WILTSHIRE COUNCIL

COMMONS ACT 2006

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS 'GREAT LEES FIELD' AT SEMINGTON, Nr TROWBRIDGE, WILTSHIRE AS A NEW TOWN OR VILLAGE GREEN

Application number: 2016/02

Dated 7 February 2020

INSPECTOR'S REPORT

Introduction

1. I am instructed by Wiltshire Council ('WC'), acting in its capacity as commons registration authority ('CRA') under Part 1 of the Commons Act 2006 ('CA 2006'), which is the responsible authority for determining applications to register land as a new town or village green ('TVG') under section 15 of the CA 2006 (as amended). In fact the decision-making body within WC is the Western Area Planning Committee ('WAPC').

2. I was instructed by WC to hold a non-statutory public inquiry to enquire into the facts behind the application to register the application land ('the land') and to apply the relevant law to those facts in order that I might provide the WAPC with a report containing my recommendation on whether the application to register should be allowed or refused.

3. Accordingly, I gave directions for the holding of a public inquiry which was held over five days in the village hall at Semington on 15 – 17 October and 4 – 5 December 2019.

4. Participants at the inquiry

(a) The applicants for registration ('As') were Steven Hall, Jon Jonik and Dr William Scott who were represented by Horatio Waller, a barrister.

(b) The only objectors ('Os') were William Stuart-Bruges and his nephew Arthur Haythornthwaite in whose joint names the freehold title of the application land is vested. Os were represented by Ruth Stockley, a barrister.

I am indebted to these parties for their assistance and helpful submissions. I am also grateful for the administrative support provided by Janice Green and her colleagues on behalf of the CRA.

5. References in this report to A/1, O/1, CRA/1 and so on are to page numbers in, respectively, the inquiry bundles of the applicant, the objector and the CRA (which includes an unpaginated supplemental CRA bundle).

6. References in this report to P/1, P/2, P/3, P/4 and P/5 are to various documents attached to this report. P/1 shows the application land coloured red. P/2 is a map showing the boundaries of the Civil Parish of Semington (and incorporates the AL shown coloured blue and the names of streets within the village). P/3 is a plan produced by As showing the AL with perimeter access points. P/4 is an extract of the Definitive Map for the area. P/5 is the application map on the application made in April 2016 to add footpaths to the Definitive Map and Statement at Semington.

Legal framework

7. Section 15(3) of the CA 2006 (under which subsection, in its amended form, the application to register is made) enables any person to apply to register land as a TVG in a case where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the relevant period of no more than one year before the date of the application.

8. One then has to look at the various elements of the statute <u>all</u> of which have to be made out to justify registration.

'a significant number'

9. 'Significant' does not mean considerable or substantial. What matters is that the number of people using the land has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation rather than occasional use by individuals as trespassers (*R v Staffordshire County Council, ex parte McAlpine Homes Ltd* [2002] EWHC 76 at [64] (Admin) (Sullivan J)). In most cases, where recreational use is more than trivial or sporadic it will be sufficient to put a landowner on notice that a right is being asserted by local inhabitants over his land. See *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438 at [31] (Sullivan L.J) and *R (Allway) v Oxfordshire CC* [2016] EWHC 2677 (Admin) where the court found that an inspector had properly concluded that the starting point had to be whether the recreational use relied was such as to suggest to the reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land.

'of the inhabitants of any locality'

10. The term 'locality' is taken to mean a single administrative district or an area within legally significant boundaries. On this application the parties agreed that the relevant locality is the Civil Parish of Semington (P/2). As I am informed by As, according to the 2011 Census 930 people lived in the parish in 389 households (A/75). It is therefore unnecessary to concern ourselves with the existence of a qualifying neighbourhood.

'have indulged as of right'

11. The traditional formulation of the requirement that user must be 'as of right' is that the use must be without force, secrecy or permission (the so-called 'tripartite test').

12. The rationale behind 'as of right' is acquiescence. In the first instance, the landowner must be in a position to know that a right is being asserted and, in the second, it must be shown that he has acquiesced passively in the assertion of the right. 'As of right' will be defeated if the landowner has either resisted or permitted the use. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use had passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the elements of the tripartite test applied, judging these questions objectively from how the use would have appeared to the landowner.

13. The issue of 'force' needs to be examined with some care as it is a material issue on this application. Put shortly, the applicable principles are set out below.

(a) Use by force is not use as of right (*R v (Oxfordshire County Council ex parte Sunningwell Parish Council* (2000) 1 AC 335).

