WILTSHIRE COUNCIL

COMMONS ACT 2006

DECISION REPORT

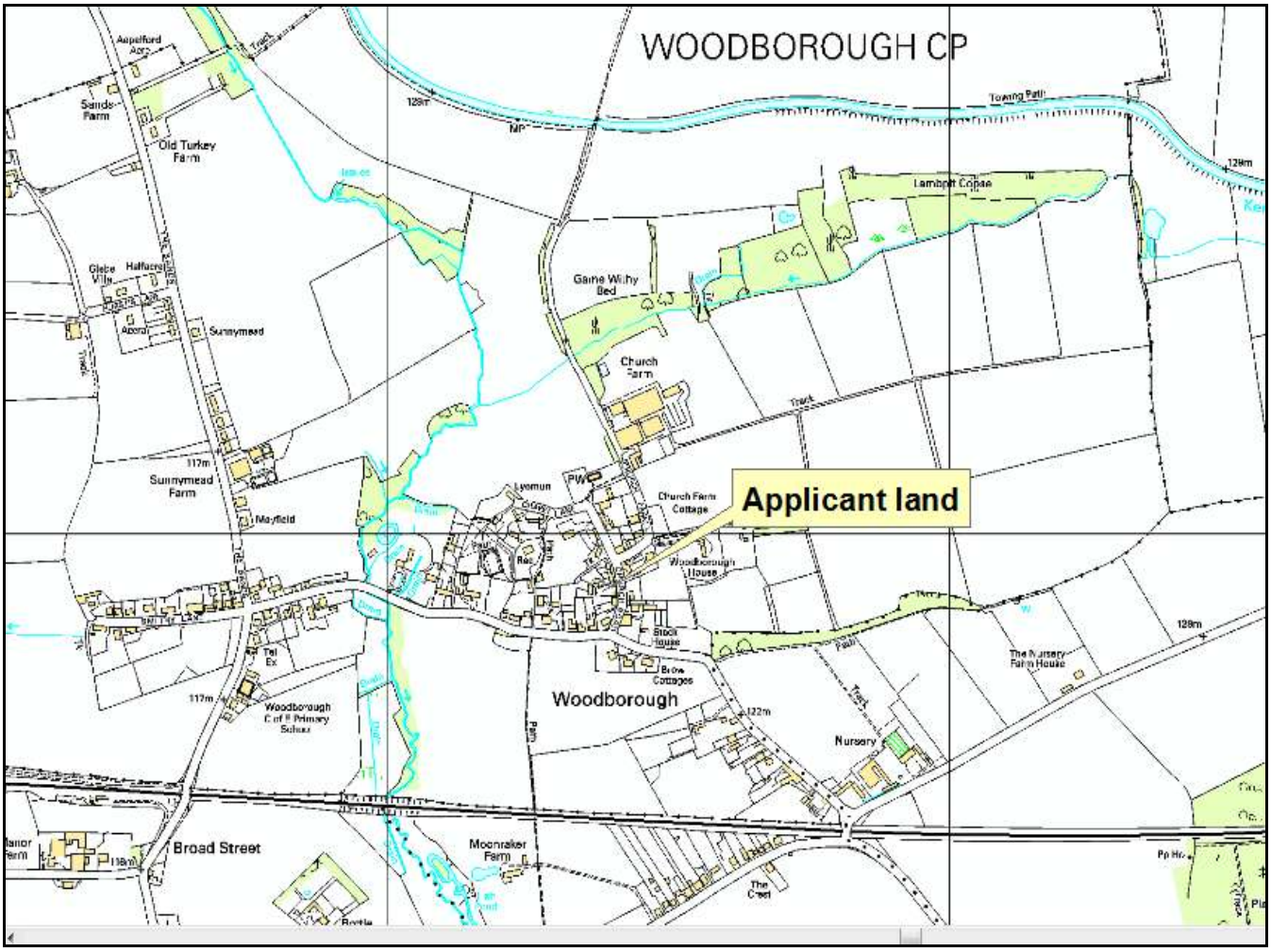
APPLICATION TO REGISTER LAND AT BONDFIELD, WOODBOROUGH AS A TOWN OR VILLAGE GREEN

1 PURPOSE OF REPORT

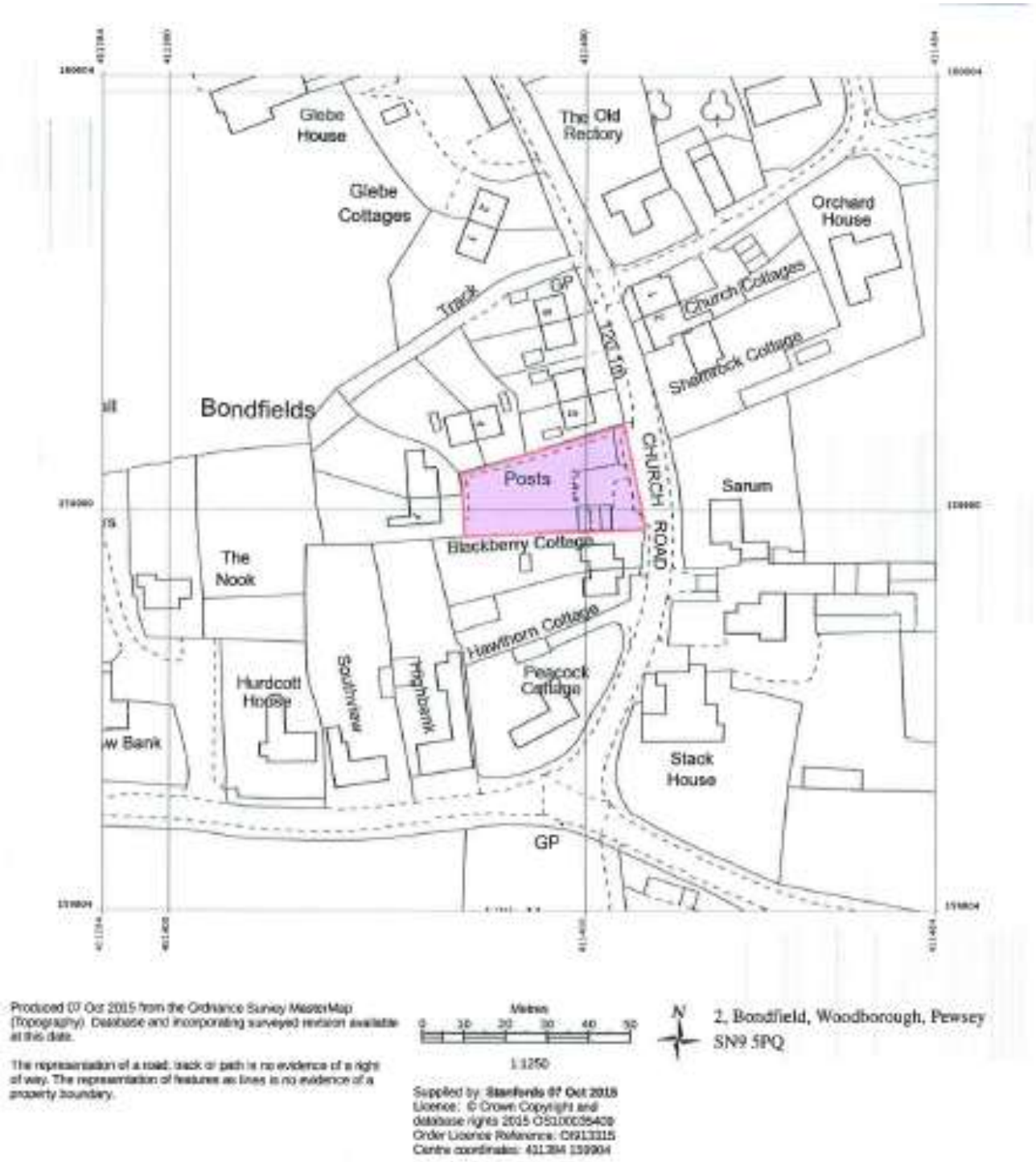
i) To consider the application and evidence submitted under Section 15(1) and (2) of The Commons Act 2006 to register land at Bondfield, Woodborough as a Town or Village Green.

