

COMMONS ACT 2006

INTERIM REPORT

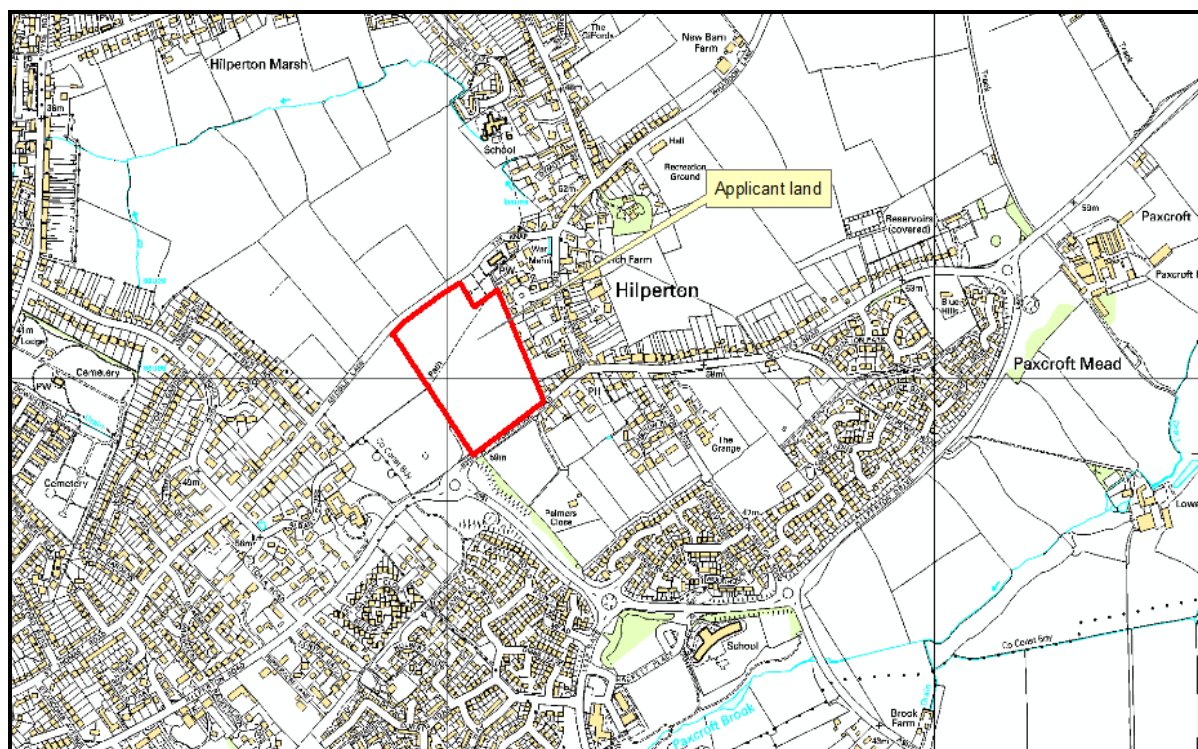
APPLICATION TO REGISTER LAND AT CHURCH FIELD, HILPERTON AS A TOWN OR VILLAGE GREEN

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 Church Field, Hilperton as a Town or Village Green.
- ii) To recommend that a non-statutory public inquiry is held before an expert in this area of law to test all evidence and to make a recommendation to assist the council make a decision on the application.

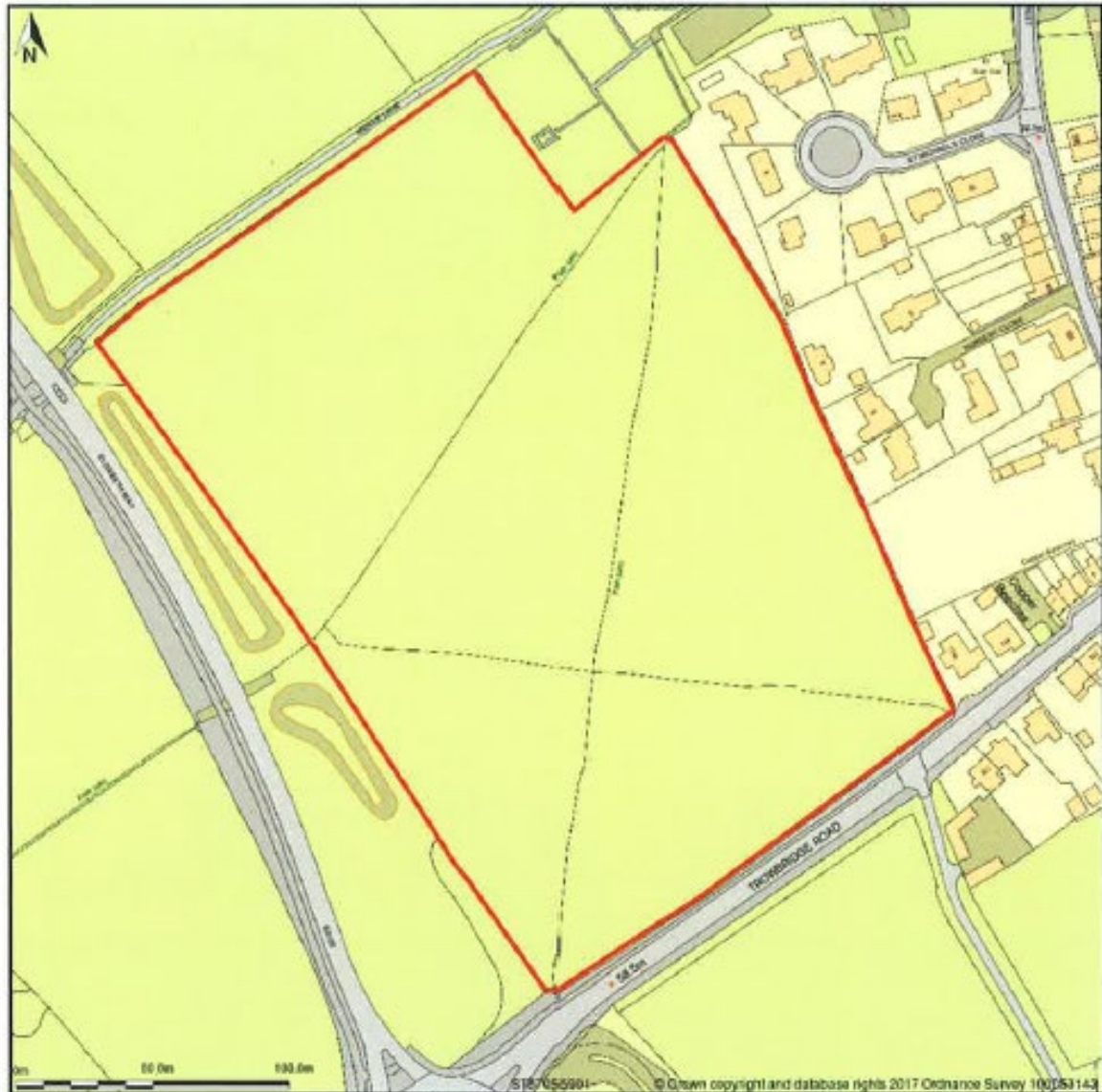
2 LOCATION PLAN

The land is located south west of the Church of St Michael and All Angels, Hilperton, BA14 7RJ and is referred to as Church Field (shown highlighted in red):