(b) Forcible use does not require the use of physical force; use of land in the face of resistance by a landowner is forcible use, and not therefore use as of right (*R* (*Lewis) v Redcar and Cleveland BC* [2010] 2 AC 70, per Lord Rodger at [88]). It follows that use which is contentious and non-peaceable (even if not accompanied by physical force) amounts to use which is forcible.

(c) The erection of a fence or a locked gate to enclose or secure land or the erection of a prohibitory notice will generally be such to render use forcible (see *Lewis* (above) and *Winterburn v Bennett* [2016] EWCA Civ 482).

(d) Where a landowner takes steps to resist trespassory use through the erection of a fence, locked gate or a suitably placed prohibitory notice, the fact that those steps are disabled (through making gaps in a fence and/or removing locks or notices) will not negate the effect of those steps in terms of rendering use forcible (*Taylor v Betterment Properties Ltd.* [2012] EWCA Civ 250 per Patten L.J at [38] and at [60]-[63] – where he spoke of the principle

that rights of property cannot be acquired by force or by unlawful means). It follows that notwithstanding the fact that an individual trespasser may not himself/herself have broken a fence and/or forced an entry through a locked gate and/or removed a prohibitory notice, their use remains forcible. In other words, if prohibitory signage is not seen as it has been wrongfully removed then an applicant would not be entitled to rely on the evidence of users whose ignorance of such signage was due only to its removal in this way. In both cases the user would be non-qualifying.

(e) Provided steps taken by a landowner are sufficient to indicate that trespassory use is resisted, if those steps are interfered with or disabled, or ignored a landowner is not then required to take further steps to resist on-going trespass (*Winterburn v Bennett* (above) at [36]-[37]).

(f) It also follows that if use is rendered forcible by actions taken by the landowner <u>before</u> the commencement of the twenty-year qualifying period (which, in this instance, would have begun on 27 April 1996) trespassory use within the qualifying period will remain contentious unless or until there is clear evidence that a landowner has changed its position such that it is no longer contesting the use. The issue was addressed in *Winterburn v Bennett* which was a notice case. The notice in question had been erected before the commencement of the prescriptive period yet the CA held (see [37]) that that step remained sufficient to render use in the prescriptive period trespassory. Evidence of a landowner's change of attitude can be, for example, through the introduction of measures to facilitate recreational use such as the installation of a bench or a dog waste bin.

'in lawful sports and pastimes'

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

15. Difficulties arise where the predominant recreational use is that involving the use of paths (typically linear tracks around the perimeter or crossing a field)

such as would have appeared to a reasonable landowner to be referable to the exercise of existing, or the potential acquisition of new, public rights of way rather than rights sufficient to support a TVG registration. The matter has been addressed in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102]-[103] and in *Laing Homes Ltd v Buckinghamshire County Council* [2004] 1 P&CR 36 at [102]-[110]. The guidance in these cases was approved by Lord Hoffmann in the *Oxfordshire* case at [2006] 2 AC 674 at [68].

16. In the *Oxfordshire* case at [103] Lightman J said this:

> 103. Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, eg, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.

17. A helpful overview of these cases is to be found in the TVG report of Vivian Chapman QC in *Radley Lakes* (13/10/2007) at [304]-[305] who said that the main issue in such cases is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to a lesser right, i.e. a right of way.

'on the land'

18. The expression 'on the land' does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather

the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period, always bearing in mind that qualifying use will be heavier in some areas than in others (*Oxfordshire* [2004] Ch 253 at [92]-[95]). Where areas of the AL are shown not to have been used for LSP (and the whole of the AL is, in this instance, accessible to walkers) the question is whether the whole of the AL is still registrable. One answer to this may be whether the unused areas can be said to be integral to the enjoyment of the land as a whole. On the other hand, the registration authority does have a power to sever from the application those parts of the land where qualifying use may not have taken place, either at all or not for the full period.

' … for at least 20 years ..'

19. The relevant 20 year period in this case ends, at the latest, on the 27 April 2016 when the AL was ploughed.

20. Qualifying use has to be continuous throughout the 20 year period (*Hollins v Verney* (1884) 13 QBD 304). However, temporary interruptions in use are not to be equated with a lack of continuity. It is essentially a matter of fact and degree for the decision-maker to determine whether the whole of the land has been available for LSP throughout the 20 year period. In *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 at [71] Patten L.J said this:

> … there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green. If the two competing uses can accommodate each other (as they did in Redcar (No 2)) then time does not cease to run. But here the exclusion was complete and the use of the land for the drainage scheme was not compatible with it remaining in use as a village green. The judge was therefore correct in my view to hold that there had not been twenty years' user of the works site.