2 LOCATION PLAN

The land is located at Bondfield, Church Road, Woodborough, Pewsey, SN9 5PQ



3 APPLICATION PLAN



3.1 The application plan was not marked as an exhibit to the statutory declaration in support of the application (*The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007 2007 No. 457 10(3)(c)*).

10. – *(1) This Regulation applies to the description of any land which is the subject of an application for registration as a town or village green.*

(2) Land must be described for the purposes of the application –

(a) by any Ordnance map accompanying the application and referred to in that application; or

(b) in the case of land already registered as common land, if the application relates to the whole of the land in a register unit, by a reference to that register unit.

(3) Any Ordnance map accompanying an application must –

(a) be on a scale of not less than 1:2500

(b) show the land to be described by means of distinctive colouring; and

(c) be marked as an exhibit to the statutory declaration in support of the application.

(d) ….

3.2 The regulations at 5.4 permit the Commons Registration Authority (the CRA) to allow the applicant an opportunity to correct the application:

5. – *(1) Where an application is made under section 15(1) of the 2006 Act to register land as a town or village green, the registration authority must, subject to paragraph (4), on receipt of an application –*

(a) …….
(b) …….
(c) ……

(2) ……

(3) ……

(4) Where an application appears to the registration authority after preliminary consideration not to be duly made, the authority may reject it without complying with paragraph (1), but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action.

(5) ……..
(6) …….
(7) …….

3.3 The application was received and dated in accordance with the Regulations on the 7th October 2015. The application plan was returned to the CRA marked as an exhibit on the 16th November 2015.

4 APPLICANT DETAILS

The application has been made by:

Mr Karl Lloyd
Shamrock Cottage
Woodborough
Wiltshire
SN9 5PL

5 LANDOWNER DETAILS

The land is owned by:

Aster Group
Sarsen Court
Horton Avenue
Cannings Hill
Devizes
SN10 2AZ

Acting for Aster Group in this matter:

Neil Lawlor
Devonshires Solicitors LLP
30 Finsbury Circus
London
EC2M 7DT

6 PHOTOGRAPHS OF THE APPLICANT LAND 12th November 2015

From front of 1 Bondfield looking towards Church Road

From parking bay off Church Road looking towards 1 Bondfield

7 AERIAL PHOTOGRAPHS OF THE APPLICANT LAND

7 LEGAL EMPOWERMENT

7.1 Wiltshire Council is the Commons Registration Authority for the County of Wiltshire (excluding the Borough of Swindon).

7.2 The application has been made under Section 15 of the Commons Act 2006 as amended by the Growth and Infrastructure Act 2013 (the 2013 Act).

7.3 Section 16 of the 2013 Act amended the law on the registration of new town and village greens under Section 15(1) of the Commons Act 2006. It did this by inserting new provisions – section 15C and schedule 1A into the 2006 Act – which exclude the right to apply to register land as a green when any one of a number of events, known as 'trigger events', have occurred within the planning system in relation to that land.

7.4 The trigger events are prescribed by Schedule 1A of the Commons Act 2006. For example, where an application for planning permission is first publicised then the right to apply to register land as a green is excluded. This ensures that decisions regarding whether land should be developed or not may be taken within the planning process.

7.5 The new section 15C(2) of the Commons Act 2006 provides for 'terminating events', which are also set out in Schedule 1A to that Act. If a terminating event occurs in relation to the land in question, then the right to apply for registration of a green under section 15(1) is again exercisable. For example, if the right to apply to register land has been excluded because of an application for planning has been publicised, the right to apply for registration of the land as a green again becomes exercisable if planning permission is refused and all means of challenging that refusal have run their course.

7.6 The 2013 Act amended the Commons Act 2006 in two other ways (Section 14 amended sections 15(3)(c) and inserted sections15A and 15B. These amendments relate to the deposit of 'landowner statements' – the purpose of which is to protect the land from future claims – but are not relevant to the application being considered here as no deposits have been made.

7.7 This application has been made under Section 15(1)(2) of the Commons Act 2006

7.7 ***Commons Act 2006***

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 the application.

(3) …….

(4) …….

15A ……

15B ……

15C Registration of greens: exclusions

(1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land ("a trigger event").

(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land ("a terminating event").

(3) The Secretary of State may by order make provision as to when a trigger or a terminating event is to be treated as having occurred for the purposes of this section.

(4) The Secretary of State may be order provide that subsection (1) does not apply in circumstances specified in the order.

(5) The Secretary of State may by order amend Schedule 1A so as to –

(a) specify additional trigger or terminating events;

(b) amend or omit any of the trigger or terminating events for the time being specified in the Schedule.

(6) A trigger or terminating event specified by order under subsection 5(a) must be an event related to the development (whether past, present or future) of the land.

(7) ……...

(8) ……...

7.8 The trigger and terminating events relevant to the consideration of this application are at Schedule 1A (1):

Trigger Event	Terminating Event
An application for planning permission in relation to the land which would be determined under section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act.	(a) The application is withdrawn. (b) A decision to decline to determine the application is made under section 70A of the 1990 Act. (c) In circumstances where planning permission is refused, all means of challenging the refusal in legal proceedings in the United Kingdom are exhausted and the decision is upheld. (d) In the circumstances where planning permission is granted, the period within which the development to which the permission relates must be begun expires without the development having been begun.

8 BACKGROUND

8.1 The applicant land is currently owned by Aster Property and forms part of a small development of ex-local authority housing known as Bondfield. It was transferred from Kennet District Council to Sarsen (Aster) Property in July 1995. The development consists of 4 houses (numbers 1 to 4) arranged on two sides of a green area with garages and a car park area on the eastern extent of the site bordering Church Road. Contemporary ex local authority housing (numbers 5 to 8) also extends northwards up Church Road as part of 'Bondfield'. Only two of the properties are tenanted today.

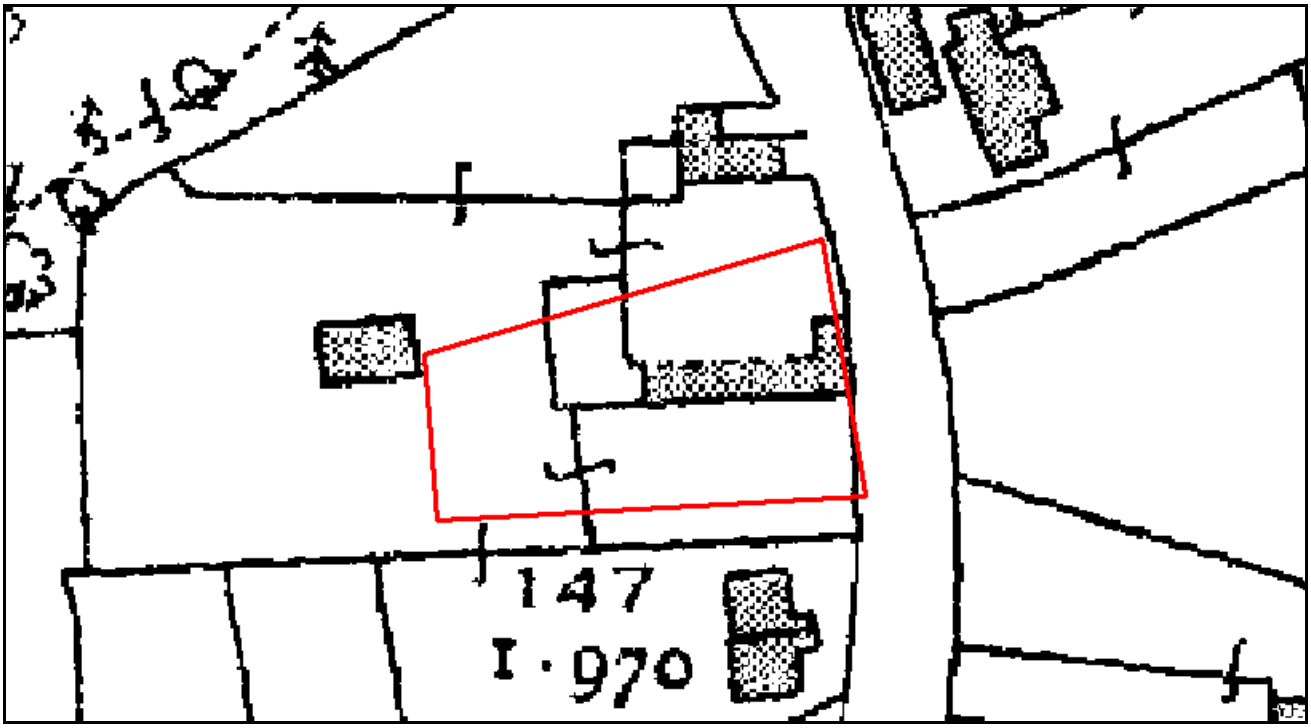
8.2 Woodborough is a predominantly rural parish bounded by the railway line in the south and by Woodborough Hill in the north. The Kennet and Avon canal runs through it. Although there are some scattered outlying dwellings the majority of people who live in Woodborough live in a small village settlement in the south east of the parish. The applicant land lies centrally within this settlement.