3 APPLICATION PLAN

Exhibit A - Churchfield



4 APPLICATION DETAILS:

Application number: TVG 2017/01

Date of receipt: 24 April 2017

Name of applicant: Church Field Friends

Address of applicant: c/o 2 Nursery Close
Hilperton
Trowbridge
Wiltshire
BA14 7RP

Application made under:	Section 15(1) and (2) Commons Act 2006
Description of land:	Church Field, Hilperton
Locality or neighbourhood:	Hilperton parish
Justification for application:	“A significant number of inhabitants of Hilperton have used the land (marked on the map Exhibit A) for a period of over 20 years, as of right, and continue to do so.”
Supporting documentation:	Exhibit A – map Exhibit B – supporting statement Exhibit C – supporting photos Exhibit D – 33 x personal statements Exhibit E – land registry search documents Exhibit F – map of Hilperton parish

5 LANDOWNER DETAILS

From 1959 to his death in late 2017 the land was owned by:

Mr Roger Pike
Fairfield House
Nursery Close
Church Street
Hilperton
BA14 7RP

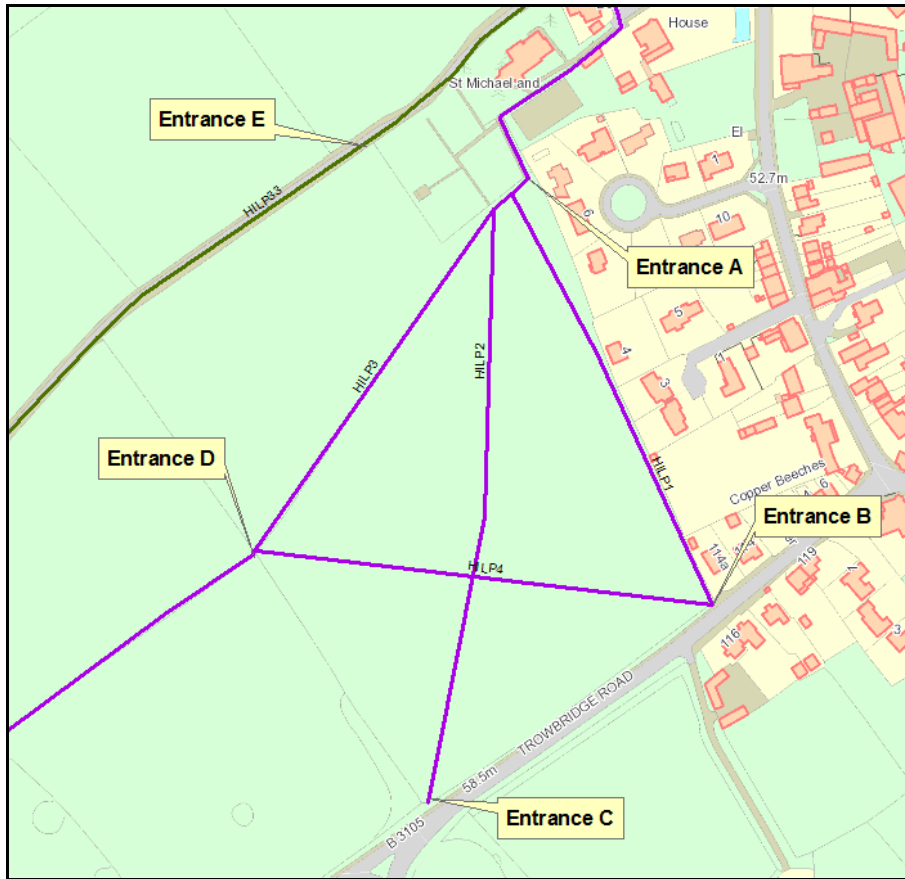
The land is now administered by Goughs Solicitors on behalf of the estate:

Dave Powell
Goughs Solicitors
Ramsbury House
30 Market Place
Devizes
SN10 1JG

The land was subject to a Grasskeep Agreement between approx. 1990 and 2017 to:

Mr R M Fyfe
Lower Paxcroft Farm
Hilperton
Trowbridge
BA14 6JA

6 PHOTOGRAPHS OF THE APPLICANT LAND 31 MAY 2017



Entrance (A) to land by church (footpath HILP1)



Entrance (B) to land at B3105 (footpath HILP4)



Entrance (C) to land at roundabout (footpath HILP2)



Entrance (D) at link road (footpath HILP 3 & 4)



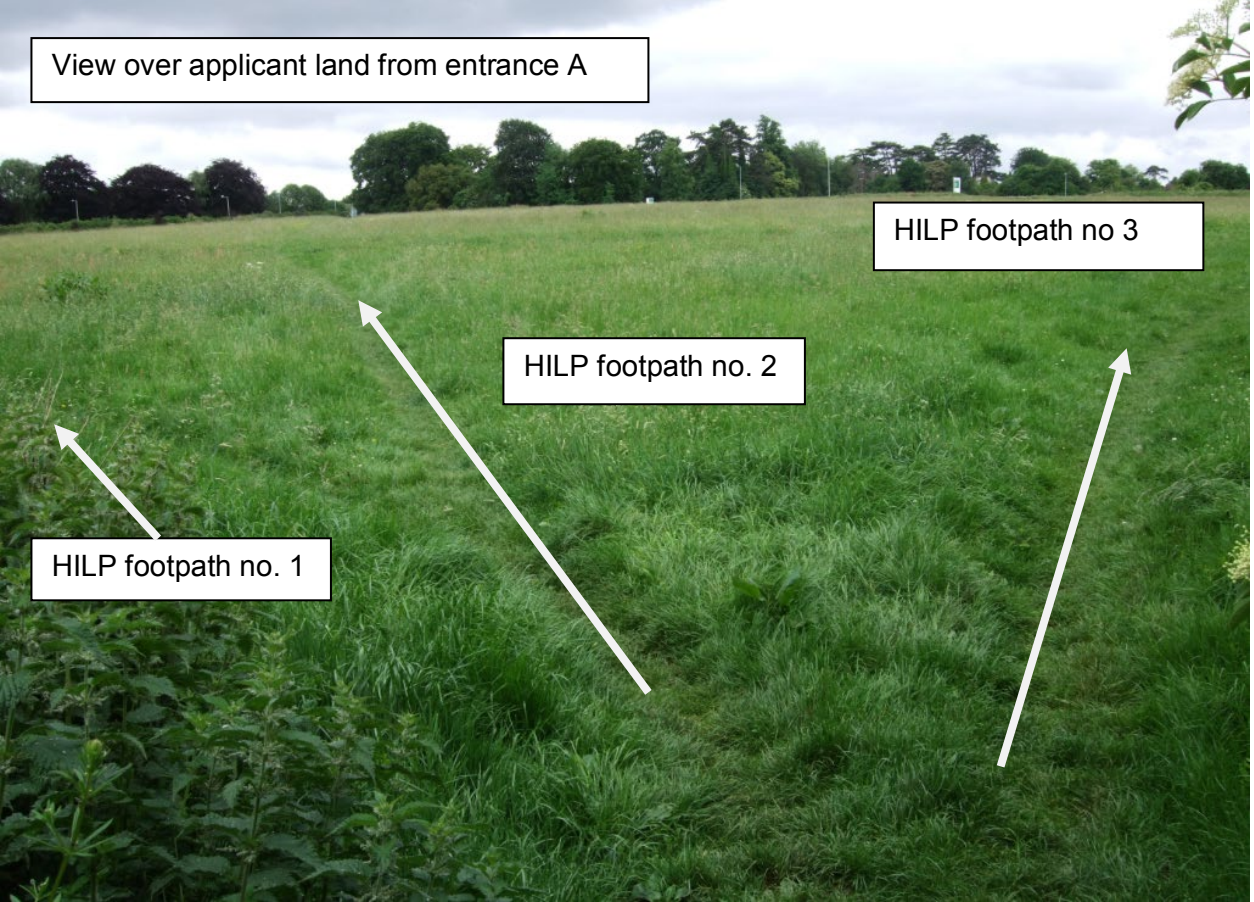
Entrance (E) from applicant land to bridleway HILP33