In *Taylor* there was an issue arising from the public's exclusion from part of the land for around four months and it was found that an interruption of this duration was sufficient to stop time running in relation to such land. The same principle is equally applicable to periods when qualifying use was interrupted at a time or times when use could not have been exercised 'as of right'.

21. On this application there is an issue of competing uses arising from the use of the AL for low-level farming activities. The law is now clear about this, namely that where the recreational uses are not displaced or excluded by, or incompatible with, the owner's use in the qualifying period they would generally still be regarded as qualifying for TVG. The question posed in *R (Lewis) v Redcar & Cleveland BC (No.2)* [2010] 2 AC (in the context of rights after registration) was whether it was possible for the respective rights of the owner and of the local inhabitants to co-exist with give and take on both sides. If the two uses could not sensibly co-exist at all then it may very well give rise to a material interruption in the LSP. In *TW Logistics Ltd v Essex CC* [2018] EWCA Civ 2172 (again in the context of an argument on continuing use after registration) the court accepted the finding at first instance that the competing uses had co-existed during the qualifying period which it was found was essentially a question of factual evaluation.

22. It is perhaps also worth recalling that in the *Oxfordshire* case Lord Hoffmann said this at [2006] 2 AC 674 at [57]:

> … 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 it was 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 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 … if in practice they were not.

Procedural issues

23. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority

to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

24. In *Regina (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 Waller L.J suggested at [62] that where there is a serious dispute, the procedure of

> conducting a non-statutory public inquiry through an independent expert should be followed almost invariably.

However, the CRA is not empowered by statute to hold a hearing and make findings which are binding on the parties. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However, the registration authority must act impartially and fairly and with an open mind.

25. The only question for the CRA is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.

26. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

27. The procedure in this instance is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

28. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not 'duly made', it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

29. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be ‘properly and strictly proved’ (*R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p.111 (Pill L.J) and approved in *R (Beresford) v Sunderland City Council* [2003] UKHL 60 at [2] (Lord Bingham)).

Consequences of registration

30. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.

31. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.

32. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede

> the use or enjoyment thereof as a place for exercise and recreation.

33. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any

> disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green.

34. Following registration a landowner is not prevented from using his/her land altogether and retains the right to use it in any way which does not interfere with the recreational rights of the inhabitants, nor, for that matter, can the inhabitants’ rights to use the green after registration interfere with the competing activities of the landowner to a greater extent than during the qualifying period (*R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70).

35. Accordingly, it follows under both Acts that development is prevented.

Description of the application land and surrounding area

36. The land is situated on the western side of Semington just outside the settlement boundary. It is edged in red on P/1 and coloured blue on P/2 on the map on which the civil parish boundaries are also edged in red. The land extends to around 4ha or nearly 10 acres and slopes downwards from south to north with extensive views to the north and the west off Pound Lane. The land has no current public access although the public footpath SEMI/1 runs along the towpath on the southern side of the Kennet & Avon Canal. Pound Lane runs along the southern edge of the land. Vehicular access into the land from Pound Lane is obtained via a substantial metal gate which is currently locked and chained and has barbed wire threaded around the top of seven cross-bars. I was told that this gate has been locked since the land was ploughed on 27 April 2016.

37. The footpath SEMI/6 crosses the field immediately to the west of the land ('the Masters' field') where there is a swing bridge over the canal and is an attractive destination for walks. The Master's field is ordinary grazing land and is probably how the land would have appeared before it was ploughed. The popular canal towpaths (SEMI/1 and MELW/16) run alongside the canal. Bridleway SEMI/7 is slightly further west and meets the public rights of way ('PROW') at the canal swing bridge to the west of the land.

38. I had an accompanied view of the land and general neighbourhood on the afternoon of 17 October 2019. After a short diversion along SEMI/26 (on the eastern side of High Street), our walk on the western side of the High Street took us along SEMI/1, beginning at the bottom of the High Street, close to the Somerset Arms, took us along a narrow track past the end of Pound Close and the paddock and the northern end of the land (crossing two stiles in the process) before arriving at the swing bridge. We not only walked around the perimeter of the land but also walked back to Pound Lane across the Masters' field to the west of the land (which is a fairly well-worn track) where, at the Pound Lane end, there is a somewhat dilapidated farm gate with a stile alongside. It is plain that the land separates the canal from the built up area of the village and that when viewed from the canal the land has a tranquil and rural character. The planning inspector said as much in his decision letter at CRA/1112 (para 27).

