- (1) The application land has to have been used for lawful sports and pastimes.
- (2) The use has to have been by a significant number of people who come from:  
A locality; or  
Any neighbourhood within a locality.
- (3) That use has to have been carried out for at least 20 years up to when it ceased and the application to register has been made within the statutory period from the use ceasing (s.15(3)).
- (4) That use has to have been “as of right” throughout that period.

The land which forms the basis of the application has to have been used for lawful sports and pastimes

5.5 The expression “*lawful sports and pastimes*” was considered in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 A.C. 335. It was held that “sports and pastimes” is not two classes of activities but a single composite class, so an activity that was a sport or pastime falls within it. It was further held that dog walking and playing with children are, in modern life, the kind of informal recreation, which may be the main function of a village green<sup>36</sup>. Flying kites, picking

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<sup>36</sup> [2000] 1 A.C. 335, 357A-D.

blackberries, fishing and tobogganing have been considered to fall within “sports and pastimes”.

- 5.6 Not all use that falls within the meaning of “lawful sports and pastimes” is sufficient, however. In *White v Taylor* (No.2)(1969) 1 Ch 160 at 192 Buckley J held:

*...But the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed.*

The use must be to a sufficient extent; use which is “*so trivial and sporadic as not to carry the outward appearance of user as of right*” is to be ignored: *Sunningwell* [2001] 1 A.C. 335, 375D-E.

- 5.7 It is necessary to distinguish the use of footpaths from use for sports or pastimes. That distinction is important in this case, where there are tracks across the path and a application for a modification order was made in respect of the land under section 53 of the Wildlife and Countryside Act 1981 a short time before the TVG application was made.

- 5.8 In *Oxfordshire County Council v Oxford City Council* [2004] EWHC 12 at [102]-[110] (the *Trap Grounds* case) in the High Court Lightman J stated that where the public use defined tracks over land this will generally only establish public rights of way unless the user is wider in scope or the tracks are of such character that user of them cannot give rise to a presumption at common law as a public highway, but user of such tracks for pedestrian recreational purposes may qualify. The House of Lords [2006] 2 AC 674 at [68] (as well as the Court of Appeal) on appeal held that it would not be appropriate to give any guidance on the evidentiary matters relating to the use of tracks and the other land. The Objectors also refer to the Judgment of Sir Nicholas Browne-Wilkinson in *Dydfed CC v Secretary of State for Wales* [1989] 59 P & CR 275, 279:

*“...There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way. Such use for purely recreational walking would be a use of the path as a footway and give rise to the possibility of deemed dedication in the absence of evidence that the owner of the land had no intention to dedicate.”<sup>37</sup>*

5.9 Given the importance of this issue to WOOD’s Application, I set out the approach in *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) at [102] – [110], where Sullivan J. held as follows:

*102. As noted above, the Footpath Order confirmed the existence of footpaths all around the perimeters of each of the three fields (the paths cut across the south western corners of Fields 1 and 3). For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under section 22(1) of the Act: land is more likely to be used for recreational purposes by local inhabitants if there is easy access to it. But it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way — to walk, with or without dogs, around the perimeter of his fields — and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.*

*103. Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of “informal recreation” which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog’s owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?*

*104. The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.358E of *Sunningwell* . I do not consider that the dog’s wanderings or the owner’s attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.*

*105. While the Inspector was not obliged to carry out a field-by-field analysis, he was obliged to grapple with the principal point made in the Claimant’s analysis: that looking at the 20-year period, walking, including*

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<sup>37</sup> Objectors Authorities Tab 5

*dog walking, was the principal activity, and that it was largely confined to the footpaths around the perimeter of the fields. If that use was discounted, the other activities over the remainder of the fields were not of such a character and frequency as to indicate an assertion of a right over the entirety of the 38 acres for 20 years, not least because the other paths (across the fields) only began to evolve after 1993 and so were not claimed as footpaths (10.17). In paragraph 14.24 the Inspector appears to have accepted the Claimant's analysis, up to a point: noting that in addition to walking on the paths that developed around the field boundaries, some of the other activities such as blackberrying would have taken place on or near the boundaries, rather than across the fields as a whole.*

*106. But when the Inspector concluded in paragraph 14.25 that there was abundant evidence of continuous use by local people of the whole surface of the fields he relied "in addition to the dog walking and playing with children" referred to in Sunningwell , also upon "general walking (i.e. without dogs)" as being among the many activities that took place on the fields.*

*107. Thus the Inspector considered whether the whole, and not merely the perimeter of the fields was being used, but he did not deal with the issue raised in the Claimant's analysis: how extensive was the use of the fields if the use of the footpaths around their boundaries for walking and dog walking (making allowance for the fact that dogs off the lead may stray, see 10.18) was discounted, such use being referable to the exercise of public rights of way, and not a right to indulge in informal recreation across the whole of the fields.*

*108. I accept that the two rights are not necessarily mutually exclusive. A right of way along a defined path around a field may be exercised in order to gain access to a suitable location for informal recreation within the field. But from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.*

*109. I do not suggest that it will be necessary in every case where a footpath crosses or skirts an application site under the Act to distinguish between the exercise of a right of way and the use of a site for informal recreation. The footpath may be lightly used as such and the evidence of non-footpath use may be substantial. But the present case is most unusual in that there were recently confirmed footpaths around the perimeters of all three Fields. These footpaths were not lightly used. The Footpath Inspector had concluded that there was "unchallenged evidence of considerable weight that their routes have been in such use as would satisfy section 31 of the [Highways Act] 1980 ". The Claimants drew the Inspector's attention to evidence from one of GAG's witnesses "that the majority of people in the fields stuck to the boundary footpaths" (10.16).*

*110. It is no accident that the Inspector's list of activities in paragraph 14.25 commenced with dog walking and general walking (i.e. without dogs). On any view of GAG's evidence set out by the Inspector in Chapter 7 of his Report these were the principal activities throughout the 20-year period. A*

*number of the other activities were very occasional, such as kite flying, or of limited duration, e.g. use by the Cub Scouts appears to have ceased in 1987 (7.67). I do not underestimate the difficulties confronting the Inspector but he does appear to have relied upon the extensive use of the perimeter footpaths as such, for general and dog walking, in reaching his conclusion that there was abundant evidence of the use of the whole of the fields for lawful sports and pastimes for the 20-year period (14.25). To Laings, as a reasonably vigilant, and not an absentee, landowner those walkers would have appeared to be exercising public rights of way, not indulging in lawful sports and pastimes as of right. For these reasons the claim also succeeds on ground (1)*

- 5.10 The Objectors also bring my attention to the analysis of Vivian Chapman QC in his Inspector's report in the *Radley Lakes* application (13/10/2007) at [304&5]:<sup>38</sup>

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

- 5.11 With regard to the extent of coverage of the application land by qualifying user, not every part of the application land has to have been used. However, the evidence must be such so as to indicate use as of right for lawful sports and pastimes of the land as a whole. In *R (Cheltenham Builders) v South Gloucestershire Council* [2003] EWHC 2803 at [29] Sullivan J. stated that a "common sense approach is required when considering whether the whole of a site was so used".