Additionally 3 properties have gates onto the land from their gardens:





View over applicant land from entrance A



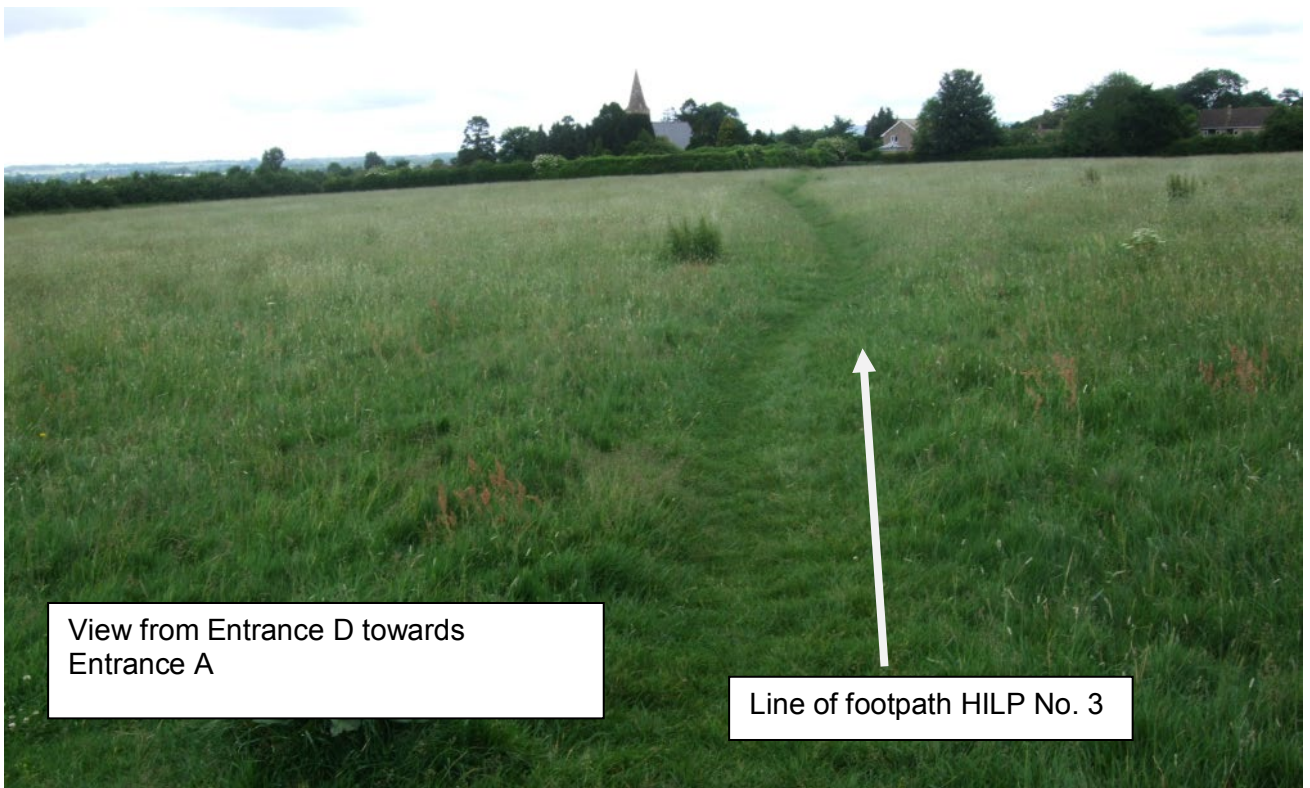
View from Entrance B looking north to Entrance A



View from Entrance B south west towards Entrance C



View from Entrance C north towards Entrance D (link road)