39. There are really only two man-made features on the land. Firstly, overhead electricity wires run across the field with a pylon standing virtually in the middle of the field. Secondly, there is a much decayed and overgrown WWII pill box located on the north-east side close to the crossing into the Masters' field on the western side (this is classified as a non designated heritage asset and as such must still be taken into account on planning applications whereas the Semington Aqueduct, which carries the canal over Semington Brook to the north-west of the AL, is a grade II listed structure). The rest of the land is now under cultivation. The land is flat and featureless as its slopes down from Pound Lane and there are no worn tracks running within or around the field.

40. The boundaries of the land are either fenced or consist of traditional field hedgerows. The fencing on the eastern side, where it abuts Pound Close, consists of posts and barbed wire (two strands) which is set into the land by around a meter or so from a mix of the concrete mesh and other styles of fencing running around the edges of the nine gardens which border the land. If reference is made to P/3 there is a very helpful plan produced by As where the number 7 denotes those properties which have gates which lead directly into the land which can no longer be used because of the new fencing erected by Os which precludes all access into the field other than by way of the informal track at the northern end which leads into the Master's field. If one again refers to P/3 there are access points into the land denoted at points 4, 5 and 6. There are stiles at points 4 and 6. The one at point 4 is wooden (see top photo and accompanying location plan on CRA/942) whereas the other at point 6 is a stone structure (see bottom photo on same page with its accompanying location plan) and the land is open and accessible between these points. There is a short but relatively steep embankment on the southern side of the canal upon which there is a good deal of impenetrable undergrowth which is likely to preclude access to the canal directly from the edge of the land and the Masters' field on the western side belongs to Julia Masters and her brother Thomas Masters who are local farmers and whose farm (█████████) we observed at a distance on the eastern side of High Street as we walked a short way along SEMI/26.

41. There are traditional field hedges elsewhere along the eastern boundaries as well as along the western boundary and it is certainly possible to walk unhindered around the entire perimeter of the field. The southern boundary alongside Pound Lane also comprises a substantial hedgerow with a single gateway. Just inside this gateway, on the eastern side, there is a solitary rusted angle iron (which is of some age and is certain to be embedded in concrete as it was impossible to move it) which cropped up in the oral evidence and can be seen in the photos which I took on my accompanied view which will be found in the supplemental CRA bundle (with the reference RA/3 noted on the top right hand corner of six documents). The angle iron also appears at CRA/593 where there is a photo taken by Sally Madgwick, a WC Rights of Way officer, on 28 April 2016, showing the angle iron and the newly ploughed field in the background with the gate's closing mechanism holding the gate firm against the angle iron (rather than the main gate post on this side) leaving a gap of around 2-3 feet enabling pedestrians to walk through into the field if they wanted. Another picture was taken by a Mr and Mrs Hall of the same gate being held firm against the angle iron on 8 April 2016 (O/158). However, the same gate is properly secured to a gate post in another photo taken by them on 5 May 2016 (O/156) to which they refer in their email dated 21 May 2016 (O/155) as a 'new gate post'.

42. If one again refers to P/3 one can see at point 2 the location of what at one time had been an opening in the hedge some 20m to the north of Pound Lane. No such gap currently exists. At point 3 on P/3, running some 90m north of Pound Lane, there used to be a gateway in the hedgerow. On my visit I observed a narrow gap in the hedgerow at this point which had been filled by some rough and ready mesh fencing which at one end was, as I recall, attached to a movable post in the same manner as the former *Wiltshire gate* which I was told used to exist at this point. One can see a gate post on the northern side of this gap in the western hedgerow in the photos at O/201 which form part of the officer's decision report on the DMMO applications to which reference will be made later.

43. The accompanied site visit also took in the children's play area off Wessex Close which is close to the Pound Lane gateway into the land, and what was

referred to as the ‘Motel Field’ which is another area in which dogs might be walked in safety which is located on the southern side of the village close to the A361 roundabout which is the main access point for vehicles entering and leaving the village.

44. In the result, in the 20 year period ending on 27 April 2016 access into the land would have been available to local inhabitants via (a) the Pound Lane gateway; (b) the gateway in the western hedgerow; (c) a smaller gap within the same hedgerow much closer to Pound Lane; (d) the PROW on the northern boundary (SEMI/1) (where there are stiles on both sides of the field); and (e) in the gates at the rear of dwellings in Pound Close.