- 5.12 The approach of the House of Lords in the *Trap Grounds* case is also instructive. Lord Hoffman stated:

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

*"The city council argue that the scrubland is now so overgrown that the majority of it is inaccessible and that this in itself precludes registration as a green. As noted above, my estimate is that about 25% of the total area is reasonably accessible, the rest consisting of trees and scrub. In my view, the question whether land has become a town or village green cannot be*

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<sup>38</sup> Objectors' Opening Submissions at [29] on p.9 and Tab 11 of Objector's Authorities at p. 58

*determined by a mathematical assessment of the amount of the land which is open to recreation. ... Where the recreational use is informal and consists of activities such as walking, with or without dogs, children's play, exploring and watching wild life, 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 This is not an application for judicial review of Mr. Chapman's decision and your Lordships are not invited to express a view on whether, on the facts, he was entitled to reach the conclusions which he did. For my part, in the absence of an inspection or at least photographs of the site, I would be very reluctant to do so. If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land 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.*

The use has to have been by a significant number of people who come from:

A locality; or

Any neighbourhood within a locality

#### Significant Number

- 5.13 In *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76 at para. 71 Sullivan J held that a "significant number" need not be considerable or substantial. It was held that it was a matter of impression for the decision-maker on the evidence and what mattered was that the number of people using the land in question had to be sufficient to indicate that their use of the land signifies that it is a general use by the local community for an informal recreational use, rather than occasional use by individuals as trespassers.

- 5.14 Given the issues arising in this case and the submissions made, particular note should also be taken of paragraphs 72 and 73 of Sullivan J's judgment in the *Alfred McAlpine Homes* case:

*72. The inspector concluded in paragraph 7.1 that substantial use had been made of the meadow for informal recreation for more than 20 years before the application. He referred specifically to six of the witnesses who could give evidence covering the whole of the 20-year period. Mr. Wolton's criticisms of the inspector's conclusions are not well founded. It is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period.*

*73. It is difficult to obtain first-hand evidence of events over a period as long as 20 years. In the present case there was an unusual number of witnesses who were able to speak as to the whole of the period. More often an inspector at such inquiries is left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period. In the present case, however, the evidence of the six witnesses who were able to cover the whole 20-year period was amply supported by many other witnesses who dealt not simply with the last few years but with a very considerable part of the 20-year period, some of them going back almost 20 years, some going back to times before the 20-year period began.*

- 5.15 This aspect is often referred to as part of the issue of "the quality of user" and has been addressed in several authorities since then. In the Court of Appeal decision in *Leeds Group plc v Leeds City Council* [2011] 2 WLR Sullivan LJ, as he had by then become, held:

*Quality of user*

*28. I agree with Mr. Laurence that this ground of appeal is better described as the quality of user point. It is based on certain passages in the speeches of Lord Walker of Gestingthorpe JSC and Lord Hope of Craighead DPSC in R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70. In para 30 Lord Walker JSC referred to the general proposition that had been relied on by Mr. Laurence:*

*"that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose*



*between warning the trespassers, or eventually finding that they have established the asserted right against him.”*

*In para 36 Lord Walker JSC said that in the light of the authorities he had “no difficulty in accepting that Lord Hoffmann was absolutely right, in Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with ‘how the matter would have appeared to the owner of the land’ (or if there was an absentee owner, to a reasonable owner who was on the spot).”*

*Any Locality or any Neighbourhood within a Locality*

5.16 As seen above, section 15(3)(a) provides:

***A significant number of the inhabitants of any locality, or of any neighbourhood within a locality***

This repeats the insertion of “neighbourhood within a locality” into section 22 of the CRA 1965 (by section 98 of the Countryside and Rights of Way Act 2000), and was intended to apply more flexibility to the issue of “locality” and mitigate the strict legal test that had been applied in some cases. The Court of Appeal confirmed in *Leeds Group Plc v Leeds City Council* [2011] EWCA Civ 1447 (the second Leeds Group Plc case) that:

- (1) It was common ground that Parliament's intention in enacting s.98 was to remove the evidential difficulty posed by the need for users to be predominantly from an administrative area known to the law.
- (2) The enactment of s.98 was to strike a balance between two competing interests; users who wished to apply for the registration of land as a TVG and landowners whose land might be the subject of such application.
- (3) The new policy contained in s.22(1A) of the 1965 Act applied in its entirety to all applications made on or after January 30, 2001, when s.98 came into force.

5.17 A “locality” is however not an arbitrary line on a map; it means an administrative unit and a “neighbourhood” within a locality means an area with a sufficient degree of cohesiveness, as held by Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803

(Admin). What can constitute a locality includes a county, a city a town or borough, a parish (civil and ecclesiastical) and an electoral ward.<sup>39</sup>

That use has to have been carried out for at least 20 years up to the date of the application

- 5.18 The House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 WLR 1235 confirmed that under the previous provisions, sections 13 and 22(1A) of the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000), the user as of right had to continue to the date of the application. As noted above, section 15 of the Commons Act 2006 provides for this situation but also situations where the recreational use has ceased (sections 15(3)-(7)).

That use has to have been as of right throughout that period

- 5.19 To be “as of right” the use must have been carried out:

- (i) Without force (*nec vi*)
- (ii) Without secrecy (*nec clam*)
- (iii) Without permission (*nec precario*).

The phrase “*as of right*” is based upon the acquisition of rights by prescription. The whole law of prescription and the whole law that governs the presumption or inference of a grant or covenant rest upon acquiescence by the land owner: as held by Fry J in *Dalton v Angus & Co.* (1881) 6 App. Cas. 740, 773 as cited by Lord Hoffman in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 at 351B-C.

- 5.20 *Sunningwell* related to an application to register 10 acres of glebe land. The House of Lords decided that, where a use had to be established *as of right*, user that was apparently *as of right* could not be discounted merely because many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge

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<sup>39</sup> See Gadsden on Commons and Greens (Second Edition) at 14-26 on pp. 519-520

that it did not. It was also held that toleration of the recreational use was not inconsistent with user *as of right*.

5.21 If the user has been by coercion or if the user is contentious in the sense that the owner continually and unmistakably protests against it, there is no acquiescence and the user is considered to be by force and cannot be “as of right”<sup>40</sup>. This will apply if the circumstances are such as to indicate to the user, or to a reasonable user with the user’s knowledge of the circumstances, that the owner actually objects and continues to object and backs his objection by physical obstruction or by legal action. Signs can, depending on the wording and circumstances, have a similar effect. Physical obstruction includes fencing and gates; the legal effect will in any case depend upon the nature and circumstances of such obstructions and actions.