8.3 The applicant land is not a historic green site and was only created when Bondfield was built. Only post Second World War maps show the site, maps before this date show properties on the site that were demolished to allow for the development.

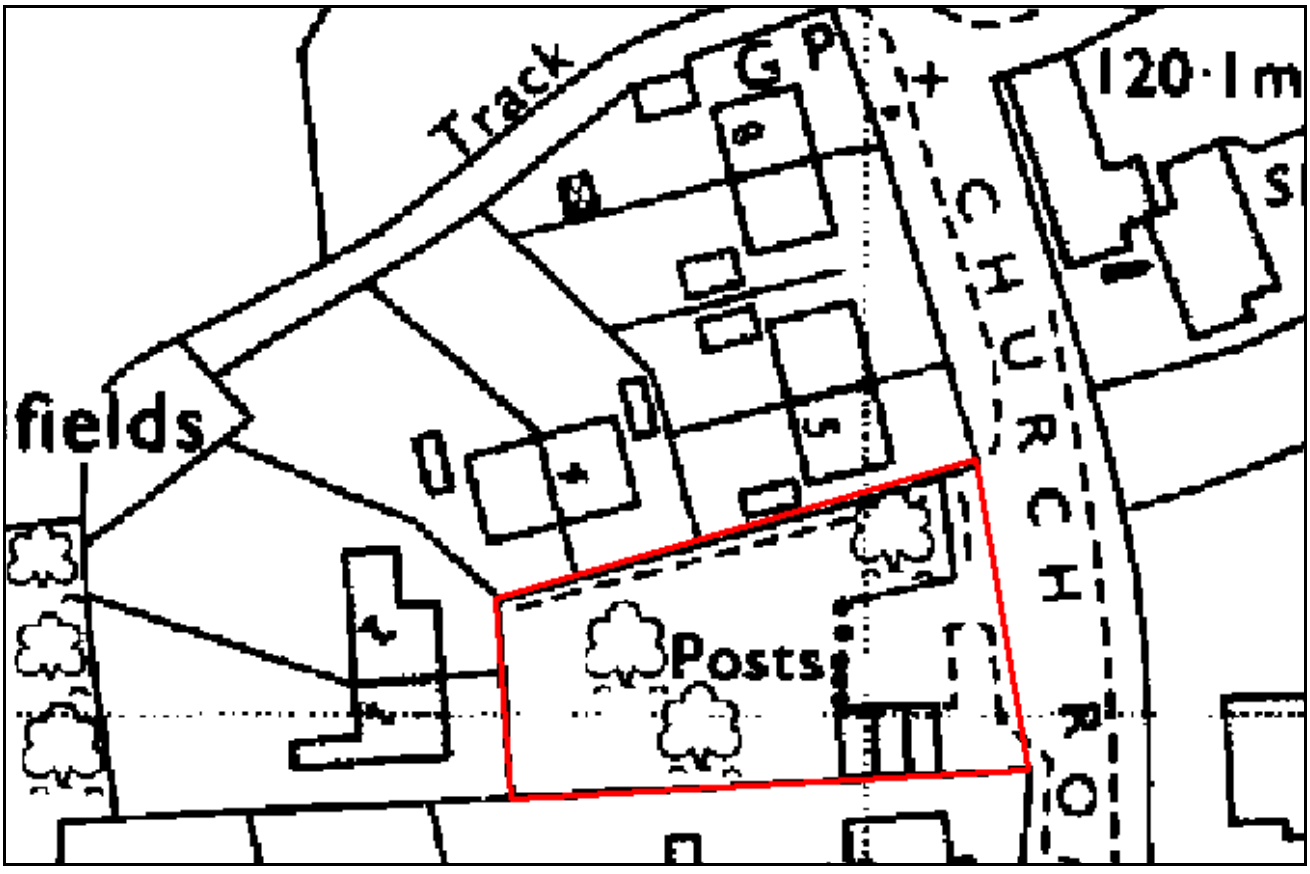
8.4 The population of Woodborough in 1991 was 264, in 2001 267 and in 2011 292.

8.5 The red line on the maps below represents the extent of the land affected by this application.

Ordnance Survey 1:2500 County Series 1939 Revision



Ordnance Survey 1:2500 National Grid Series c.1970



8.4 The application adduced evidence from 12 witnesses on User Evidence Forms (UEFs) supplied by The Open Spaces Society. When the applicant submitted the map marked as an exhibit (see paragraph 3.1) an additional 7 UEFs were submitted.

8.5 The copy of the application sent to the landowner contained all of the above (para 8.4).

9 TIMELINE

07 October 2015 Town and Village Green (TVG) application received
08 October 2015 CRA wrote to PINS and Planning Authority requesting details of Trigger events
12 October 2015 Negative response received from Planning Authority
14 October 2015 Negative response received from Planning Inspectorate
14 October 2015 Planning application affecting applicant land validated and published by Wiltshire Council
19 October 2015 TVG applicant informed of failure to comply with reg. 10(3)(c)
12 November 2015 Application advertised
18 November 2015 TVG applicant returned map marked 'Exhibit'
02 December 2015 Application for planning permission refused by Wiltshire Council
21 December 2015 Copy of application for TVG requested and sent to Aster's Solicitors (Devonshires).
29 December 2015 Objection to the application duly made by the landowner
29 December 2015 End of advertisement period
29 January 2016 End of additional time granted for submission of supporting material to objector (landowner). Submission received.
02 February to 29 February 2016 Period given to applicant to comment on objection
29 February 2016 Applicant's comments of objection received
03 March – 31 March 2016 Period given to objector to comment on applicant's response
31 March 2016 Objector's comments received

10 PUBLIC CONSULTATION – exchange of correspondence

10.1 Submissions from Aster Property **APPENDIX A**

10.2 Response from the applicant **APPENDIX B**

10.3 In summary, Aster Property list the following reasons for their objection (though not necessarily exhaustively):

1. The Council has no power to register the Land by virtue of s.15C
2. The application incorrectly identifies the land
3. The Land has not been used by a significant number of local inhabitants as of

right in lawful sports and pastimes on the land for a period of more than 20 years
4. Such use did not continue as at the time of the application

10.4 In summary, the applicant considers that:
1. The TVG application was received 11 days before the application for planning permission was published. *NB it was actually 7 (officer's comment)*
2. That the map is an accurate and logical representation of the parcel of land known as Bondfield. The CRA has discretion to exclude some of the land from registration.
3. & 4. That the land has been used for 20 years and beyond this back to the 1950s. It is a natural refuge and publicly accessible green space in the village. Its size has no bearing on registration.