The material history of the AL

45. The land is jointly owned by Os. It appears from the oral evidence of William Stuart-Bruges (‘WS-B’) that the land belonged to his grandmother who died in 1956 (she had acquired the land in 1951). In 1954 the land (which had been reduced by 1.34 acres following a sale for public housing) passed to his father who died in 1984 following which the land passed (in, I think, 1987) to his four children in unequal shares. In 2015 the land was registered (under title number WT414792) and the title became vested in Os who hold on trust for the Stuart-Bruges’ siblings. The trusteeship arose in consequence of capacity issues affecting the elder sister’s interest.

46. The land was tenanted for many years by a local farming family, the Masters of [redacted] in Semington. Between 1951 and 1987 the land was subject to an agricultural tenancy held by William Masters which ran from year to year (O/83-85). However, after 1987, there were a series of annual seasonal grazing licences involving the Stuart-Bruges’ siblings (with the exception of the licence for 1988 when a Mr David Morris, most probably a Salisbury solicitor, participated in the licence jointly with WS-B in their capacity as owners of the land) and members of the Masters’ family. From and after the 2002 season Julia and her brother Thomas Masters were the licensees whereas before this time Helen Masters, presumably their mother, had also been a joint licensee in what would have been a family farming partnership.

These licences will be found at CRA/761- 858 and end with the licence for the 2015 season.

47. In each licence the 9.62 acre parcel is occupied for grazing or mowing for periods of less than a year ending on 25 December in each year. The licensee is responsible for looking after the land and keeping the gates and fences in good order. In the 1988 season (CRA/763) one observes a covenant which required the licensee not to permit any trespass on the land (c.6(a)). By the time we get to the licence in 2003 this obligation had extended to a requirement to keep the gate (meaning the gate off Pound Lane) 'closed and locked' (CRA/812). I also observe from the licences for the seasons in 1989, 1995, 2003 and 2015 that of the four Stuart-Bruges siblings, only WS-B was resident in the UK and he lived at addresses Nr Salisbury, Warwickshire and in Hampshire. We are, therefore, not dealing with a landowner living close to the land but with absent landowners.

48. A joint statement by Julia Masters and her brother Thomas is produced by Os (O/51-53) although neither of these parties gave oral evidence (a matter with which I will also deal with later). It is of interest that the statement says that from the late 1980s to the early 1990s the land (which they call 'Big Lees Field') was grazed by cattle when they say that they visited the land on a daily basis to check on their cattle. It was thereafter used for silage and hay when they say that their visits to the land were only occasional. They also say that the land was not used in 2000 and that it was sprayed in the 1980s. They say signs were put up indicating that the land had been sprayed. The last grazing licence was for the 2015 season (CRA/858) and the obligation to prevent trespass and to keep the gate on Pound Lane 'closed and locked' continued to the end.

49. On 26 April 2016 an application was made by Peter Smith of █ The Hunt Close, Semington to add three footpaths to the Definitive Map and Statement ('DMS') at Semington. The application plan will be found at P/5 from which it will be seen that perimeter paths were being sought around the Masters' field and around most of the land (less a short stretch on the western boundary). The third path claimed was a linear path commencing at the Pound Lane gate

leading into the land and running west through the gateway at point 3 on P/3 and continuing across the Masters' field joining up with SEMI/6 just short of the swing bridge over the canal. The application to so modify the DMS failed and the decision report of Sally Madgwick dated 27 September 2016 will be found at CRA/581. Ms Madgwick's report recommends that the application to modify the DMS should be dismissed, which recommendation was duly accepted by WC and was not appealed. In her lengthy report Ms Madgwick considered that (a) there was insufficient evidence to justify the application in the case of the claimed route coloured red on P/5; (b) that there had been an interruption in the use of the routes coloured blue and green on P/5 prior to the elapse of 20 years before the right had come into question in April 2016; and (c) the fact that any user via the Pound Lane gateway had been non-qualifying as it had been non-peaceable owing (as she found at para 29.4 of her report – see CRA/633 – top of page):

> … to the locking of the gate and subsequent damage to it.