View from Entrance D towards Entrance A

Line of footpath HILP No. 3



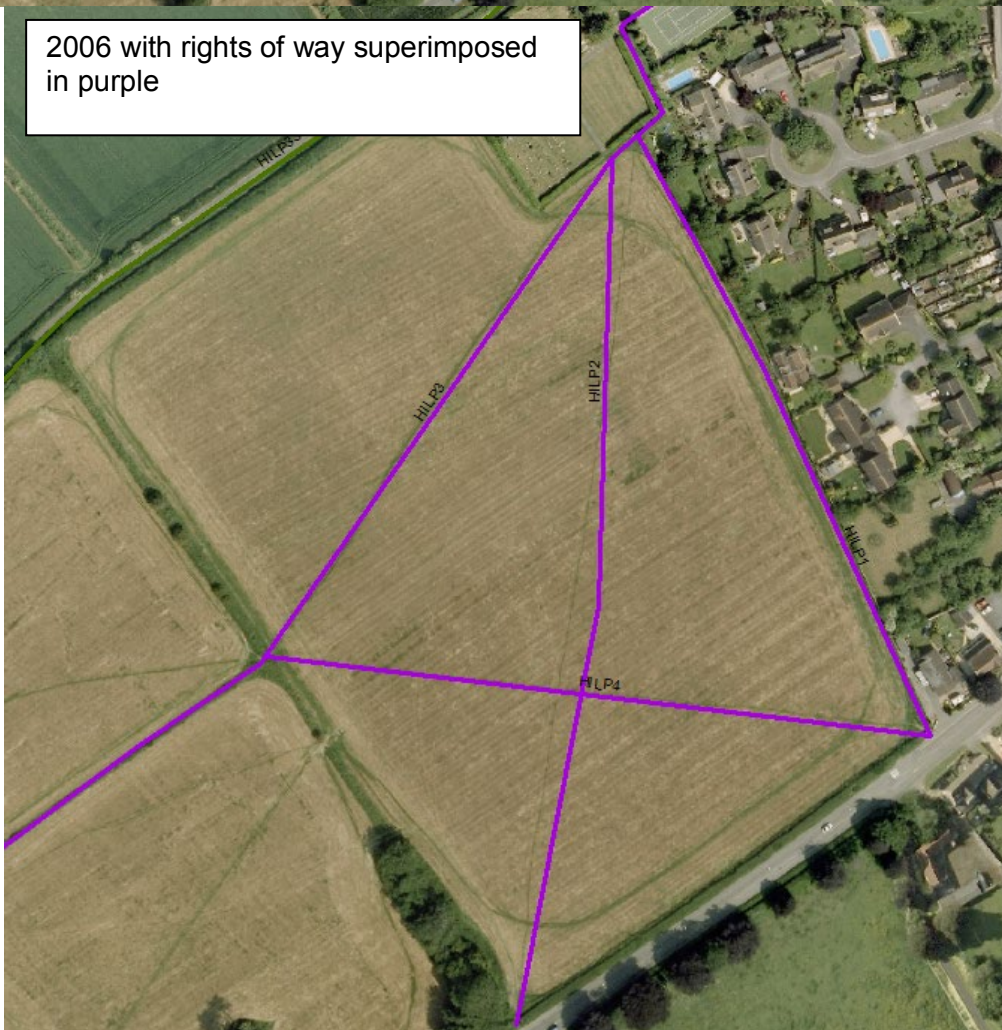
View to Entrance E



View from Entrance E south across Applicant Land

7 AERIAL PHOTOGRAPHS OF THE APPLICANT LAND

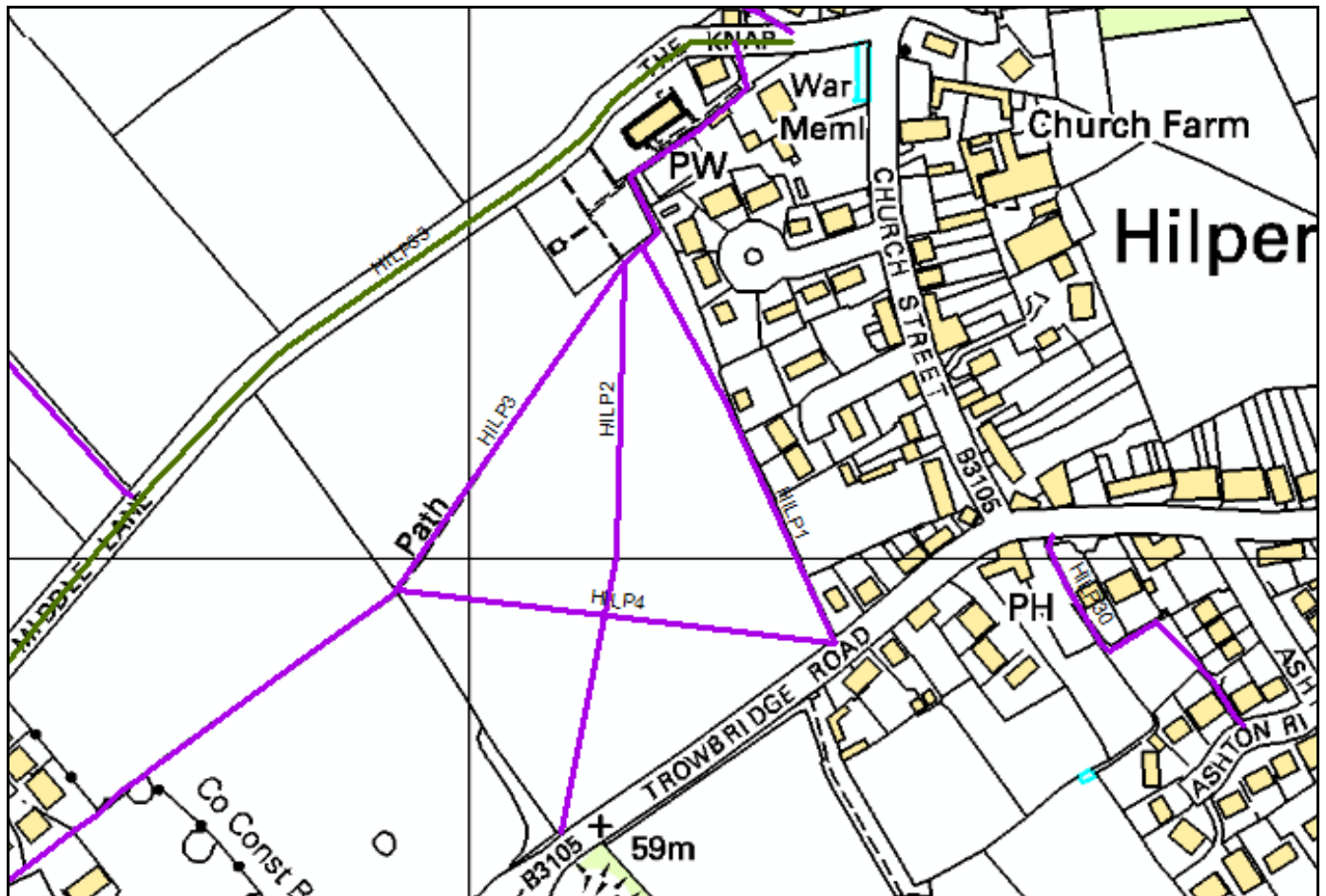






8 PUBLIC RIGHTS OF WAY

Plan showing public rights of way across and beside the applicant land:



9 LEGAL EMPOWERMENT

- 9.1 Wiltshire Council is the Commons Registration Authority for the County of Wiltshire (excluding the Borough of Swindon).
- 9.2 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).
- 9.3 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.
- 9.4 The trigger events are prescribed by Schedule 1A of the Commons Act 2006, and extended by the Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2014 and The Housing and Planning Act 2016 (Permission in Principle etc)(Miscellaneous Amendments)(England) Regulations 2017 Statutory Instrument 2017 No. 276. 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. Other

Trigger Events include the inclusion of the land in adopted or emerging development plan policy.

- 9.5 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.
- 9.6 The 2013 Act amended the Commons Act 2006 in two other ways (Section 14 amended sections 15(3)(c) and inserted sections 15A 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.
- 9.7 This application has been made under Section 15(1)(2) of the Commons Act 2006:

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 by 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)

9.8 Once an application has been delivered to the Commons Registration Authority (the CRA) it is necessary to first ascertain whether a Trigger Event has occurred. If it has, and no corresponding terminating event has occurred the right to apply is suspended and the application must be returned. However, if there are no Trigger Events the CRA may proceed with the application.