5.22 In *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250, LJ Patten held:

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

5.23 In *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] LGR 631 (the *Warneford Meadows* case) HH Judge Waksman QC (sitting as a Judge of the High Court) considered Pumfrey J's dictum in *Smith v Brudenell-Bruce* in the context of an application to register a meadow adjoining the Warneford Hospital in Oxford as a town or village green. The land in question was

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<sup>40</sup> *Smith v Brudenell-Bruce* [2002] 2 P&CR 4 at [12].

crossed by a public footpath alongside which was a notice stating: “No public right of way”. This was said to have prevented any public use of the meadow itself from being as of right. The judge held that the notice had not rendered such use contentious because, reasonably read, it had to be taken to refer to the user of the footpath rather than the meadow land generally. He was not therefore concerned with a case where the notice had been placed in an inaccessible position or where (as in the present case) the notices had been removed. But in his judgment he set out some general principles. Having referred to *Smith v Brudenell-Bruce* and to *Redcar (No 2)* he said this:

*21 By way of contrast in Oxfordshire County Council v Oxford City Council [2006] Ch 43, the relevant sign read:*

*Oxford City Council.*

*Trap Grounds and Reed Beds.*

*Private Property.*

*Access prohibited*

*Except with the express consent*

*Of Oxford City Council*

*22 From those cases I derive the following principles:*

*(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;*

*(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;*

*(3) The nature and content of the notice, and its effect, must be examined in context;*

*(4) The notice should be read in a common sense and not legalistic way;*

*(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in *Brudenell-Bruce (supra)* to ‘consistent with his means’. That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to*

*see why that should absolve him without more.<sup>1</sup> As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.*

*In my judgment the following principles also apply:*

*(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean' that is simply another way of asking the question as to what the reasonable user would have made of it;*

*(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;*

*(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant user.*

The Objectors invite the registration Authority to consider [17] to [57] of the judgment of HH Judge Waksman QC.<sup>41</sup>

5.24 Against this legal framework I now turn to consider the Application, having regard to the statutory criteria and the contentions on behalf of the Applicant and the Objectors. I first identify the issues that arise and then set out my assessment of those.

### THE ISSUES

5.25 It is of course necessary for the Applicant to demonstrate that, on the balance of probability, each criterion within section 15(3) of the Commons Act 2006 is satisfied, as set out above.

5.26 It is not in dispute that:

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<sup>41</sup> See para. 36 of the Objectors Opening Submissions

- (1) The Applicant is entitled to rely upon section 15(3) of the Commons Act 2006 and the relevant 20-year period is from 4 April 1991 to 4 April 2011.
- (2) Winterslow CP constitutes a valid locality for the purposes of section 15(3).<sup>42</sup>

5.27 Two key (but not by any means the only) elements of the Objectors' case against registration can be summarized as:

- (a) The Applicant has not demonstrated sufficient of qualifying LSP use of the Application Land, which has been mainly used for highway purposes rather than LSP to a degree that was significant over the whole of the land. The Applicant added to and clarified its submissions on the Copse in a short Supplemental Closing Submission sent on 17<sup>th</sup> December 2014, after the close of the Inquiry.
- (b) Any use has in any event not be "*as of right*" by reason of the signage erected in February 2009 (year 18 of the relevant 20-year period). Further, use of the land following access through the breaches in the fencing at Highfield Crescent is by force and to be discounted.

5.28 Having regard to the evidence and the submissions of the parties, I consider that the following key issues arise:-

- (1) The Sufficiency of Qualifying User of the Whole of the Application Land during the Relevant 20-Year Period

Has the Applicant satisfied the requirement to demonstrate that a significant number of inhabitants from the agreed locality have used the land for LSP?

If so, has the Applicant demonstrated sufficient use of the whole land (applying a common sense approach as referred to in

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<sup>42</sup> The Winterslow PC is shown on the plan at AB/A Tab 2

paragraph 5.8 above) by those inhabitants continuously over the relevant 20-year period?

Only qualifying use is to be taken into account and not uses that are permitted/licensed. Further, and significantly, the sufficiency of use of the whole land needs to take account of the fact that the land has been used for people to walk to and from one side of the village to the other.

(2) The By Force Issue

Is the qualifying use “as of right” or:

- (i) Is it by force by reason of the two signs erected on posts in 2009?
- (ii) Is it by force by reason of the field being accessed through the gaps in the fence at Highfield Crescent?

I now set out my assessment of each of these issues. I provide my overall conclusions at the end.

ASSESSMENT

**The Sufficiency of Qualifying Use of the Whole of the Application Land During the Relevant 20-Year Period**

5.29 An appropriate starting point for consideration of this issue is the recognition of the following key characteristics of the Application Land during the relevant 20-year period:

- (i) Both the field and the Copse are open and readily accessed from different directions. Even though there are no public footpaths over the land, they very closely related to the land. The only areas of fencing are those around Highfield Crescent and the village hall.
- (ii) Having been set aside in 1988/9, which is not disputed, the land was not cropped and only grass grew on the major part of the field until it was ploughed in April 2011, as Mr. Sheppard explained. The field was then ploughed again and linseed sown in 2012.

- (iii) Key village facilities are located on both “sides” of the Application Land. There is for example the school, village shop and a public house (the Lord Nelson) broadly to the north/north-west with the village hall, tennis courts and doctors surgery and another public house (the Lion’s Head formerly owned by Mr. Yates, who gave evidence at the Inquiry) to the south/south-east.
- (iv) In addition, there is of course significant housing close to and around the Application Land. Much of the housing is on the opposite side to the School and village shop.
- (v) My strong impression was that the Copse is also an attraction and destination in its own right, as was seen from the evidence from some of the witness for both the Applicant and the Objectors. The Copse constitutes a little under 40% of the overall area of the Application Land.

5.30 The Objectors’ primary contention (on this issue) is that any proven use of the field would have had to them, as reasonably vigilant landowners, the objective appearance of the exercise of public rights of way over defined routes, rather than LSP over the whole of a much wider area of land.<sup>43</sup> They say that any use outside of these tracks would have been occasional and/or ancillary to the exercise of putative rights of way over the land. The Objectors also contend that several problems arise with relying on the Applicant’s evidence to discover the pattern of use over the relevant period.<sup>44</sup>

5.31 The Applicant, however, contends that evidence given at inquiries will invariably represent only a fraction of the actual use of the land and it is reasonable to infer that in reality that general pattern of user was followed by a much greater number of local inhabitants. The Applicant further contends that there is a presumption of continuing user unless evidence to the contrary suggests otherwise. The Applicant also contends

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<sup>43</sup> See [8] on p.4 of the Objectors’ Closing Submissions

<sup>44</sup> See [2] on pp. 2-3 of the Objectors’ Closing Submissions



that the locally controversial nature of the Application encouraged by letters and public statements from the Objectors makes it reasonable to assume that less evidence of users was given than might otherwise have been expected.<sup>45</sup>

5.32 Having heard and reviewed the evidence and submissions in detail, my overall impression (illustrated by specific reference to some but not all of the evidence that I have taken into account) is as follows:

(1) A significant proportion of those on the field during the relevant period have been crossing the land to and from in particular the school, the shop, the doctors' surgery, the two public houses and the village hall. This is hardly surprising given the location and open nature of the field. The nature of Middleton Road would in my view also encourage walkers to try and avoid using that route. The tracks seen on the land throughout the relevant period are consistent with that. Mr. Paton said that, besides dog walking, the field was used mainly to cross and accepted that most people would say that it was used for transit. Mr. Rickard said that he mainly used the field to get from one side of the field to the other. Dr. Flindell's own use was consistent with using the field to cross. Mrs. House said that the main use of the field by adults was for crossing but that children would play on the field as it was "a nice open space". Mr. Day said that it is mainly people and dog walkers crossing that you see. Mr. Clark said that the main route across the land was diagonally from Highland Crescent to the south-east corner, although it should be noted his evidence only covers 2008 onwards. Mr. Fry (for the Objectors) had used the same route.