11 MAIN CONSIDERATIONS FOR THE COUNCIL

11.1 The application is made under s.15(1) and 15(2) of the Commons Act 2006.

The requirements of these sub-sections can be broken down into a number of elements or legal tests which the application must satisfy in order for the land to be registered as a town/village green, and are as follows:

- Significant number
- Inhabitants of any locality or of any neighbourhood within a locality
- Indulged "as of right"
- Lawful sorts and pastimes
- The land
- A period of at least 20 years
- Use is continuing at the time of application.

11.2 The burden of proof lies in the "balance of probabilities", i.e. the Registration Authority is not required to prove beyond reasonable doubt that 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 over the land for a period of at least 20 years and that use is continuing at the time of application, but just that it is more likely than not.

12 CONSIDERATION OF THE EVIDENCE – UEF SUMMARY APPENDIX C

12.1 Wiltshire Council relies upon the UEFs submitted and the submissions from Aster dated 29 December 2015, 29 January 2016 and 31 March 2016 and from the applicant on 29 February 2016.

12.2 It is noted that 2 of the witnesses live at Bondfield (witness numbers 2 and 11). Although their UEFs state that they have not used the applicant land with permission it is accepted that if they are or were tenants of the properties that there may have been a condition in their lease permitting their use of the applicant land. Additionally it is stated by Aster that tenants "would have made a contribution to the maintenance of the Land…".

12.3 No details of whether witnesses 2 and 11 were tenants or indeed any copies of tenancy agreements have been adduced that would cause the Council to disregard their evidence. The Council does not have an investigative role in determining this application and accordingly their UEFs will be included in these considerations though reference will be made as to the effect of the evidence should they be discounted.

12.4 The relevant period for the consideration of the 20 years use is taken as being from October 1995 to October 2015.

13 SIGNIFICANT NUMBER

The meaning of the word 'significant' was considered in *R (Alfred McAlpine Homes) v Staffordshire County Council [2002] EWHC 76 (Admin)* by Mr Justice Sullivan who rejected the argument that it means 'a considerable or substantial number'. What matters, he said, is that the number of people using the land has to be sufficient to indicate that it is in general used by a local community for informal recreation, rather than just occasional use by individuals.

13.1 The application adduces evidence from 19 people all of whom have used the applicant land for periods ranging from 15 to 65 years for a variety of purposes. All witnesses have used the land up to the date of their UEF (dates vary from the 6th October to the 14th November 2015). 15 of the witnesses have used it for more than 20 years

13.2 All witnesses state that they have seen other people using the land though 1 witness does recognise that he has seen people using it to visit friends. The Council recognises that use to visit the houses would be viewed as by licence and discounted.

13.3 If evidence of their own use was disregarded for witnesses 2 and 11 they both record seeing others using the land and this evidence is submissible even in the event that their own use wasn't.

13.4 The population of Woodborough for the relevant period is as follows:

1991	264	
2001	267	
2011	292	Data from UK Census figures.

13.5 Although every witness refers to the annual village fete taking place on the applicant land every witness has also observed children playing on the land and high numbers have recorded seeing people playing football or cricket (16), having picnics (11), riding bicycles (13) and singing carols (13).

13.6 Aster point out that considerably fewer numbers describe these activities for their own use. Witnesses refer predominantly to the annual fete and other fundraising activities with only some describing playing with grand children on the land or generally socialising.

13.7 This is hardly surprising, as it is not the children who have offered the evidence of use but the adults who observe it. It is more than likely that the general playing, the football and cricket, the riding of bicycles and the picnics are all activities undertaken by minors from whom it would not have been appropriate to receive a UEF. The adults completing the UEFs have correctly recorded only the use they made of the land while also recording the use they saw others make of it. Accordingly, the UEFs form a cogent and cohesive body of evidence to support the application.

13.8 The picture that emerges from the evidence of use is that the land was predominantly used by children for general play activities and by adults for community events like watching children play, fetes and carol singing.

13.9 The land is visible from Church Road and some adjacent properties and the Council considers that the use described in the UEFs indicate that the land was in general use by the local community and that the requirement for a 'significant number' is satisfied.

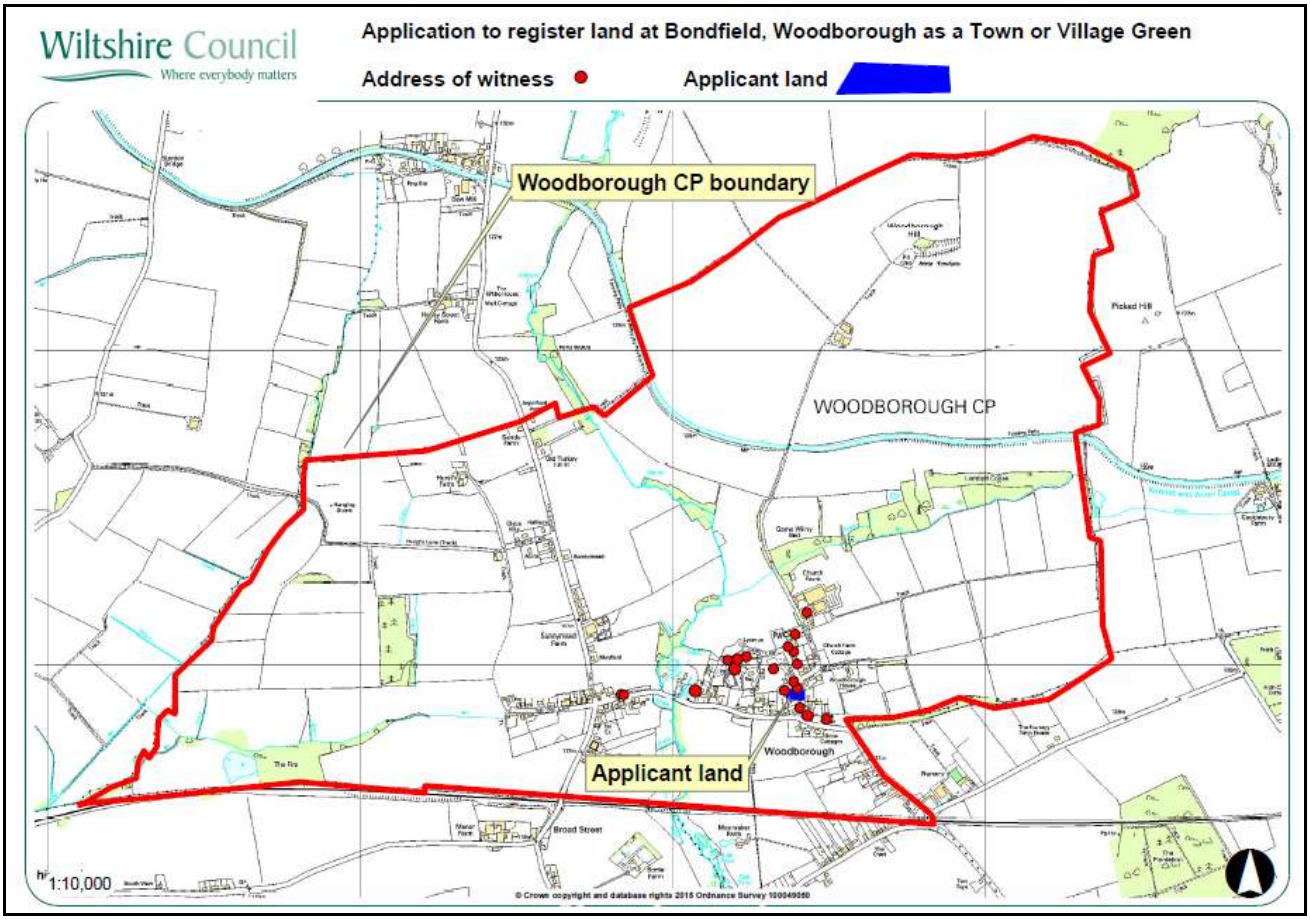
14 INHABITANTS OF ANY LOCALITY

14.1 The Court of Appeal in the *Paddico* (*Paddico Ltd v Kirklees Metropolitan Council [2012] EWCA Civ 262*) discussed the meaning of "locality". The primary meaning of a "locality" is some legally recognisable administrative division of the country such as a borough, parish (civil or eccliastical) or manor.