50. Ms Madgwick's report contains a number of useful photos. I shall deal with the aerial photos later but those at CRA/590-596 were taken on her visit to the site on 28 April 2016. For instance, we can see that there was an established gateway at point H on P/5 (and at point 3 on P/3) between the land and the Masters' Field. There are also several photos of the land after it had been ploughed on 27 April 2016 which, as I understand it, was the day after Mr Smith's application had been made to modify the DMS. The report also contains a reference to the evidence and photos of Mr and Mrs Hall (CRA/600-602) of which mention has already been made and discloses that the main gate into the land would have been locked by 8 April 2016 with the field being ploughed on 27 April 2016 with, as is claimed by the Halls, the installation of a new gate post against which the gate could be properly secured by 5 May 2016. This entry point into the land is of critical importance to the application to register the land as a TVG as it is claimed in the statement accompanying the TVG application that some 80% of those known to have used the land entered it by means of the Pound Lane gateway (A/79).

51. On 3 February 2017 Richborough Estates applied to WC for outline planning permission to erect a total of 75 residential units on the AL (O/1147) (incorporating ancillary public open space, play areas and access from Pound Lane). The application was refused by WC on 7 October 2017 and an appeal determined by an Inspector appointed by the Secretary of State was dismissed in a decision letter running to 39 pages dated 14 December 2017. The public inquiry lasted for 14 days. In the course of the inquiry the appellant amended its application to increase the proportion of affordable housing to 40%. There were a number of objections to the application and the view taken by the inspector was that the proposal would not represent sustainable development whose benefits, with other material considerations, did not outweigh the significant harm to the character and setting of Semington or otherwise justify a departure from the development plan.

Application to adjourn

52. Shortly before the start of the resumed hearing on 4 December 2019 (Day 4) the CRA received an agreed joint note dated 27 November 2019 from counsel acting for As and Os (to be found at the end of the supplemental CRA bundle) in which the CRA was invited to adjourn the public inquiry to a date 'not before the beginning of March 2020'. The note invited the CRA to make an urgent decision in order that the parties might know whether their attendance was required at the resumed hearing on 4-5 December 2020.

53. I was consulted about this by the CRA and it was my recommendation that an adjournment of the public inquiry should not be permitted on public interest grounds and a reasoned letter was sent both parties on 29 November 2019 notifying them of WC's decision. The parties were also informed that if they wished to renew their joint application to adjourn they could so at the resumed inquiry which was then less than a week away and where all necessary arrangements had been made and publicised in advance.

54. The reason given for the requested adjournment was that the parties had reached agreement in principle that the application would be withdrawn in exchange for (amongst other things, about which I was given no details) for a dedication of a footpath around the perimeter of the land. It was suggested

that an adjournment would give the parties time to work out the details of the suggested agreement (which, it is said, they expected to reach) and that to continue the inquiry might frustrate the ability of the parties to secure an amicable settlement. It also seemed to me that the Rights of Way team at WC would need to be brought into these negotiations in order to see whether they were minded to support any proposal by the landowner to dedicate land as a public right of way in view of their powers under the Highways Act 1980.

55. The CRA has a discretion whether to allow an adjournment in much the same way as it has a discretion to allow an application to be withdrawn before it has been determined. Where it would be reasonable to allow an application to be withdrawn the discretion will no doubt be exercised in favour of the withdrawal. Much will depend on the context which might include the prospects of the application succeeding in law and the measure of support which it enjoyed within the local community. In this case we were about to begin day four of what proved to be a five day inquiry in what is a well-supported application. In such circumstances (unlike in private law litigation) there is, as it seems to me, an obvious legitimate public interest in the application being determined in order that the status of the land might be determined rather than being left in a state of limbo.

56. The inquiry was told that As had contacted ‘a number of people’ who had submitted completed evidence questionnaires and that there had been a meeting which approved the application for an adjournment. There was no suggestion that everyone, or at least an overwhelming majority of those who had lodged written evidence, had signified their consent to the proposed adjournment although a number of them clearly had.

57. I invited submissions on the application to adjourn at the start of Day 4 and the matter was also discussed privately by myself with officers of WC who attended the hearing. It was my recommendation that the application should be rejected and that the inquiry should continue (which it did) which was the unanimous view of these officers which I later communicated to the parties in open session. In my remarks I noted (a) that there was a wider public interest in seeing the application through to a conclusion now that we were part way

through the inquiry (and by that stage 12 witnesses supporting the application had already given oral evidence); (b) that the CRA had not been presented with evidence that the overwhelming majority of those who supported the application to register had agreed to the proposal to adjourn; and (c) that by adjourning the inquiry to March or even April 2020, whenever it could be re-fixed to suit the convenience of the parties and their witnesses, it would mean that there would potentially be a gap of around 6 months before the inquiry resumed which made it extremely difficult for the Inspector who was obliged to make findings on the earlier evidence.