Mr. Hardiman estimated the split of transit and recreational use was 50/50. Taking account of the evidence overall, and each party's comments on the witnesses, my own distinct impression is

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<sup>45</sup> Applicant's Closing Submission at [2] - [6] on pp. 1-3

that the transit uses would have been greater than that, and probably noticeably so.

- (2) When walking across the land in such a way, such use would have appeared to a reasonably vigilant landowner as the exercising of a right of way and not a greater right than that. I apply that also to those crossing but observing their surroundings on the way. If they remain on their “route” across but stop to observe the wildlife adjacent to the path or across the field then in my view it would be difficult for a reasonable landowner to interpret that as asserting a greater right than a right of way.
- (3) There appears no doubt that some users of the land would have strayed from their path and that use might properly be considered by a reasonably vigilant owner as asserting a greater right, namely that consistent with a village green. However, whether that was sufficient in itself or combined with other assertions of such a right, has to be carefully considered taking into account the significant number of users on the land not asserting such a right.
- (4) Further, my impression of the oral evidence was that many of those on the land would have had dogs with them. That impression was re-enforced when I reviewed the EQs and statements of those who have not given evidence at the Inquiry. Mrs. Hazard said (in-re-ex) that people walking their dogs were mainly going up the middle of the field and mainly using the tracks. I have little doubt that many of the dogs would have been let off the lead and ran around. I have also no doubt that there would have been a mixture of that happening whilst the owner walked straight across the field and those where the owner stopped and/or walked around the fields as the dog exercise over the field.
- (5) Consistent with that, was the evidence of the throwing of objects for dogs to retrieve. Mr. Broadley (for the Objectors) had witnessed this, although Mr. Yates and Mrs. Fry (also for the Objectors) had not. In my view, even if that activity were being carried on by those people who were walking straight across the

field, such an activity would be, and be perceived by a reasonable landowner to be, more akin to an assertion of a greater right. My impression of the evidence was that this was often more than just a dog owner retrieving an errant dog in a way that it would be unreasonable to a land owner to attribute an assertion of a greater right to (adopting the approach of Sullivan J in *Laing Homes* (at [104])). I also take into account that there has also been some dog training and socializing on the field.

- (6) There is clear evidence in my view also of a small number of people regularly parking in the morning at the Village Hall and letting their dogs out briefly to go to the toilet on the southern part of the field close to the Village Hall car park. I have considered this to be LSP, albeit I have also taken into account the short duration and confinement to the southern area of the land of this particular aspect of dog walking. However, as recorded above, that is by no means the only evidence of dog walking on the field.
- (7) There have been other uses on the field but in my view less regularly and less extensively than the walking across and the dog walking. These would have included infrequent kite flying (Mr. Crossland refers to this happening 2-3 times a year, although that is post 2005); riding of bikes; the infrequent kick around on the shorter grass (Mr. Day); “fooling around” by children – including hide and seek in the longer grass; infrequent frisbee (Mr. Day); infrequent flying of model aircraft. Mrs. Fooks saw an archer. People would run over and perhaps to a limited extent around the field, the latter being more referable to LSP, if it was not reasonably perceived as someone just running across/through the land.<sup>46</sup> Dr. Putman used the land for observing nature, as did others. Mr. Crossland taught his daughter to ride alongside the Copse, when she was 9 years old in 2006.
- (8) My impression of the evidence was that the field was not used to any great extent for ball games, picnics, informal gatherings.

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<sup>46</sup> See paragraph 45 on pp. 13-4 of the Applicant’s Closing Submissions

However, I do accept that people would stop and chat together – if that was done whilst people were crossing the land only, then that would not qualify. If they chatted otherwise than whilst transiting the land in a direct way, then that might well constitute LSP. It may have been difficult, however, for a reasonable land owner to distinguish the two so as to interpret this as an assertion of a greater right than that of a right of way.

- (9) I note the evidence of Mrs. House relating to her use (at least once per week) with children between 1993-2003. The children would play in the long grass at the southern end of the field – the girls tended, she said, to collect things for craft, whilst the boys ventured into the Copse to play with sticks and on the rope swings. Mr. Crossland also referred to his daughters running around at the bottom of the field to the east of the Copse. That was between 2005-08.
- (10) My impression also was of seasonal blackberrying (August – September – alongside and at the corner of the Copse near Highfield Crescent and along inside of Middleton Road) and sloe picking (Autumn when there had been a frost – also along the inside of Middleton Road) as well sledging and snowball fights when the winter weather brought snow and ice. Although the former are seasonal and the latter only occurred on a few years in the relevant 20-year period (but may have lasted on each occasion for 3-4 days), these activities are LSP and cannot be ignored. The tobogganing took place more on the northern part of the field, where there is the steepest slope. They have to be taken into account in the overall assessment of how the use of the land by local inhabitants would have looked to the reasonably vigilant landowner. The seasonal nature of such activities and of LSP generally (with seasonal fluctuations in the degree of use) is a feature and of course does not itself preclude registration.<sup>47</sup>

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<sup>47</sup> See paragraphs [46] – [52] on pp. 14-15 of the Applicant's Closing Submissions

- (11) With regard to the Copse, I agree with the Applicant's characterization of this as "somewhat of a magnet" for children living nearby.<sup>48</sup> Indeed, I would go further than that as I consider the Copse to be an inherent attraction to children and many adults too, and there was a lot of evidence consistent with that. That was exemplified perhaps by Mrs. Hazard's description of the Copse and her wish to have her ashes scattered there. That was also consistent with others, including Mr. Paton.
- (12) As indicated above, my very strong impression is that to many people the Copse was a destination in its own right. That was in my view more so than the field. The main, but as recorded above not only, attraction of the field was for crossing to and from the different parts of the village.
- (13) In terms of the attraction of the Copse, Mrs. House's evidence was consistent with that – she had not realised that the Copse was part of the same land and was privately owned. Many witnesses referred to for example the bluebells, celandines, wood anemones, primroses, wild raspberries and crab apples in the Copse. It was an obvious "stopping off" point for play for children on their way home – Mr. Beagle specifically referred to this. It seems clear that children would even go in there in less inclement weather (see the evidence of e.g. Mrs. House, Mr. Day [albeit only re. 2008-11]). The main non-crossing use of the land, which Mr. Rickard referred to, was of the Copse by children. Mrs. House said that there would always be people playing in the woods and that it would be used more for activities than the field. Mrs. Fooks' son played "more in the Copse" and she saw children playing in the Copse and "spilling out into the areas around".