14.2 The locality given by the applicant is Woodborough which is a Civil Parish in the county of Wiltshire.

14.3 All of the witnesses come from Woodborough though some recognise that occasionally people from neighbouring villages may support their organised activities (for example attend the fete). In *Sunningwell [2000] 1 AC 335* Lord Hoffman accepts that the requirement if not for *only* the inhabitants of the locality; it is sufficient for the majority to come from the locality.

14.4 The distribution of witnesses supplying UEFs throughout the locality of Woodborough Parish (boundary shown by red line) is shown on the map overleaf:



14.5 The Council considers that the application adduces evidence of use from a significant number of inhabitants of the locality of Woodborough parish.

15 HAVE INDULGED AS OF RIGHT

15.1 Use of the land must be "as of right", that is without force, without secrecy and without permission.

15.2 The state of mind of the user is not a consideration, all that may be considered is whether that use has gone on, without permission, without force and without secrecy. This point was addressed by Lord Hoffman in the House of Lords in the case of Regina v Oxfordshire County Council and others ex parte Sunningwell Parish Council [2000] 1 AC 335. In his judgement Lord Hoffman dismisses any additional requirement of subjective belief for the satisfaction of 'as of right':

"In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in any way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to

whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like Steed when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr J G Ridall's article "A False Trail" in [1997] 61 The Conveyancer and Property lawyer 199."

15.3 Use must be judged objectively, from the standpoint of a reasonable landowner; does the user carry the outward appearance of user as of right? In *Sunningwell* Lord Hoffman indicated that whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land'.

16 PERMISSION

16.1 No witnesses record having been granted permission though it is acknowledged that there may be circumstances where tenants of the housing or garages at Bondfield may have had access to all of the land as part of their tenancy. However, the Council has no evidence before it of this.

16.2 Aster, in their submission dated 29 December 2015, detail that at all material times the Land was maintained for the purposes of the tenants of Bondfield. Works were undertaken with liveried vans and by uniformed individuals and it is stated that it cannot have escaped the attention of anyone familiar with the Land that it was being maintained, not as public open space, but by Aster Property for use in accordance with the properties in the immediate vicinity (of which two units are held on tenancies, the remainder have been purchased over time).

16.3 The submission also points out that the Land is substantially enclosed and that the obvious impression is that the Land is for the benefit of Bondfield. Aster state that the Land was being maintained "not as public open space".

16.4 Accordingly Aster conclude the occupiers of the housing units had permission to use the land and that anyone else using the site was doing so by implied licence.

16.5 It is acknowledged that it is possible, as a matter of law, for implied permission to defeat a claim to prescription, the authorities suggest that the landowner must do some positive act in order to give rise to the implication, otherwise the landowner is merely acquiescing. In the Supreme Court in *R v North Yorkshire County Council & Others ex parte Barkas [2014] UKSC 31,* Lord Neuberger stated:

"In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on Easements (19th edition, 2012), para 4 – 115:

> *"The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some*

circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right' ; acquiescence is the foundation of prescription. However, user which is without licence or permission of the owner is not 'as of right.' Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence."

16.6 The evidence adduced by both parties in this case brings nothing to the Council's attention related to any express permission. The question is then whether or not the use was by implied permission based on the partial enclosure of the land and the maintenance of the land for the benefit of the householders and not as public open space.

16.7 It is worth re-iterating the point made by Lord Hoffman in *Sunningwell* and re-produced here at 15.2 in that it does not matter what was in the mind of the user, what matters is whether the use took place. Even if, in the mind of the landowner, the use was by implied permission there is no evidence that this was ever made apparent to the public, additionally there have been no acts of revocation of any permission and no limits attached to it. Mowing the grass is the action of a reasonable landowner and cannot be taken as an invitation to the public to use the land.

16.8 It is clear that the use took place in an open manner that residents would not have been unaware of. It is also clear from the evidence that the annual fete is a major event for villagers and cannot have gone un-noticed as it would have been locally well publicised and in all probability led to at least the trampling of the grass.

16.9 There is no evidence before the Council that anyone asked for permission, that any permission was granted for any event or activity, that any signs or notices relating to permission were put in place or that any attempt to restrict access to the Land were made. The land is enclosed quite naturally by property boundaries on three sides and although some fencing is in place on the road side the area has an open feel owing to the gap in the fencing for the path, the path itself and easy access from the parking area through the bollards.

16.10 Equally there is no evidence that any accommodation for the activities was made or that there were any positive acts, for example by the placing of benches or in saying that the Land was maintained for the benefit of anyone other than the residents. It is therefore hard to say how permission was implied and it is considered far more likely that Aster Property (and their tenants) exercised passive toleration to the use of the Land for anyone other than themselves.

16.11 Bearing in mind the fact that the land was formerly owned and managed by a local authority (in this case Kennet District Council) It is necessary to consider whether the land was held under any of the Housing Acts. For example Section 80 of the Housing Act 1936 permitted an authority to provide and maintain, *inter alia,*

recreation grounds *"where they serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided".* The power to maintain these was continued under Section 12 of the Housing Act 1985. The recent judgement in the Supreme Court in *R(Barkas) v North Yorkshire CC [2014] UKSC 31* makes it clear that where land has been allocated and maintained as public recreational space by a local authority then any use is not 'as of right' but 'by right' and hence not qualifying use for registration.

Lord Neuberger at [24]:

"I agree with Lord Carnworth that, where the owner of the land is a local, or other public authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right" simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

16.12 There are a number of indicators that the ruling of the Supreme Court in the case of *Barkas* is not relevant here. Firstly the land passed from the local authority to private ownership in July 1995 (the relevant period of 20 years runs from October 1995 to 2015). For this period the Land has been owned by a Housing Association which is a society, company or body of trustees established for the purpose of providing, constructing, improving or managing, facilitating and encouraging the construction of housing accommodation, it is not a local authority. Secondly when a change of use of part of the land was applied for in 2010 it was from visual amenity land to enclosed garden; there was no discharging of any allocation for recreation (i.e. there was no decision to appropriate the land to discharge any previous allocation for public use), thirdly Aster in their response of the 29th December 2015 clearly state that *"it was maintained, not as public open space, but by our client for use in accordance with the properties in the immediate vicinity (which still include two units of accommodation held on short tenancies, the rest having been purchased over time by use of the right to buy."* Finally, the land was <u>not allocated for public use</u> as required by Lord Neuberger above. There is no reliance on any of the Housing Acts.

16.13 It is concluded that use has been without permission.

17 WITHOUT FORCE

If, during the period of use, any form of force is employed to gain access to the land, for example by breaking a padlock from a gate then use is not as of right. Additionally use is by force in law if it involves climbing fences or gates, is contentious, under protest or in the presence of notices (for example 'keep out'). If use is forcible, the landowner is not acquiescing in the use.

17.1 Use of the applicant land was not by force. The site is readily accessible from Church Road either by crossing the tarmac area in front of the garages or by using the gap and pathway leading to the houses.

17.2 There were no signs preventing public access (for example 'residents only' or 'access only').

18 WITHOUT SECRECY

The use must be open, so that the landowner (or someone acting as his agent) is capable of seeing that the land is being used for sports and pastimes. There is no requirement that the landowner must be shown to have known of the use of the land, only that he would have known of the use had he chosen to look.