9.9 Regulations prescribe the form that the application must take.

(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)

9.10 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)

9.11 In the case of *R (The Church Commissioners for England) v Hampshire County Council and Guthrie [2013] EWHC 1933 (Admin) Collins J* considered that the CRA were entitled to consider the application as duly made from the date it was originally received and that a period of at least five years was a reasonable time period in which corrections could be made.

10 Timeline for the Processing of the Application

- | | |
|----------------------|---|
| 24 April 2017 | Application deposited at the offices of Rights of Way and Countryside, Wiltshire Council at 1715. |
| 25 April 2017 | Letter enquiring whether a Trigger Event (and/or Terminating Event) had occurred sent to:
Wiltshire Council Development Management (Planning Authority) – <i>responded negative</i>
Wiltshire Council Spatial Planning – <i>responded negative</i>
The Planning Inspectorate – <i>responded negative</i> |
| 26 May 2017 | Letter to applicant informing them there had been no trigger events. Application allocated number TVG 2017/01. |
| 30 May 2017 | Letter to applicant returning the application for correction owing to identified failings in Form 44 and Exhibit A. |
| 19 June 2017 | Revised application returned. |
| 17 July 2017 | Letter sent to applicant, landowner, believed tenant farmer, Wiltshire Councillor, Parish Council and Wiltshire Council as planning authority enclosing Form 45 (Notice of Application) and application plan. |
| 20 July 2017 | Form 45 notices posted on site (all entrances to the land) and maintained until 04 September 2017. |
| 21 July 2017 | Form 45 published in the Wiltshire Times. Responses to be received by 1700 04 September 2017. |
| 13 Aug 2017 | Objection received from R Sims |

14 Aug 2017	Representation in support received from E Clark
01 Sept 2017	Objection received from R H & I R Craddock
04 Sept 2017	Objection received from Goughs on behalf of R Pike (landowner)
02 Oct 2017	Additional statements submitted by Goughs on behalf of Mr Pike
25 Oct 2017	3 objections and 1 representation submitted to applicants for comment
18 Dec 2017	Copies of 3 objections and 1 representation sent to Goughs for information
18 Jan 2018	On 16 th January 2018 Hilperton Parish Council resolved to fully support the application and has no objection to Church Field being registered as a Town or Village Green
26 Feb 2018	Response received from applicant
08 Mar 2018	Applicant's response sent to 3 objectors and 1 representor for comment
30 Apr 2018	Response received from Goughs
15 Nov 2018	Further enquiries made to Wiltshire Council as Planning Authority regarding the effect of Wiltshire Council's Core Strategy (adopted January 2015) on the application in the light of the decision of D Elvin QC in <i>Cooper Estates Strategic Land Ltd v Wiltshire Council et al [2018] EWHC 1704 (Admin)</i> .
16 Nov 2018	Response from Wiltshire Council confirming no trigger event applied to the land at the time the application was made. The land being outside of the limits of development, not within a SHLAA site and not identified for development in the Wiltshire Core Strategy, Site Allocations Plan or any other development document for Wiltshire.
23 Jan 2018	Wiltshire Council case officer commences writing report.

11 EVIDENCE IN SUPPORT OF THE APPLICATION

It is for this applicant to demonstrate to the Registration Authority (Wiltshire Council) that on the balance of probabilities a significant number of the inhabitants of the parish of Hilperton have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years and that they continued to so on the 25th April 2017. Exhibit A of the application is the application form (Form 44).

11.1 Exhibit B is a supporting statement on behalf of applicants:

"This following statement is submitted in support of the application to enter into the register of Village Greens the land known as Church Field, Hilperton, (see Exhibit A).

The land has been used by the local community for a period in excess of 20 years. The Hilpertons historic society has evidence of the field being used during the war as a runway for aircraft (US Army Air Corp L-4 Grasshopper reconnaissance aircraft) and we cannot find any evidence to suggest that it has not been in continuous use by the community to the present day.

The field has been used for lawful sports and pastimes, as of right, including dog walking, snowman building, kite flying, ballgames and camping, a full list is provided in the appendix to this statement. A number of local organisations such as the local pre-school and Brownie/Scout groups have also used Church Field for various activities including nature trails and sports.

We have collected together witness statements from members of the Hilpertons community who used Church field over a period stretching from 1980 to present. These same members of the community have also provided us with photos taken during this period of various uses of the field, such as snowman building and nature trails.

These letters witness that the signatories have used Church Field as Village Green as of right without let or hindrance, and on no occasion have the owners or controllers of the land challenged their use of the land. That every part of Church Field has been used by the witnesses and that there has not been a period where use of Church Field has been prevented.”

“Appendix – summary of uses of the land from witness statements

*Kite flying
Running/walking for relaxation
Building snowmen
Dog walking
Ball games
Socialising
Building dens
Creating dance routines
Creating memories
Rounders/football/cricket
Scouts/brownies/pre-school activities
Nature trails
Camping
Air Ambulance landing
W – unreadable text”*

11.2 Exhibit C is a collection of 33 pages of undated photographs showing activities on the applicant land:

- | | |
|-------------------------------------|---|
| 1. Dog walking games with ball | 2. 6 people building large (8ft plus) snowman |
| 3. 9 people with same snowman | 4. 2 people with same snowman |
| 5. 8 people & dog with same snowman | 6. Snowman in middle of field |
| 7. Snowman | 8. Dog in snow |
| 9. Snowman | 10. 2 walkers in snow |
| 11. 2 walkers and dog in snow | 12. 2 walkers in snow |
| 13. 2 walkers and dog in snow | 14. Old picture of 9 men in uniform |
| 15. Walkers and dogs | 16. Walkers and dogs |
| 17. Meadow flowers | 18. Poppies |

- | | |
|--|---|
| 19. 11 people and large snowman | 20. Report of use of field in the 1940s |
| 21. Aircraft photography | 22. 4 people and snowman in 1999 |
| 23. 8 people and snowman | 24. 9 people and several dogs |
| 25. C. 16 St Michael's children waking | 26. 9 St Michaels children |
| 27. Man walking dog | 28. Photography of rainbow |
| 29. Landscape photography | 30. 2 walkers and dog in snow |
| 31. Brownie, adult and cows | 32. Children playing in snow |
| 33. Children playing in snow | |

11.3 Exhibit D is 33 signed statements from people who have used the land. Of the 34 people, 32 live (or lived in Hilperton at the time of their use), 1 gives her address as St Michael's Pre-school, Hilperton and 1 lives close by but in Trowbridge. A summary of their evidence produced by the case officer for Wiltshire Council is attached at **APPENDIX 1**

11.4 All 33 users have used the land within the period of 1997 to 2017 with 13 of them having it used it for the full 20 years. All bar 1 have seen others using the land.

11.5 No users have been challenged or seen any sign or notice prohibiting their use. They report that their use has been uninterrupted.