5.33 However, that overall impression is not itself sufficient to demonstrate compliance with the section 15(3) criteria. From that overall impression, therefore, I now consider whether the Applicant has demonstrated on the

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<sup>48</sup> Paragraph 33 on p.11 of the Applicant's Closing Submissions.

balance of probability that the land as a whole has been used for LSP by a significant number of local inhabitants for the relevant 20-year period.

5.34 This discounting of non-qualifying use is not an altogether easy exercise to carry out where as here a significant, and in my view the main, use of the land is for crossing on foot, as if exercising a right of way. The onus is upon the Applicant to demonstrate compliance with the statutory requirement. I also have to take into account that the law of prescription is based upon how it would have appeared to the owner. Acquiescence by the owner is the foundation of prescription.<sup>49</sup> Although Mr. Sheppard, and Mrs. Sheppard to a lesser extent, was by no means an absentee owner and did observe and go to the Application Land and of course live nearby, I have used the test of the vigilant land owner and assumed a more frequent observation and checking of the land.

5.35 Looking at the land as a whole and the evidence as a whole:

- (1) I note the criticism by the Objectors that of the witnesses giving evidence at the Inquiry in support of the Application, only 2 users cover periods for 20 or more years and 5 for between 10-15 years.<sup>50</sup>
- (2) However, it is important to look at the totality of the oral evidence - the oral evidence presents itself, as is common in TVG cases, as a jigsaw of different and often overlapping periods in terms of the evidence given. It is also important to take into account, as I have done, where these witnesses refer to seeing others on the land using it for LSP. There are also the other statements and EQs and documentation to be taken into account.
- (3) Nonetheless, I do have serious concerns, as detailed below, about the totality of that evidence with regard to demonstrating the use of the Application Land as a whole throughout the whole of the 20-year period. I have concerns about some exaggeration of the

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<sup>49</sup> See *Barkas* [2014] UKSC 31 at [17] - [19].

<sup>50</sup> Objectors' Closing Submissions at [4]-[5]

recreational uses, as I judged it, in respect of certain elements of the Applicant's evidence. For example, although I would not wish to overstate this, I share to some extent the Objectors' concern as to the way the additional photographs of the Copse were submitted and then withdrawn.<sup>51</sup> I had specific concerns also about Mrs. Stevens' evidence on recreational use, which, and I mean no offence to her, seemed exaggerated to me. Also, I was not entirely convinced that Mr. Hardiman's recollections were a fully accurate reflection of the likely position. I should make it clear that in no case I am suggesting there was any deliberate misleading by, or bad faith on the part of, these witnesses. However, it is natural that a witness' evidence may be influenced (often sub-consciously) by their desire to maintain the current use of the land.

- (4) Although not of course determinative and again on its own not to be given too much significance, I note the lack of photographs of LSP being carried out on the land. There were relatively few photographs produced in support of the Application and those that there were related to the later part of the relevant 20-year period. Such photographs are, in my experience, commonly produced in support of TVG applications.
- (5) As indicated above, it is my clear impression that apart from the Copse the main attraction of the Application Land was the use of the field to transit as if using a right of way. The January 2012 application to modify the MDS and the Highways Authority's analysis of the evidence supporting that is consistent with that impression.<sup>52</sup>
- (6) If no dog walking that qualified as LSP had taken place on the Application Land during the 20-year period, there would in my view be no doubt that remaining evidence of LSP was not itself sufficient to show, on the balance of probability, qualifying use of

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<sup>51</sup> Objectors' Closing Submissions at [2.3] on p.2

<sup>52</sup> AB/B Tab 12 at BB2 pp.1-7

the whole land by a significant number of local inhabitants in terms of how it would be seen by the reasonable landowner.

- (7) However, the field clearly was attractive to dog walkers and I don't doubt a lot of that use has been of a nature that qualifies as LSP as would have been perceived by a reasonable land owner aware of TVG rights. That use has to be considered together with the other qualifying LSP uses.
- (8) However, even considering the totality of the qualifying evidence, my overall impression is that the Applicant has not demonstrated sufficiency of use for the Application Land as a whole throughout the 20-year period. That impression applies overall, given the degree of use of the Application Land that was clearly not LSP and that which it would have been difficult for a reasonable land owner to interpret as an assertion of village green rights.
- (9) Moreover, I also have particular concern with regard the earlier part of the 20-year period, as detailed below. This in itself is, in my view, reason alone for concluding that the statutory criteria have not been met in this respect.

5.36 With regard to the earlier part of the relevant 20-year period in respect of the field, I note the following:

- (1) The last crop was sown in 1988. Thus the land was not used for the growing of a crop for 2 years or over before the start of the 20-year period.
- (2) There is no convincing evidence of the field being used for LSP or walking even prior to it being set aside, although I am aware that there was some claim of that in support of the modification order. This is therefore not a piece of land, other than the Copse, that has a history of recreational use for any significant period prior to the commencement of the 20-year period.
- (3) So the LSP itself has come in essence from a "standing start". Although I accept that it may be possible that qualifying user by a significant number of local inhabitants might in some



circumstances build up to a sufficient level quite quickly, I would be surprised if that happened in this case. I would have expected that any use of the land would have build up over time as people saw others on the land and got used to the idea that they could go onto it with apparent impunity.

(4) What I consider would have been be more likely in this case would be that people would have started using the field as a short cut, given the location of the site in relation to the housing and village facilities and the character of Middleton Road as referred to above. In my view, that traversing use would be likely to have build up over time. Likewise I would expect, given the creation of the tracks to cross and the openness of the land that over time people would also use it for wider recreational uses, within the meaning of LSP and in particular dog walking.

(5) My clear impression of this being the likely position in this case is supported by the following:

(a) Although I fully acknowledge that one has to look at the evidence as a whole and I have done so, I consider it important to note that few witnesses for the Applicant covered the full 20-year period. Indeed many covered a much shorter period.

(b) The two witnesses for the Applicant who appeared at the Inquiry that did cover that period were Dr. Putman and Mr. Rickard. I mean no disrespect to either by saying that Mr. Rickard's evidence of LSP on the field was not strong. Dr Putman was patently to my mind an honest witness. However, the evidence on LSP was not in my view particularly specific or convincing with regard to the use of the field. I again emphasise that this evidence has to be, as I have done, considered along with all other evidence. However, my particular concern in this context is the evidence of use of the field for qualifying purposes in the early part of the 20-year period i.e. from 1991- mid 1990s.