18.1 The use of the land detailed in the UEFs was not made in secret. Children play during daylight hours and uses of the land for community events (including the fete) would have been likely to have been publicised and again, taken place during daylight hours.

19 LAWFUL SPORTS AND PASTIMES

The term lawful sports and pastimes is a wide term that includes many activities. The effect of the adjective lawful excludes activities that are unlawful (for example badger baiting or dog fighting). Many sports and pastimes have been acknowledged by the courts specifically children playing (*Sunningwell* at 356F – 357E) additionally the playing of cricket and football both formally and informally, walking, carol singing, may pole dancing and community events (such as fetes and flower shows) are all accepted as lawful sports and pastimes.

19.1 There is no requirement that the same activities must be exercised throughout the 20 year period and activities may vary according to the time of year or shifting trends in behaviour. What is required is that some form of sports and pastimes have been exercised on the land for the requisite period. It is not necessary for there to have been sports *and* pastimes, one or the other will suffice (see *Sunningwell [2000] 1 AC 335* pp 356F – 357E).

19.2 The application to register land at Bondfield adduces evidence from 19 people who have attended (and observed others attending) a village fete on the ground (witness 6 describes it as "an annual weekend summer fete"). There are also references to

other community activities such as barbecues, parties and fund raisers distinct from the annual fete. A number of people refer to their own use more generally "village activities", "any village activities", "for community events", "parish community events", "village gatherings" and "events".

19.3 All witnesses have seen children playing on the land, 2 use it to play with their grand children (though it is accepted by the Council from the evidence that one of these is a resident of Bondfield and may be able to do this by right), 1 record their own children using it and another specifically records watching children play which suggests that it is their own children they are watching.

19.4 In their response to the application dated 29 December 2016 Aster consider that the community use is infrequent and "cannot possibly be sufficient to support the application."

19.5 Whilst it is agreed that the attendance of community events, including the fete, is the majority use of the witnesses themselves, it is considered that, any other use notwithstanding, the use of the land for an annual fete would be sufficient to be a qualifying lawful sport or pastime for the purposes of registration. In the House of Lords in *Oxfordshire County Council v Oxfordshire City Council [2006] UKHL 25 (The Trap Grounds case)*Lord Hoffman considered what a village green might be and at paragraph 39 gives examples of greens that have qualified for registration based on unusual or regular but infrequent use.

"…On 24 May 1976 the Chief Commissioner Mr Squibb ordered registration of land which the local authority wanted to use for housing purposes but upon which there was the custom of having an annual Guy Fawkes bonfire. No doubt there are other examples in the archive of decisions of the Commons Commissioners."

19.6 In addition to the witnesses who record they use the land for their own children or grand children there is the additional evidence that they have all seen children playing on the land.

19.6 It is therefore considered that the application raises a sufficiency of evidence of use of the land for lawful sports and pastimes to qualify.

20 ON THE LAND

It is not necessary for the applicant land to look like a traditional village green and there are examples of land that is covered with water being registered and of land where only 25% of it was accessible to the public for lawful sports and pastimes (for example the *Trap Grounds Oxfordshire CC v Oxford CC Lightman J [2004] Ch 243, Court of Appeal [2006] Ch 253 and House of Lords [2006] UKHL 25*).

20.1 The applicant land in Woodborough, as identified in Exhibit A and by all witnesses, includes that parcel of land belonging to Aster Properties which includes part of a private garden (as affected by planning consent E/10/1323/FUL – Retrospective

application for the change of use of a parcel of land to the front and side of Blackberry Cottage to be a domestic garden enclosed by post and rail fence – application approved in 2010 - the land being then owned by Sarsen Housing Association) including a parking area, a row of garages, a footpath leading to houses and an area of grass and trees.

20.2 Aster, in their response dated 29 December 2015 consider that these inaccuracies not only point to the application having a defective plan but also to the lack of reliance that may be placed upon the applicant's statutory declaration and the evidence adduced by the witnesses all of whom rely on the same representation of the land.

20.3 The applicant responded to this on the 29th February 2016 by explaining that the representation of the applicant land was an accurate and logical way of showing that parcel of land commonly referred to as 'The Green' at Bondfield. He acknowledges that it shows the garages and the car parking over which he makes no claim and that he has been led by Oxfordshire County Council v Oxford City Council in that the CRA has the ability to consider only part of the land for registration. He further observes that "*an important consideration when marking the land was that the Authority has the power to determine a smaller area of land than marked for registration, but not a larger area of land*".

20.4 The applicant further points out that the area in front of the garages and marked "*parking"* on the map submitted by Aster on the 29th January 2016 has infact got a large sign in front of the garages saying "NO PARKING GARAGE ACCESS ONLY".

20.5 The applicant is correct in saying that the CRA may register only part of the application land if it is satisfied that part but not all of the application land has become a new green. In the *Trap Grounds* case in the House of Lords ([2006] UKHL 25) Lord Hoffman, upholding the decision of the Court of Appeal ([2005] EWCA Civ 175) at paragraph 62:

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

20.6 Clearly the CRA has no authority to register a larger piece of land than applied for since this would be prejudicial to the landowner.

20.7 Further, it does not matter that different parts of the land have been used for different recreational purposes. Also, provided that the area claimed is clearly defined, it will not be a bar to registration if it is not all used for sports and pastimes provided it

can fairly be regarded as part of the same land (for example flower beds or a shrubbery on a green may not be used for sports or recreation but they form a part of the whole).

20.8 It is therefore a matter of fact to be decided according to the circumstances and evidence adduced whether the whole area has been sufficiently used to support the application.

20.9 It is clear that the area enclosed as part of the garden of Blackberry Cottage was not used for lawful sports and recreation throughout the relevant period and should be excluded.

20.10 It is clear that the area covered by the garages was not available for lawful sports and recreation and should be excluded.

20.11 However, the remainder of the area has been available for lawful sports and pastimes notwithstanding times when cars were parked. By signage either Sarsen Housing Association or Aster Properties did not encourage parking in the area in front of the garages. It is accepted that there would have been times of the day and night when cars were parked either in front of the garages or in the area off Church Road. However it is clear from the UEFs that no-one regarded these as a bar to their recreational use of the area and it is unrealistic to suggest that when the green area was being used for play or community events that any areas adjoining the land that didn't have a vehicle parked on them were also used. Aerial photographs at paragraph 7 support that vehicular use was light.

20.12 The concept of shared use of a green was considered in the Supreme Court in the case of *R (Lewis) v Redcar and Cleveland BC [2010] EWCA Civ 3* where it was established that land can be registered as a new green even though the landowner uses the land for his own purposes and local people defer to that use. Hence it is reasonable to say that if no cars were on the site the land was accessed by any route and hard surfaced areas used accordingly, conversely when cars were parked there, the land was, temporarily, unavailable for use and people had to walk round them.

20.13 Lord Hoffman noted in the *Trap Grounds* case at paragraph 39 that in 1975 in New Windsor Corporation v Mellor ([1975] Ch 380) the Court of Appeal confirmed the registration of a car park in Windsor as a customary green.

20.14 It is considered that an area of land excluding the fully enclosed garden and the garages would, on the face of it, qualify for registration.

21 PERIOD OF 20 YEARS

21.1 The relevant use must continue throughout the whole of 20 years relied upon and must be continuous and uninterrupted throughout this time. By virtue of section 15(6) Commons Act 2006, user is to be disregarded for any period where it is

prohibited by any enactment (for example to control the spread of Foot and Mouth Disease) but this does not apply in this case.

21.2 There is no need for the applicant to show that the land has been used every day or every month but it must have been available to be used when needed. No user must be prevented from using the land during the relevant period.