58. It is my view that the application to adjourn was, in the exercise of their undoubted discretion in the matter, rightly rejected by the CRA.

The failure of Julia Masters and Thomas Masters to appear and give oral evidence at the public inquiry

59. It concerned me when I was informed by Os that Julia and Thomas Masters had refused to attend the inquiry to give evidence. Although it is clearly no function of the CRA to assume any control over the evidence given by the parties, it seemed to me to be necessary to enquire into the steps taken by Os to obtain the agreement of these witnesses to give evidence on matters which were clearly of the first importance to the outcome of the application and with which they would have been very familiar in view of their close association with the land over many years. Indeed, on my accompanied site visit I was told that a tractor travelling past the land was in fact being driven by Thomas Masters whose home is only a short walk from the inquiry venue. I therefore invited Miss Stockley to seek instructions with a view to clearer evidence being given about the steps taken to secure the presence of Julia and her brother Thomas Masters at the inquiry.

60. In the event, at the resumed hearing Os produced a letter to the inquiry dated 2 December 2019 from Os solicitor, namely Matthew Scudamore of Gately LEGAL, detailing the efforts which had been made by his firm to secure evidence from Julia and Thomas Masters (I have taken the liberty of adding this letter at O/438E(i)-438E(ii)). The letter noted that the writer had first

visited Miss Masters at her home on 5 July 2016 to discuss her evidence in response to the DMMO applications. Subsequent efforts to speak to her again did not prove fruitful until Mr Scudamore received a telephone call from the Masters' solicitors in Stratford-upon-Avon who informed him that she was not, as he put it:

> … prepared to provide any evidence in respect of Great Lees Field (although she did submit a letter to Wiltshire Council in respect of alleged rights of way affecting her own field.

61. Mr Scudamore goes on to say that once the date of the inquiry had been fixed his firm chased the Masters' solicitors (whom he had been informed were still acting for Miss Masters) on twelve occasions between August and October 2019 with a view to securing evidence from her for use at the inquiry. Eventually, on 4 October 2019, Miss Masters provided a joint statement bearing that date which will be found at O/51 and to which reference has already been made. Thereafter Mr Scudamore repeatedly tried to secure the attendance of Miss Masters and her brother at the inquiry until, on 18 November 2019, he was informed by Miss Masters' solicitors that she would not be attending the hearing.

62. Mr Scudamore also notes that WS-B also tried to get Miss Masters to provide evidence and he evidently met her in June/July 2018 but his efforts were not fruitful.

63. Mr Scudamore concludes his letter by saying this:

> Given that Ms Masters has repeatedly refused to provide evidence at a hearing, as confirmed by her solicitors, unfortunately I do not consider that there is anything further that can be done to secure her appearance at the hearing on 4 December 2019.

64. I accept such evidence which was, I think, quite rightly not challenged at the inquiry by Mr Waller. In the event, written and oral evidence was produced by Os from other witnesses at the resumed hearing.

Aerial photographs (to be found in supplemental CRA bundle and online)

65. We start with the image from Google earth for 2001 which is undated although the grass looks to have been recently cut. There are obvious linear tracks

leading from the Pound Lane gate and from 32 Pound Close across the field to the gateway at point 3 on P/3. There is also the feint sign of a track around the eastern perimeter but with much clearer signs of usage on the northern boundary in line with SEMI/1. On the face of it, local inhabitants appear to be using the Masters' field as a main crossing point to the swing bridge via the stile on Pound Lane. The 2001 image shows heavy use of the perimeter on the eastern and northern boundaries and a feint cross field path from point 3 on P/3 joining up with the main track crossing the Masters' field which is SEMI/6.

66. The image for 2006 is broadly similar but the effect is lessened by recent mowing. The image for 2014 is not very clear. All that one can see with any clarity on the land is the linear path between the Pound Lane entry and point 3 on P/3 on the western boundary. The inquiry would have been greatly assisted by year to year aerial images from a professional source.