- (c) In terms of the 15 oral witness, the following witnesses (additional to Dr Putman and Mr. Rickard) gave evidence that cover some part of the 1990s:
- (i) Mr. Paton who said that the main use was to cross the land.
  - (ii) Dr. Flindell referred to use of the field since the summer of 1994 but didn't take his dog there until 1997.
  - (iii) Julia House gave evidence of the use of the land since 1993: and her evidence related mainly to the use of the field near to the Village Hall and the Copse.
  - (iv) Christine Stevens said that children would play on the field in 1986/7 – in a “hole in field” – when the wheat there. I have concerns regarding the reliability of that evidence and in any event I have taken into account the possibility of children occasionally playing in the crops in concluding there was no meaningful LSP on the land prior to it being sat aside in 1988/9.
  - (v) Elizabeth Page didn't use the land before 1994/6.
- (d) I have considered the other EQs and letters/statements in support of the Application. The Applicant has said that some people have chosen not to give evidence because of the Objectors' response to the TVG Application. I am not in a position to comment or draw any conclusions on that but I would note that this can happen to both sides' potential witnesses, particularly where there is division within the community. Nonetheless, I have taken full account of the evidence in written form on behalf of the Application. This has of course not been tested and the weight I can give to them therefore has to reflect that. In any event, I note and have taken into account that:

- (i) David Acton, Carol and Michael Andrews and Rose Maylin were witnesses originally listed to attend the Inquiry but in the end were not able to but their written evidence is relied upon (see AB/A Tab 4). The Andrews' statement refers to people crossing the land and dog walkers at the weekend. They say over the years that they regularly used pathways to cut across the field to visit the Copse to view the Bluebells and taking their grandchildren to look at the flowers in the woods. They do refer to activities on the field (see also their answer to Q.23 of their EQ), in addition to dog walking but the evidence is not specific as to the years other than saying they have lived in Middleton Road for the past 28 years. The answer to Q.14 of their EQ is "For walking mainly. Sledging." Mr. Acton refers to using the field many times between 1992 and 1995 to fly model aircraft and model rockets. Rose Maylin has lived in Winterslow since 1998. So neither of those cover the early/ middle 1990s period.
- (ii) Of the 7 statements and EQs of witnesses that the Applicant had not intended and did not call (Tab 5 of AB/A), 3 cover some part of the 1990s. One (F.M.Marks) deals with the period from 1994 and it is not clear what recreation of the land took place by that individual beyond walking across the land. The statement of David Platt refers (for the 1990s period) to his wife and her 2 children moving in with him in Woodland Drive and the children growing up using the open space to go to and from various activities such as tennis and badminton in the village hall and playing with friends. Mr. Platt's answer to Q.14 of his EQ (p.205) refers to him walking and

running on the land to gain access to the Common, Surgery and Village Hall without having to go on the road. Jean Radnege (p.210) moved into Woodland Drive in 1991 and again refers to using the land as a short cut. Although she refers to LSP uses, it is not clear exactly when these took place and how often.

- (iii) Of the EQs in of AB/A Tab 6, many do cover the earlier period but again they are not specific enough and have not been tested so do not change my overall impression regarding lack of sufficiency either overall or during this earlier part of the 20-year period.
- (e) I have also considered the evidence in support of the Objectors (and taken account of the Applicant's submissions on this) in so far as relevant to this aspect and note in particular:
  - (i) Mr. Fry said that initially there was only one informal path in 1991.
  - (ii) Mrs. Hazard said that she used the land to walk her dogs after 1991. However, it was not clear to me how long after and she did not provide detailed evidence of LSP at that time.
  - (iii) Mrs. Loader started crossing the field in 1989. However, her evidence did not support LSP at that time to any meaningful degree.
  - (iv) Mrs. Fry was asked (in xx) to confirm that use of the land by people walking started in 1990 – she said that she couldn't recall walking until later.
  - (v) The Applicant states that it is clear that the field was in regular use by 1990/1.<sup>53</sup> It is further contended that Mr. Sheppard confirmed that there were a number of well-established tracks across the field by

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<sup>53</sup> Applicant's Closing Submissions at [12] on p.6

1991 and accepted their presence that it was in regular use at that point. It is important to consider Mr. Sheppard's evidence (as well as the other evidence) on the aspect as a whole to draw the appropriate impression and conclusion. Mr. Sheppard said that when topping in 1988 he was aware of the tracks and that it probably took 2-3 years for the tracks to be formed and by 1991 there were tracks – several tracks. However, Mr. Sheppard also said that the tracks got more definite over time. That is why he took action in 1998. So although he indicated tracks perhaps at the outset, clearly the use of the land was growing. This does not provide in any event itself a lot of support however for the LSP at that early time in the relevant period.

- (vi) I also note that there are no aerial photographs of the 1990s presented by either party in respect of the TVG Application. However, there were 1981 and 1991 aerial photographs referred to in relation to Mr. Clark's application for a modification order to the DMS. At paragraph 17 of the Highways Authority's Decision Report it is stated:

*The aerial photograph taken in 1981 in Wiltshire Council's possession shows the field in which the claimed paths cross has been ploughed and cropped with no routes show on the line of the claimed paths. The 1991 aerial photograph shows the route of the existing path Winterslow 42 very clearly defined but no other clearly defined routes are shown on the claimed footpaths. The aerial photographs are attached as BB3.<sup>54</sup> I acknowledge that aerial*

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<sup>54</sup> OB/A Tab 8 at p.38; see also the Modification Order Inspector's comments on this at [22] – OB/A Tab 8 at p. 67

photographs are not definitive even for tracks/paths but this does offer some further support my overall impression of what the position was likely to have been.

(vii) I also take into account the Applicant's reference to Mr. Fry's recollection of the development meeting in the Village Hall in about 1994-95 where some people suggested that the Application Land was common land.<sup>55</sup> That is not inconsistent with my overall impression.

5.37 The land has to be looked at as a whole and of course not every foot of the land has to be covered by LSP.<sup>56</sup> I have taken into account the Applicant's submission on this and reference to the relevant passages in the *Trap Grounds* case on this, as recorded above. I have also taken into account the Applicant's contention that "there is a presumption of continuing user unless evidence to the contrary suggests otherwise".<sup>57</sup> However, any such presumption has to be considered in the context of the burden on the Applicant to demonstrate compliance with the statutory criteria. In any event, in my view the evidence has not demonstrated sufficient qualifying use of the Application Land as a whole taking into account the use of the Copse throughout the 20-year period and in particular during the early years. For the avoidance of doubt, I should make it clear that I have reached this view without discounting any use as being contentious.

5.38 With regard to the Copse, the Objectors contend (in their Closing and Supplemental Closing Submissions) that any proven use of it would have had the objective appearance of the exercise of public rights of way over defined routes rather than LSP to a degree that was significant over the

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<sup>55</sup> Applicant's Closing Submissions at 69(b) on pp.20-21

<sup>56</sup> Applicant's Closing Submissions at paragraph [57] on p.17

<sup>57</sup> Applicant's Closing Submissions at [2] on pp.1-1

whole of the land. Reliance is placed on Mr. Paton's evidence that around 5-10% of the Copse was made up of the paths.