21.3 UEFs cover the period 1950 to 2015 with all users still using the land at the date of application. For the period 20 years prior to application (1995 to 2015) there are 15 who have used it for the full 20 years or 13 if witnesses 2 and 11 are excluded owing to any tenancies they may have.

21.4 The period of 20 years is covered by the application.

22 RISK ASSESSMENT

22.1 Wiltshire Council has a duty to determine this application to register land at Bondfield as a Town or village Green.

22.2 If it fails to determine it within a reasonable timescale it may be liable to an application for judicial review.

22.3 If it determines it without due regard to the evidence adduced from all parties, without due regard to all relevant statute law and case law or acts in any other unlawful manner it is liable to an application for judicial review.

22.4 If the land, or part of the land, is registered as a town or village green Wiltshire Council has no duty to maintain or monitor the green, its only role is to maintain the Register.

23 ENVIRONMENTAL IMPACT

23.1 The environmental impact of either the registration of land at Bondfield as a green or the failure to register land is an irrelevant consideration for the purposes of the Commons Act 2006.

24 LEGAL CONSIDERATIONS

24.1 It is the Council's duty as the Commons Registration Authority for this area to determine the application to register land at Bondfield, Woodborough. Any failure to determine the application within what may be considered to be a reasonable timescale is liable to an application for judicial review.

The holding of a non-statutory public inquiry

24.2 In determining the application the Council may hold a non-statutory public inquiry if it is considered that a substantial objection is raised, or there is serious dispute, "*the authority may well need to …hold a non-statutory inquiry". R (Whitmey) v Commons Commissioners (2005) QB* at page 282 at paragraphs 29 and 66.

24.3 The necessity to hold a public inquiry is plain where there is a substantial dispute of fact which is likely to be resolved through an inquiry process in which live witnesses can give evidence about matters in dispute. Where the facts are not really in dispute but there is disagreement as to the legal construction which is to be placed on those facts, the matter will not be advanced by an inquiry because the Council, having taken professional independent legal advice if necessary, can make its final decision in the same way and with no less authority that it could with the benefit of an Inspector's report.

24.4 Furthermore, given the considerable cost of holding inquiries and the many competing demands on scarce public funds, it cannot have been intended that inquiries should be held simply because an objection has been raised which includes some averments of fact if they are flimsy and, even if resolved in the objector's favour, unlikely to affect the outcome.

24.5 In this case the objector avers that the majority of the witnesses only used the Land for the annual fete and that this is insufficient for registration. However, putting aside the example of just this sort of annual event leading to registration as cited in *The Trap Grounds* by Lord Hoffman; this is not the only activity here. It is clear from those same witnesses that they all observed children playing and indeed some had played with their grand children on the Land. It is accepted by the courts that 'children playing' qualifies as a' lawful sports and pastime' and accordingly, because the witnesses are not the children themselves, the CRA or indeed the courts, must inevitably rely on the evidence of adults observing the activity.

24.6 Additionally matters relating to the CRA's ability to register a lesser parcel of land than that claimed and dispute over the date of publication of the application for planning permission (and hence the date of a possible trigger event) are not matters that would be advanced at a public inquiry.

24.7 The risk of not holding a public inquiry if land is not registered is that it may lead to an appeal for judicial review. This is also a possible outcome if land is registered as is an appeal to the High Court under section 14(1)(b) of the Commons Registration Act 1965. In this case the whole merits of the registration will be reconsidered at a trial, with a view to ascertaining whether the registration should or should not have been made.

When is an application duly made?

24.8 The Council is reliant upon the general rule of law explored and endorsed in the Court of Appeal in *R (Church Commissioners for England) and Hampshire County Council & Another and Barbara Guthrie [2014] EWCA Civ 634* whereby an application will be "duly made" when it is first submitted notwithstanding that it may have some defects that require clarification.

24.9 The *Church Commissioners case* has convenient parallels to the application being considered here in that the application was submitted by ordinary people without a detailed knowledge of this complicated area of law. In The *Church Commissioners* case there were much more substantial defects in the application and the applicant repeatedly failed to address them for a substantial period of time – in that case 10 months was considered reasonable whereby over a year was not (Lady Justice Arden para 64 and 65), however, crucially for this application affecting Bondfield, the *Church Commissioners* case considers in detail the prejudicial effects to both parties caused by either the acceptance, or the non acceptance of the application at the application date rather than at the date of amendment.

24.10 In the *Church Commissioners* case the application relied upon being made within a 5 year period following the cessation of use. If the application was accepted at the date of submission then it was within time and the Land *could* be registered; if it was accepted at the date all the corrections were made to render it 'duly made', the Land *could not* be registered.

24.11 The parallel with the Bondfield application is thus clear – if the application is accepted at the date it was received by Wiltshire Council it was made before the trigger event of the planning application being published and is therefore capable of leading to registration; if it is accepted at the date it was corrected and hence 'duly made', the trigger event remains in place and the land cannot be registered unless a terminating event occurs.

24.12 With the *Church Commissioners* case the applicant, on application form (Form 44), failed to delete para. 4, failed to identify the relevant locality or neighbourhood and failed to provide a date less than 5 years before the date of application. Two of these were manifestly serious errors. The 5 year one was critical to the determination of the application.

24.13 In the case of the Bondfield application the only bar to it being duly made was a failure to mark the map as 'Exhibit A' and for it to be duly signed as per The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) regulations 2007 (2007 SI no 457) Regulation 10 (3)(c). Although it failed to strictly satisfy the Regulations it cannot have affected anyone's ability to interpret the application or its intention.

24.14 Wiltshire Council received the application on the 7th October 2015 and notified the applicant of the omission on the 19th October and it was corrected on the 18th November 2015.

24.15 An application for planning permission for the land was published by Wiltshire Council on the 14th October 2015.

24.16 In the *Church Commissioners* case Arden LJ considered that a minor error in the application (that did not affect the ability of anyone to interpret the application) could

properly be treated as not reaching the threshold necessary for sanction by the law on the basis of the maxim *de minimis non curat lex (*the principle whereby judges will not sit in judgment of extremely minor transgressions of the law). Indeed, the failure is not a matter on which the objectors rely, however, it is considered reasonable to consider the matter further in the light of the possible prejudicial effect of the application date and the failure to strictly comply with the Regulations.

24.17 Arden LJ quotes with approval ("*the judge's judgement is precise and clear"*) from the judgement of Collins J in *Church Commissioners* in the High Court ([2013] EWHC 1933 (Admin):

"23. Regulation 4 of the 2007 Regulations requires any application to be stamped and recorded. There is no provision that, where it is regarded as not duly made, once put in proper form there is any fresh record to be made….."

"24. There is nothing in the wording of the Regulations which requires me to decide that there cannot be a retrospective affect of a corrected application……It must be borne in mind that many applications for TVGs are made by interested persons acting without legal assistance and, since the rights sought will be for the benefit of the public, applications should not be defeated by technicalities."

"25. It follows that I am satisfied that in principle Mr Blohm QC, Ms Crail and Mr Hobson are right in submitting that a corrected application can have retrospective effect…."

24.18 The possibility for correction of an application can be found at Regulation 5(4):

"(4) Where an application appears to the registration authority after preliminary consideration not to be duly made the authority may reject it without complying with paragraph (1), but where it appears to the authority that any action by the applicant might put the application in order, the authority must not reject the application under this paragraph without first giving the applicant a reasonable opportunity of taking that action."

24.19 The Regulations specify the action of the CRA when receiving an application and at regulation 4(1):

"(1) On receiving an application, the registration authority must –

(a) allot a distinguishing number to the application and mark it with that number; and (b) stamp the application form indicating the date when it was received."

24.20 Arden LJ considers the potentially prejudicial effect of retaining an original application date by preferring the case of Mr Hobson in comparing the Commons Act example with that considered in *the Winchester case*. In that case it was found that strict compliance with the regulations was required and that accordingly an application that wasn't (in the *Winchester case* it related to a failure to provide copies

of evidence in applications made before a certain date) could not be retrospectively corrected.