11.6 A range of activities carried out by witnesses include:

Dog walking	25 people
Walking	12 people
Snowmen and igloos	10 people
Kite flying	9 people
Rounders	7 people
Football/cricket/rugby	7 people
Ball games	5 people
Picnics	5 people
Blackberry picking	3 people
Meeting friends	3 people
French cricket	3 people
Building dens	2 people
Running	2 people
Frisbee	2 people

11.7 Exhibit E is the Land Registry search for the land.

11.8 Exhibit F is a plan showing the boundaries of Hilperton Parish which is the claimed locality for the purposes of this application.

12 OBJECTIONS AND REPRESENTATION TO THE APPLICATION

The application was duly advertised (Form 45) between the 21st July and the 4th September 2017. 3 Objections and 1 representation in support were received.

- 1) R and H Craddock (objection)
New Barn Farm
Whaddon Lane
Hilperton
BA14 7RN

- 2) Rosemary Sims (objection)
16 St Mary's Close
Hilperton Marsh
Trowbridge
BA14 7PW
- 3) Goughs Solicitors – acting for Roger Pike deceased (objection)
Dave Powell
Ramsbury House
30 Market Place
Devizes
SN10 1JG
- 4) E Clark (representation in support)
75 Westmoreland Avenue
Hornchurch
Essex
RM11 2EF

12.1 **R and H Craddock**

“Reference: Form 45 Commons Act 2006 section 15(1). Notice of Application for the registration of land as a Town or Village Green

I am writing to express my disgust at the above reference. Church Field has been farmed by 3 generations – Amor Pike, Norman Pike and Roger Pike. Roger retired from actively farming in 1988 and remains the owner letting this land in question on a grass keep basis to neighbouring farmers, formerly R Fyffe of Lower Paxcroft Farm and more recently Richard Vigar from Poplar Far, Wingfield who have all farmed it as part of their commercial business without interruption up until the present day.

There has been no “lawful sports and pastimes on this land” and any suggestions to the contrary are untrue, and if so, any such use would be regarded as unlawful and trespass.

We the Craddock family have been close neighbouring farmers since 1933 and can confirm that to the best of our knowledge no such use has been suggested or ever taken place, other than pedestrians having use of the designated footpaths HILP1, HILP2, HILP3 & HILP4 which are clearly marked on the council rights of way website for all to view.

Mr Roger Pike has more recently donated land for the village allotments and we feel that his generosity is now being taken for granted. He has now been forced to defend his property and in his early 90's he shouldn't have to endure this anxiety.

To conclude we strongly feel that this application should NOT be included in the Town and Village Greens register.”

12.2 **Mrs R Sims**

“I wish to register my objection to the proposed application of “Church Field” in Hilperton Village as a “Village Green”.

My responses are as follows: -

1) There is already a Green Space in the village. The playing field beside the Village hall, which is used for all the things a village green needs, i.e. fetes, football etc.

2) There is no wildlife to speak of on this field, the rook population has declined by half since the "Road to No Where" (Elizabeth Way) was started. I walk these fields regularly. I have counted the nests in use fall from around 30 to around 14 this last spring.

3) This site will not be cultivated to "Village Green" standards, but left mostly to grass, roughly kept and used as it is presently, by dog walkers and people using the existing 2 footpaths that cross this field.

4) The only reason this field has been selected is that it is the last "Green Space" between Trowbridge & Hilperton Village. Should this field be built on, then Hilperton would be just another "suburb" of Trowbridge and lose its village status, which it is determined to hang on to!!

5) I trust and hope this application is very carefully and great consideration given to any objections raised regarding this matter."

12.3 Goughs Solicitors acting for Mr R Pike

The objection made on behalf of Mr Pike is appended to this report at **APPENDIX 2**. The objection comprises:

- i) Notice of Objection
- ii) RP1 – Deeds relating to the applicant land
- iii) Copies of : *R Cheltenham Builders Ltd v South Gloucestershire District Council [2003] EWHC 2803 (admin)* and *Richard Naylor v Essex County Council v Silverbrook Estates Ltd, Diana Humphreys, Tendring District Council [2014] EWHC 2560 (Admin)*
- iv) Statement of Richard Vigar
- v) Statement of Richard Fyfe
- vi) Statement of Roger Pike

12.4 E Clark

"I have seen the Wiltshire Council notice dated 21 July regarding a village green application for Church Field.

I wish to add my support to the application.

I have used the field, and others in Hilperton Gap, for twenty-one years. My first use was simply when I was taken there for walks by my parents. Over the years I have since used the field for many uses including blackberrying, playing football, building snowmen, paintballing in the hedgerow and dog walking. I still use the field for dog walking when I am in Hilperton.

I did not, and do not, remain on either the 'public' or 'other' footpaths but used/use the whole of the field and its hedges. At no time have I ever been asked to leave by the owner or anyone else and my use of the field has been in broad daylight."

12.5 Hilperton Parish Council

This representation in support was received on the 18th January 2018, outside of the advertisement period. However, it is included here for completeness:

“Re. Village Green Application – Church Field, Hilperton

At its meeting on the 16th January 2018, Hilperton Parish Council resolved to fully support this application, and it has no objection to Church Field being registered as a Town or Village Green.”

13 APPLICANT’S COMMENTS ON THE OBJECTIONS AND REPRESENTATION

Copies of the objections and representation were sent to the applicant on the 25th October 2017. The response deadline was set as being the 8th January 2018 but extended on request from the applicant to the 5th February 2018 and again to the 2nd March 2018. All interested parties were kept informed.

13.1 The applicant’s response to the objections and representation was received on the 27th February 2018 and is appended here at **APPENDIX 3**. The response comprises:

- i) Letter of response
- ii) Summary of Time and Usage of Church Field
- iii) Additional photographs 1 to 17b
- iv) Additional evidence letters Herlinger, A Sawyer, Clark, House, Bowden, Hoskins, Hayes and S Sawyer.

14 OBJECTORS’ RESPONSES TO APPLICANT’S COMMENTS

Copies of the applicant’s comments referred to at paragraph 13 were sent to the 3 objectors (and to Mr Clark who had made a representation in support) on the 8th March 2018. The deadline for responses was the 13th April 2018. Officers had no objection to an extension to this period and one response was received from Goughs Solicitors. This was received on the 30th April 2018. This appended here at **APPENDIX 4**.

15 CONSIDERATIONS FOR THE COUNCIL

The Council, in its role of Commons Registration Authority has a duty to determine this application. The legal tests that must be satisfied for registration of the land as a town or village green are contained within s.15(2) of the Commons Act 2006:

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.*

15.1 In considering whether, on the balance of probabilities (that is, it is more likely than not), a significant number of the inhabitants of any locality, or 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 it is helpful to break down the requirements as follows:

15.2 **The locality**

The claimed locality is the civil parish of Hilperton. Officers are satisfied that this is a qualifying locality and that the applicant adduces evidence from users who live or have lived in the parish of Hilperton.