5.39 The Copse of course was not itself subject to the change in the agricultural regime. As the Applicant said, and as was my distinct impression, the Copse has been in regular for LSP use for long before 1991.<sup>58</sup> I of course recognise that whilst the land was in arable production it does not seem that people, certainly in any meaningful number, would have accessed it from the field. However, it was open and unfenced from the school path throughout the 20-year period and for very many years before, as I understood. Thus in my view the Copse can be in respect of use throughout the 20-year period be distinguished from the field. Further, whilst the field was in arable use and probably for a little period beyond, the Copse would have been even more of an entity unto itself than when the field was used for people to cross and for LSP. The evidence on the use of that area seems much clearer to me.

5.40 Whilst the Objectors strongly contend otherwise, there has been sufficient qualifying LSP use of the Copse itself to indicate to a reasonable owner that a village green right was being asserted of the Copse as a whole (applying the approach in the *Trap Grounds* case), even if at times not all parts were accessible by reason of the vegetation. I have taken into account the coppicing regime, with that activity mainly in winter, but that in no way alters my overall impression with regard to use of the Coppice. I accept and find convincing the Applicant's Supplemental Submissions on this issue.

5.41 Mr. Sheppard did not understand, and had not been advised upon at that time, the distinction between such rights and rights of way. My clear impression of his evidence and that of Mrs. Sheppard was that unless someone was doing anything untoward in the Copse they would have and did tolerate that use. In many ways, whilst they will not thank me for my

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<sup>58</sup> Applicant's Closing Submissions at paragraph [12] on p.5

conclusion on this, the owners are to be commended, as it was clear (particularly from Mrs. Sheppard's words at the Inquiry) that they always considered it entirely appropriate and fair that the enjoyment of that area should not be kept from others. Hence they have clearly tolerated the use of the Copse for recreational purposes.

5.42 However, I of course have based my assessment, as does the RA, on the evidence and the statutory criteria. For the avoidance of doubt, therefore, on that basis it is my view that on the balance of probability the use of the copse as a whole throughout the 20-year period to 4th April 2011 was sufficient for the owners, if they had been aware of such rights, to recognise that they were being asserted.

5.43 For the further avoidance of any doubt, I should again make it clear that I have considered whether the use of the Copse for LSP throughout the 20-year period makes the use of the land as a whole sufficient. For the reasons given above in respect of the field I do not consider that can on the evidence be properly concluded.

5.44 I therefore accept the Applicant's submission with regard to the Copse.<sup>59</sup> I also note that the Applicant contended that if, contrary to their principal contention, the LSP use was not considered sufficient to over the whole Application Land the RA would be entitled to register only that part of the land upon which the statutory test has been satisfied.<sup>60</sup> I was invited to consider this option in that event.

5.45 Finally, I should further make it clear that I have been referring so far to the land in the Copse owned by the Objectors. I noticed on my site visit that there would appear to have been fencing and between their land in the Copse and that of the Council. The Council's land is a distinct and largely inaccessible part of the Copse. I have no evidence before me of

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<sup>59</sup> Applicant's Closing Submissions at [91] on p.28.

<sup>60</sup> Applicant's Closing Submissions at [10] on pp. 4-5



that north-western part of the Copse being accessed and used for LSP. Therefore, on the evidence available, although the Council has not objected as such to their land being registered in my view it should not in any event be included in any land to be registered as a TVG. I am very grateful to both the Applicant and the Objectors who have expressed, in their Supplemental Submission, views on this aspect that are consistent with what I observed and understood.

#### Conclusion on the Sufficiency of Use Issue

- 5.46 The main use of the land has been for transiting to and from different parts of the village. The main use of the Land for LSP has been dog walking on the field and there have also been other qualifying uses on the field but to a greater extent in the Copse.
- 5.47 However, the Applicant has not demonstrated sufficiency of qualifying use for the Application Land as a whole throughout the 20-year period, even taking into account the use of the Copse. That lack of sufficiency of LSP use relates overall given the degree of use of the Application Land that was clearly not LSP and that which it would have been difficult for a reasonable land owner to interpret as an assertion of village green rights. However, there is also a particular concern with regard the earlier part of the 20-year period.
- 5.48 The exception to this conclusion is the Copse. This has an attraction and destination in its own right. In the circumstances a reasonable landowner could not be expected to attribute the use of the Copse to the land as a whole and thus interpret this as an assertion of right over the whole Application Land. Sufficiency of LSP use of the Copse as of right has been demonstrated throughout at least the relevant 20-year period.

- 5.49 The only exception to this relates to the north-west corner of the Copse, which is in separate ownership to the Objectors and appears to have been fenced off and separate from the remainder of the Copse.

### **The By Force Issue**

#### **The 2009 Signs Issue**

- 5.50 There is no dispute that two posts each with a small green notice of about 5 x 4 inches were in place for a number of days in February 2009. The position of these posts is seen on the plan and aerial photograph in OB/A Tab 9. Their position both in the ground and when removed is seen in the photographs in OB/A Tab10.
- 5.51 What is disputed is the period of time that they were in place for, the visibility of the posts and signs and the effect of them with regard to use of the field. It is accepted by the Objectors that they were not directed to the use of the Copse.<sup>61</sup>
- 5.52 The problem that Mr. Sheppard was seeking to address was people walking over his land. He spoke to Wiltshire Council's rights of way department, which advised him to erect the signs that they gave him on posts. This he did with his son on 7<sup>th</sup> February 2009 and re-erected on 13<sup>th</sup> February. The signs stated:

WILTSHIRE  
COUNTY COUNCIL  
NO PUBLIC  
RIGHT OF WAY  
THANK YOU

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<sup>61</sup> Paragraph 29(j) on p.33 of the Objectors' Closing Submissions

5.53 The Applicant contrasts this wording, in my view correctly, with the wording on the 4 much larger red and white signs erected in June 2012 stating:<sup>62</sup>

PRIVATE  
PROPERTY  
PLEASE KEEP OFF

5.54 Although Mr. Sheppard believes the signs were up from the 7<sup>th</sup> February continuously until the 13<sup>th</sup> February 2009 (as he said he went back to check every day between 7<sup>th</sup> and 13<sup>th</sup> February), there is some evidence that would suggest otherwise.<sup>63</sup>

5.55 Many people said that they did not see the posts or signs. Some did see them and some saw just one. I am not entirely surprised that some people stated that they did not see them, although I am a little surprised how many. That may partly be the result of a combination of factors such as the short period of time that they were in place; the time of the year; the fact that some users were only on a limited part of the field and/or they were on the land when the light was not good. I also find it more difficult, to understand that some people who saw the posts did not realize that they displayed signs. I accept the signs themselves were very small and not obvious but I would have thought natural curiosity would lead most people (if not all) to ascertain the purpose of a post that suddenly appeared, sticking well up from the ground.