24.21 However, there are important differences between the two cases. Arden LJ considers this at paragraphs 37 to 44:

"37 Mr Hobson points out that the Regulations do not exclude an application which does not comply with procedural requirements from being corrected and may be contrasted with section 67(3) of Natural Environment and Rural Communities Act 2006 (NERCA 2006). This deals with applications to extinguish rights of way and which provides:

"for the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made in accordance with paragraph 1 of Schedule 14 to that Act".

38 As the judge pointed out in [22] of his judgement, in R (Fellows of Winchester College) v Hampshire CC [2008] 3 A11 ER 717, this court decided that section 67(3) meant that an application had to satisfy all the requirements of paragraph 1 of Schedule 14 of NERCA 2006 before it could be considered as made. ***But the judge pointed out that would be a serious step as it would put the applicant at the mercy of the registration authority if it failed to point out a defect in the application before it was too late under Section 15 CA 2006 to amend it."***

Bold type CRA's own.

"39 In my judgement, Mr Hobson's interpretation is to be preferred. If the application does not comply with the regulations, Regulation 5(4) enables the registration authority to reject it without going through the procedure of giving notice to the landowner and others. But if the registration authority thinks that the applicant can correct errors, it can give him a reasonable opportunity to do so. If within the reasonable opportunity so given the applicant corrects the errors, the original application has full force and effect and therefore the Regulation must be retrospective.

40 I reach this conclusion on the basis that the Regulations throughout refer to one and the same application. In addition, the application is given a date on receipt. Dating the application must be for some purpose. Furthermore there is no reason why Regulation 5(4) should restrict the opportunity for correction to a reasonable opportunity if even a correction made within a reasonable opportunity achieves nothing that would not have been achieved by a new application.

41 In my judgement, it does not help Mr Karas' argument that the Regulation 4 obligation hinges not on the making of the application but on its receipt. The point remains that it would be wholly misleading for the application to be dated with the date of its receipt if that were not its effective date.

42 The guidance note referred to in Form 44 is consistent with the view that I have taken (see paragraph 10, above). Although it is non- statutory, it has some weight because it is referred to in form 44 which is a statutory document.

43 I agree with the judge that it would have been better if Parliament had provided that the landowner should receive a precautionary notice as soon as an application was received. However, that point seems to me to lead to the conclusion that the period between the date of the application and its due completion should be short.

44 Accordingly, I conclude on this issue the Regulation 5(4) provides a means for curing deficiencies in an application which does not provide all the statutory particulars, and once an application is so cured, it is treated as duly made on the date on which the original defective application was lodged. I would therefore dismiss the appeal on this issue."

24.22 Agreement was given by Lord Justice Richards:

"71. The answer to the retrospectivity issue has to be found within the regulations. The CA2006 itself does not tell one when an application is made for the purposes of s.15 but provides in s.24 (1) that regulations may make provision as the "making" of any application. The only provision in the Regulations relating to the date is the requirement in Regulation 4(1) that on receiving an application the registration authority must allot a distinguishing number to it and "stamp the application indicating the date when it was received". That is a strong indication that the application is to be treated as made on the date it is received. As to the content of an application regulation 3(21) provides that an application "must be made in accordance with these regulations". For that purpose it must meet all the conditions in Regulations 3(2). An application that does not meet all of those conditions is not "duly made" (the expression in Regulation 5(4). Regulation 5(4) expressly contemplates, however, that an application that is not duly made at the date of receipt may be put in order within such period as may be allowed by way of reasonable opportunity. An application put in order within this period is duly made. There is no provision for resubmission, renumbering or further date stamping at the time it is put in order. The process contemplated, in my judgement, that an application put in order in that way is to be treated under the Regulations as having been made at the date when it was originally received."

24.23 Agreement was also given by Lord Justice Vos:

"75. I gratefully accept Arden LJ's explanation of the factual background and the relevant legislation. I agree with Arden and Richards LJJ that, for the reasons they give, an application to register a TVG under section 15 of the 2006 Act is made on the date it is received by the registration authority under Regulation 4 of the 2007 Regulations. As Arden LJ has explained, even if the application is subsequently "put in order" under Regulation 5(4) of the 2007 Regulations, it retains its original date, so

that the amendments that are made to the application are to be taken as being back dated to that original date."

24.24 It therefore seems clear that when faced with an application that was not duly made when received, but that is subsequently amended to be duly made, the CRA should regard the application as having been made at the date it was received, not at the date it was finally duly made. The prejudicial effect that this may have for one party (in both the *Church Commissioners* case and the Bondfield application) is in favour of the applicant, even though the backdating of the application in both cases would have been or would be fatal to the application to register the land.

24.25 In the case of the Bondfield application the applicant corrected the application within one month, which given the need for the involvement of a solicitor, would seem to be a reasonable time for the response.

25 EQUALITY CONSIDERATIONS

25.1 Considerations related to equality in the case of either the registration of land at Bondfield as a green or the failure to register land is an irrelevant consideration for the purposes of the Commons Act 2006.

26 SAFEGUARDING CONSIDERATIONS

26.1 Safeguarding considerations related to either the registration of land at Bondfield as a green or the failure to register land is an irrelevant consideration for the purposes of the Commons Act 2006. Any act of registration would be based on the recording of an acquired right based on an ongoing activity.

27 FINANCIAL IMPLICATIONS

27.1 There is no cost implication for the Council in the event that either the application is refused or that land is registered where no-one objects to the decision.

27.2 If a non-statutory public inquiry is held the cost will be proportional to the number of days that it takes. It is estimated that costs related to the appointment of an Inspector and the holding of a 5 day inquiry would be in the region of £30000.

27.3 The recommendation of any Inspector may or may not be acted upon by the Council and a final decision must still be made by the Council. This decision is liable to application for judicial review and if granted costs can be considerable; in the region of £50000.

27.4 The opinion of Counsel skilled in this area of law may be taken by the Council at any time and costs vary though an opinion on a number of restricted points of law can be in the region of £1000 to £2000.

28 OPTIONS TO CONSIDER

(i) To hold a non statutory public inquiry

(ii) To refuse to register any of the applicant land as a town or village green

(iii) To register all of the applicant land as a town or village green

(iv) To register some of the applicant land as a town or village green

29 REASON FOR RECOMMENDATION

29.1 For the reasons given at 24.2 to 24.7 it is considered that a non statutory public inquiry would not assist the Council in determining this application.

29.2 It is considered that the application brings clear evidence to the Council's attention that, on the balance of probabilities, land at Bondfield has been used by a significant number of people from the locality of Woodborough Parish for lawful sports and pastimes in a manner that is 'as of right', uninterrupted, for a period of 20 years dating back from the date of application, that is, from 1995 to 2015. Accordingly the application should not be turned down.

29.3 Not all of the land could have been used for lawful sports and pastimes during this period. Part of the applicant land was enclosed as a garden for some of the period 1995 to 2015 and three garages have existed on some of the land for the whole of the 20 year period. Accordingly from the evidence before the Council it is shown that rights could not have been acquired over all of the applicant land.

29.4 Wiltshire Council is able to register some of the applicant land. The areas covered by tarmac in front of the garages and beside Church Road have been used to access the land when the use is not shared and it is more likely than not that children would have played on them in addition to the green space. Hard surfaces being particular attractive for many aspects of childrens play including small wheeled toys, cycling, skate boarding, roller skating and kicking and bouncing balls.

29.5 The area over which the application is held to succeed is shown on the map appended at **APPENDIX D.**

30 RECOMMENDATION

That the area of land shown edged and cross hatched in red on the plan attached hereto being called The Green, Bondfield should be registered as a Town or Village Green and that the Register of Town and Village Greens be amended accordingly.

Sally Madgwick Rights of Way Officer – Definitive Map 18th April 2016