15.3 **A significant number of the inhabitants**

Population numbers for the parish of Hilperton from census information are as follows:

YEAR	NUMBER
1991	2632
2001	4284
2011	4967

15.4 The original application adduced evidence of use from 33 individuals. This was supplemented by statements from 8 additional users of the land by the applicant in their submission in response to the objectors' comments (**APPENDIX 3**). 6 of these adduced evidence of use covering the whole of the 20 year period 1997 to 2017. The total of users giving statements regarding their use throughout or during the 20 year period is therefore 41.

15.5 Figures for 1997 are not known but even if at 1991 levels, taken at its highest the application adduces evidence from just less than 2% of the population of the parish.

15.6 The case of *R(Alfred McAlpine Homes) v Staffordshire County Council [2002] EWHC 76 (Admin)* established that the term 'significant' did not mean a considerable or substantial number but needed to be sufficient to show that the land is in general use by the local community for informal recreation, rather than just occasional use by individuals.

15.7 The applicant land is in full view of a number of adjoining properties and some users in support of the application have stated that they frequently see people on the land. Aerial photography supports that the land has many well trodden paths leading across and around it. However, the land is well served by public footpaths which lead across and through it (see this report paragraph 7) and these footpaths coincide with some of the trodden paths. The landowner's property is approximately 35 metres from the land but visibility is probably obstructed by another property. 3 properties have garden gates into the field. These cannot have been missed by the owner or holder of the grazing licence.

15.8 Accordingly any landowner would not be surprised to see the public in the parts of the field where the footpaths lead and the landowner accepted that "some inhabitants of the local area regularly use these rights of way while, for example, walking their dogs". However, the presence of trodden paths in other areas of the field (especially the northern third or quarter of the field and around the perimeter) would have alerted any landowner to some form of activity occurring in the field. Additionally activities that clearly spread out from the rights of

way (for example French cricket or Frisbee) would appear different to any observer. Although it is not known where the snowmen were built in the field they would have remained in position long after the remainder of the snow had thawed and would have been very obvious to any observer of the land. Built on a right of way a snowman would be an obstruction.

15.9 The landowner considers that evidence of use is light and that it does not represent a significant number of the inhabitants. There is also a conflict of evidence regarding multiple user evidence from different family members.

15.10 The law is clear that it is “the inhabitants” that must be considered and it does not require evidence to be considered from households instead of individuals. Individual use will vary considerably and officers are content to accept that while some family members walked the dog or picked blackberries, other family members played as children or played rounders or French cricket. Frequency and years of use also vary between individuals. Anyone observing the use would not differentiate between families or households but would merely see people using the land.

15.11 **As of right**

Qualifying use must be ‘as of right’ and not ‘by right’. Use that is ‘as of right’ is without permission, without force and without secrecy. Use that is ‘by right’ is pursuant to a given authority to do so. For example it is without question that use of the public footpaths for walking, with usual accompaniments (i.e. a dog or pram) is ‘by right’ and that such use cannot qualify for registration of the land as a village green where it is coincident with the line of the paths. Any use of the paths as ‘A to B’ routes must be discounted for the purposes of village green registration as must some straying off the path by people and dogs; the application should demonstrate that there was a general use of the land for recreation which is not explicable as use of the right of way, however widely interpreted.

15.12 No users claim that they sought or had permission to use the field, nor that they used force or conducted their activities in secret. The landowner in his objection recalled that he “has been asked for permission by potential users of Church Field to carry out certain activities there”. For example he recalled being asked for permission for Hilperton School (when it was at the Knap) to camp and pitch tents in the field. The applicant consider that this was outside of the relevant period. The landowner does not claim to have granted permission to St Michael’s Pre-school to use the land though disputes that they did so, considering it being more likely that they used land that was closer to their school.

15.13 There are no reports of any signs on the land indicating that use of the wider field was by permission or that permission was needed. The presence of so many rights of way would have made it difficult for a landowner to erect signs that weren’t misleading (since the public are invited onto the land ‘by right’ on the public footpaths) but it is noted that there were none.

15.14 **Lawful sports and pastimes**

Lawful sports and pastimes can be any number of a range of activities including several of the activities that this application claims to have taken place on the applicant land. They may be formal or informal, seasonal, personal or with others. They may be taken together and whilst some uses may not cover all times (for example seasonal activities such as blackberry picking or making snowmen) they must, as a whole, have been exercised continuously throughout the period.

- 15.15 Activities stated for this application that have been approved by the courts include children playing, informal cricket, football, rounders, bird watching, picnics, kite flying, taking dogs for walks, wandering or promenading and recreational walking. Additionally blackberrying and snowballing are likely to be considered to be lawful sports and pastimes.
- 15.16 The landowner disputes that 'socialising', 'creating dance routines', creating memories' and 'air ambulance landing' are to be considered as lawful sports and pastimes. Officers agree that use by the Air Ambulance is unlikely to be considered thus or indeed that creating dance routines was likely to have been a regular occurrence, especially since it was not mentioned by many people, however, the general term 'socialising' may well be included in the term 'promenading' as referred to in Appendix 3 of the Open Spaces Society "Getting Greens Registered":

"wandering or promenading by way of pastime, recreational walking: 'Popular amusement takes many shapes; and there is no outdoor recreation so general and perennial as the promenade' Abercromby v Fermoy Town Commissioners (1900) 1 IR 302."

15.17 **On the land**

The whole of the field has been claimed for registration as a town or village green. This may include land with rights of way across it (provided that use extends beyond them) and it is not necessary for the applicant to demonstrate that all of the land was used for all of the sports and pastimes. However, any activity that causes substantial interference with the public use will be viewed as an interruption to use and will prevent registration.

- 15.18 No users claim any interruption to use of any part of the land. The landowner considers that the taking of a hay crop forms an interruption to use as does the grazing of the field by cattle. A grazing licence to Mr Fyfe was in place for the whole of the relevant period (1997 to 2017). This permitted the grazing of the land for part of the year and for a hay or silage crop to be taken. Mr Fyfe's statement confirms that he took an annual silage crop from the field in June. It is noted that harvesting grass cut for silage is less intrusive than for hay as drying and turning processes are longer for hay.
- 15.19 It is known that these activities took place in a field crossed by several public rights of way. The rights of way were not obstructed by that use of the land and were not closed to accommodate it. Claims that dog walkers stayed out of the field when the cattle were in it (potentially from after the June silage cut to December) seem highly unlikely and is not supported by any users of the land. Indeed, if cattle were to have this effect on the 4 rights of way in the field for a period of up to 6 months they would be deemed to be an obstruction; which they are not.
- 15.20 It is difficult to see therefore that if use continued on the rights of way that use of the wider field could not have also continued uninterrupted. Photograph 6b of the applicant's response to the objections (Appendix 3) shows 7 people and 3 dogs using the land over long cut grass and photograph 9 of the same appendix shows a Brownie talking to a cow in 1992. Both photographs were taken outside of the relevant period (pre and post application) but do demonstrate the principle that these farming activities continued alongside public access. There is no evidence of any segregation, division or protection by use of electric fencing or any other temporary means.
- 15.21 In *R(Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578* it was held in the High Court that the annual gathering of a hay crop was incompatible with the use of

the land as a village green. The landowner relies upon the judgement in *Laing Homes* being fatal to the registration of the land as a Town or Village Green.