5.56 It is not the fault of Mr. Sheppard that the signs were torn down. I also expect that the posts were removed by someone who took issue with the owners' challenge of their use of the land. However, there is no direct evidence on this and it would be inappropriate of me to speculate on the motives of those responsible.

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<sup>62</sup> OB/A Tab 11

<sup>63</sup> See e.g. Applicant's Closing Submissions at [73] on p.22

5.57 I have carefully taken into account the submissions of both parties and the *Betterment* and *Oxfordshire Mental Health Trust* cases. Based on those legal authorities, the fundamental question is what the notices conveyed to those using the field.

5.58 In my view, even if they had remained in the ground and displayed, the notices were not effective in rendering the recreational use contentious. I have reached this conclusion having regard, in particular, to:

- (1) The submissions made by the Objectors, including the specific relevant factors referred to and relied upon in paragraph 24.<sup>64</sup>
- (2) Whilst some users understood the sign to be excluding all trespassers, I do not accept that should be assumed to apply to the reasonable user standing in the position of the actual user. It cannot be assumed that the users were aware of the section 31(6) declarations and the significance of these.
- (3) Given the background of the clear tracks across the paths that appear to have increased during the 1990s and 2000s, the reasonable user would in my view be likely to read it as referring to rights of way rather than wider recreational use rights. As the Applicant points out, their position next to the diagonal footpath used as the main short cut across the field, is consistent with that.<sup>65</sup>
- (4) In my view the signs did not contest the recreational use and in any event at best the wording was ambiguous.
- (5) It is also my view that there was something that readily could have been done by the owners that was proportionate. Indeed, it was done in terms of the 4 red and white signs. However, those of course are not relevant to the claim in respect of the 20-year period.

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<sup>64</sup> In particular [16]-[25] on pp. 6-10 of the Objectors' Closing Submission

<sup>65</sup> Applicant's Closing Submissions at [83] on p.26

5.59 Although I have considered and reached my conclusion on the wording in the context of this case, I do note that the wording of the sign in the *Oxfordshire Mental Health Trust (Warneford Meadow case)* case is the same. The Objectors contend that the circumstances of the two cases are distinguishable.<sup>66</sup> The Objectors refer in particular to paragraphs 13, 22, 41, 49, 52 and 53 of the Judgment in that case. I note that in paragraph 41 of the Judgment reference is made to the Inspector's Report, where he found that the purpose of the signs was to prevent two paths from acquiring the status of public rights of way and that the landowner had no objection to general public recreational access to the Meadow but only to the creation of public rights of way. However, as noted in paragraphs 22(7) & (8) of the Judgment, it was held that of itself the subjective intention of the owner cannot assist in ascertaining the meaning of a notice. Further, as the Inspector went on to say (in paragraph 41) if the signs had intended to forbid general access to the Meadow, he did not understand why they did not say so. Therefore, in my view I do not see the distinction that the Objectors rely upon and indeed the passages referred to do not, in my opinion, assist the Objectors but are consistent with the Applicant's position and my own conclusion on this aspect.

5.60 The Objectors also put forward a default position. That position is that any objection from them to a lesser burden (rights of way) must by necessary implication also have included objection to the more onerous burden (TVG rights). Given the approach in the current legal authorities and in particular in the *Warneford Meadow case*, I cannot accept that submission.

5.61 I should also make it clear, in case it was being made as a separate point, that I am unable to accept the submission made by the Objectors that "as a pure matter of law" section 31(6) means that any use for LSP cannot be as of right. Such an interpretation would in my view be contrary to the

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<sup>66</sup> Objectors' Closing Submissions at [22]- [23]

distinction recognized in the legal authorities between TVG rights and rights of way.

5.62 In my view, it is likely that there were earlier signs. Several witnesses referred to these. However, the evidence on them is too vague to assess whether it can properly be concluded that they rendered the use contentious. I have therefore not taken these into account. The Objectors do not rely upon them.

### **The Breaching of the Highfield Crescent Fence**

5.63 There seems to be no dispute that there has been for many years a gap in the fence at Highfield Crescent as seen in photograph 23B (OB/A Tab 5). Mr. Yates also referred to another gap in front of his house and to his having repaired that.

5.64 As the Applicant says, the fence did not belong to them and was not repaired by them. The principle from the *Betterment* case is that it would be a direct infringement of the principle that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. However, the difficulty in this case was that the fencing did not amount to any demonstration from the owners themselves, save possibly in respect of the repairs in 2009 when Mr. Sheppard asked the Council to repair the fence. Further, the land could be readily accessed without breaking through a fence from north, south, east and west.

5.65 For those reasons, I have not discounted any of the Application Land for LSP as contentious by reason of the fencing along Highfield Crescent. Even if I had, any discount of use on that basis would not have altered my overall Conclusions with regard to the use of the Copse as a whole (apart from the north-west part), and that area only, for LSP being in accordance with section 15(3).

## OVERALL CONCLUSIONS

- 5.66 The Application Land consists of readily accessible agricultural land that was in set aside throughout the relevant period and a Copse, with the latter making up about 40% of the overall site. My clear impression was that main use of the land has been for transiting to and from different parts of the village. There has also undoubtedly been LSP uses carried out on the Application Land and the Copse. The main use of the Land for LSP has been dog walking on the field and there have also been other qualifying uses.
- 5.67 However, the Applicant has not demonstrated sufficiency of qualifying use for the Application Land as a whole throughout the 20-year period. That relates overall given the degree of use of the Application Land that was clearly not LSP and that which it would have been difficult for a reasonable land owner to interpret as an assertion of village green rights. Moreover, I also have a particular concern with regard the earlier part of the 20-year period.
- 5.68 The exception to this conclusion is the Copse. This was, during the relevant period, an attraction and destination in its own right. Sufficiency of LSP use of the Copse as of right has been demonstrated throughout at least the relevant 20-year period. The only exception to this relates to the north-west corner, which is in separate ownership to the Objectors and appears to have been fenced off and separate from the remainder of the Copse as both the Applicant and Objectors have helpfully agreed.
- 5.69 The two signs put up in 2009 did not in the circumstances make any use of the land for LSP contentious. The breaches of the Highfield Crescent fencing relied upon by the Objectors issue has no bearing on my overall assessment and I have reached the above conclusions taking no account of the effect of these breaches.

5.70 Accordingly, I conclude that the Application only satisfies the criteria within section 15(3) of the Commons Act 2006 in respect of the Copse but not in respect of that part of the Copse in the north-west corner owned by Wiltshire Council.

## **6. RECOMMENDATION**

6.1 For the reasons set out in section 5 of this Report, I recommend to the Registration Authority:

**The Application by Winterslow Opposed to Over Development (WOOD) under section 15(3) of the Commons Act 2006 be approved but only to the extent that Brown's Copse is registered as a town or village green in its entirety, other than the north-west corner of the Copse that is owned by Wiltshire Council.**

**STEPHEN MORGAN**  
Landmark Chambers  
London EC4A 2HG

10 March 2015