- 15.22 In *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 para 57 Lord Hoffman commented that he did not agree that low level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes if in practice they were not.

“57. There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in Fitch v Fitch (1798) 2 Esp 543. This was accepted by Sullivan J in R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573, 588. In that case the land was used for “low level agricultural activities” such as taking a hay crop at the same time as being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so “as of right”. But, with respect to the judge, I do not agree that the low level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not....”

- 15.23 In *R(Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 the Supreme Court considered that shared use of land could give rise to a town or village green where there was evidence that some users deferred to other users of the land.

- 15.24 At paragraph 28 Lord Walker in considering the judgement of Sullivan J in *Laing Homes* says:

“28Taking a single hay crop from a meadow is a low level agricultural activity compatible with recreational use for the late summer and from then until next spring. Fitch v Fitch (1797) 2 Esp 543 is venerable authority for that. That is not to say that Laing Homes was wrongly decided, although I see it as finely – balanced...”

- 15.25 And at paragraph 36:

“36...I have no difficulty in accepting that Lord Hoffman 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). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector’s word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all members of the Court agree, in much the same terms) with courtesy and common sense.....”

- 15.26 *Lewis v Redcar* makes it clear that actions of deference and acting in a courteous manner are no bar to use being ‘as of right’ and do not amount to an interruption to use. At Hilperton the users of the public footpaths must have deferred to the agricultural use at the time the silage was being cut or baled and it is logical to accept that their use of the greater

area of land would have been similarly directed for those relatively brief and infrequent times that the crop was being cut and taken.

- 15.27 Unlike in the *Laing Homes* case where a hay crop was taken, the land at Hilperton was used only for silage. Mr Fyfe says in his statement that “As far as I can recall, in each year throughout the 27 years or so in which I had Grasskeep Arrangements for Church Field, I first mowed the land for silage in around June, and after that I would graze livestock, primarily cattle, on the whole of Church Field.”
- 15.28 Additionally. In *Laing Homes* there were other potentially disruptive processes associated with the hay crop. There was harrowing, rolling with a three ton roller and fertilising; none of which are activities described by Mr Fyfe. Hay crops require considerably more drying and turning than silage crops where moisture levels can be much higher. If silage is collected and clamped it can be off the field very rapidly after cutting. If silage is baled it will still be taken off the field much quicker than hay. In *Laing Homes* the judge considered the level of agricultural activity associated with the hay crop (including the growing and cutting of the grass) to be an interruption to lawful sports and pastimes. In this case however, many of the activities are compatible with long or cut grass, for instance it is still possible to play with a ball, to play Frisbee or to promenade over long or cut grass. It is a matter of fact and degree.

15.29 At least 20 years

The application is made under s.15(2) where use continues up to the date of application. In this case therefore the twenty year period is from April 1997 to April 2017.

- 15.30 Any evidence referring to events after this date (for example many of the applicant’s photographs adduced after the application was submitted) must be disregarded for the purposes of this application.
- 15.31 The application adduces evidence extending back to the 1970s and covers the 20 year period 1997 to 2017.

16. Reasons for recommendation

- 16.1 The council has a duty to determine the application. The council has the power to accept the evidence adduced with the application and register the land as a town or village green or it may refuse the application and not register the land. The landowner has raised a number of points in objection to the application which the council has a duty to consider in a reasonable manner. The council must remain impartial throughout the determination process.
- 16.2 In summary the matters highlighted by the objectors are as follows:
- i) Can the evidence of multiple family members be taken?
 - ii) Is the evidence from a significant number of the inhabitants?
 - iii) Was use by permission?
 - iv) Was use by right owing to the presence of the rights of way?
 - v) Are socialising, creating dance routines and creating memories lawful sports and pastimes?
 - vi) Is use of the land for grazing cattle and taking a silage crop a bar to registration?
 - vii) How were the witnesses motivated?

viii) How credible is some of the evidence?

- 16.3 Officers have considered the evidence and the objections and consider that the opinion of an expert in this area of law would greatly assist the Council in coming to a decision on the application. In particular a non-statutory public inquiry where witnesses could give their evidence verbally and possibly under cross examination would expand and elucidate the following points especially:
- a) Is there sufficient evidence from a significant number of inhabitants?
 - b) Has use been by permission?
 - c) Have the agricultural activities prevented registration?
 - d) Is the evidence sufficient to demonstrate use of the whole field and not just the public rights of way?
- 16.4 Where matters of evidential interpretation are not clear the Council is bound by the Court of Appeal judgement in *R(Christopher John Whitmey) and The Commons Commissioners [2004] EWCA Civ. 951*
- 16.5 In considering the duty of the Commons Commissioners to determine disputed applications for registration of town or village greens under s.13 of the Commons Registration Act 1965 Lady Justice Arden at paragraphs 26 onwards:

“26. In my judgement, there are three ways in which disputes as whether land should be registered as a green under section 13 can be determined. First, there can be an application to the court at any time for a declaration that a property is or is not a village green for the purposes of the Act. Second the registration authority could itself determine the matter. Third, following registration a dissatisfied party can apply to the court for rectification of the register under section 14(b) of the 1965 Act.

27....

28. *As to the second option, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by a judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs (as the Commons Commissioners are able to do: section 17(4) of the 1965 act). However, the registration authority must act reasonably. It also has power under section 111 of the Local Government Act 1972 to do acts which are calculated to facilitate, or are incidental or conducive, as to the discharge of their functions. This power would cover the institution of an inquiry in an appropriate case.*
29. *In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the land or indeed on any person who might be held to have caused damage to a green and thus to have incurred a penalty under section 12 of the Inclosure Act 1857. (There may be other similar provisions imposing liability to offence or penalties). Likewise if it wrongly rejects the application, the rights of the applicant will not receive the protection intended by Parliament. In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of The 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute*

is serious in nature, I agree with Waller LJ that if the registration authority itself has to make a decision on the application (c.f. paragraphs 30 and 31 below), it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry.

30. *One advantage of such an inquiry is that the proceedings can take place with some degree of informality and utilising a flexible approach to procedure.....The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest....”*

16.6 Waller L J agreed and at paragraph 66 said:

“66. I make these points because the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration.”

17. RECOMMENDATION

That a non-statutory public inquiry is held before an expert in this area of law to test all evidence and to make a recommendation to assist the Council make a decision on the application.

Sally Madgwick
Definitive Map and Highway Records Team Leader
Wiltshire Council

05 February 2019