67. To be fair to As, I looked online at a fuller assembly of the pre-2016 aerial imagery. This included an image from 2002 which is much the same as described above for 2001 but with the addition of a track leading from point 2 on P/3 (the second gap in the western hedgerow of which there is no longer any evidence) up to the cross field track running out from 32 Pound Close. There are also very feint tracks in the eastern corner which are very probably associated with the use by two of those dwellings which have gates onto the land. There is also an image for 2014 which is none too clear either but one can see the linear paths from the Pound Lane gate and from 32 Pound Close which lead to point 3 on P/3. The image for 04/2015 does not really have sufficient clarity to work with and the image for 08/2016 post-dates the ploughing but shows a number of trenches associated with archaeological investigation prior to the planning application made in 2017.

Applicants' evidence

Written evidence

68. The submission accompanying the application sets the scene for the initial evidence gathering in the form of the 66 completed evidence questionnaires. I

could not do justice to As submission by summarising it and have therefore decided to set it out in full below.

Justification for the application to register Great Lees Field as a Village Green

Introduction

This document sets out the facts supporting the claim to have Great Lees Field in Semington, Wiltshire designated as a ***village green*** under Section 15(1), subsection 15(3), of the Commons Act, 2006.

It presents an analysis of recent (June 2016) survey data to demonstrate there has been *as of right* use by Semington villagers for the 20-year period (up to 27th April 2016) when the land was ploughed for the first time in living memory. Data illustrate that this usage goes back well beyond the 20-year qualification period, certainly to the 1950s. Data were collected by means of a questionnaire based on the pro-forma produced by the Open Spaces Society and were acquired over a 7-day period in mid-June 2016.

The document begins with a context-setting of the village of Semington, before describing Great Lees Field itself. It then has sections covering the ownership of the field, data gathering, and the nature of the villagers who responded. It then sets out in detail the use of Great Lees Field by villagers with a focus on the activities that have been carried out and their frequency. Finally, it addresses the issue of 'as of right' use and demonstrates that villagers have exercised this for at least the 20 year period up to April 27th 2016.

The village

The village of Semington lies within Semington parish which is in the Melksham community area in Wiltshire. The village is just over a mile south of Melksham. It lies west of the (recently diverted) A350, which, together with the A361 Trowbridge to Devizes road, runs through the parish. The vast majority of the housing and village amenities are clustered around or near the old A350 road.

According to the 2011 Census [1], 930 people lived in the parish in 389 households – an increase of 12% and 18% respectively since 2001.

Semington is an old settlement and people have lived here since the 12th century. St George's church dates from around 1300, and records of Littleton Mill (which was burnt down in 1802 during a protest against the use of machinery) go back to these times. The village is surrounded by farmland and its farmhouses date from the 1500s. The parish has a number of notable houses built in the 17th, 18th and 19th centuries. The village school began in 1859. It is still thriving, although in much more modern buildings. The village Hall, built in 1933, and recently refurbished, is the heart of the village, both geographically and socially. It has a social club and a skittle alley, and hosts the WI, a bridge club, bingo, a stompers class, two choirs, quizzes, a special needs children's group, a Zumba class, and the parish council. An extensive history of the village was compiled with funding from the Millennium Commission and published in 2002 [2].

The Kennet & Avon Canal, and Semington Brook which flows into the River Avon west of Melksham, form the northern boundary of the parish. The Wilts & Berks Canal started at Semington until its closure in 1914, but a new connection with the Kennet & Avon is now planned. Of the many well-used village footpaths, the most popular is the canal towpath.

The parish has the following features;

- Two small grassy areas; one is opposite the village hall where the Christmas tree stands. The other, The Ragged Smock, is at the south of the village and is named after an old windmill that resembled an old man in a tattered coat.
- At the Queen's Diamond Jubilee, a wood was planted south of the A361 and east of the old A350 road; since then, villagers have planted 9000 daffodil bulbs, scattered 10000 poppy seeds, and planted an oak to mark the outbreak of the First World War.
- A conservation area in the school grounds where children can monitor and encourage wildlife. There are wildlife ponds along the A350 with special crossing points underneath the road to protect the great crested newts and other fauna in the wildlife areas nearby.

1 2001 Census, household and population data (2001C), Wiltshire Parish Population Estimates and Projections 2001-2011. 2011 Census, household and population data, Wiltshire Census 2011 Selected Statistics Profile Tool. http://www.intelligencenetwork.org.uk/population-and-census/

2 Firmager G & Firmager D (Eds.) (2002) *Semington Past and Present*; ELSP Press

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- A small play area for children with basketball posts and a mini football pitch, a tennis court, and a full-size football pitch located south of the A361. The village has football teams, a cricket club and six skittles teams. A summer fête is held at the school.
- A Post Office, a monthly parish magazine sponsored by the church, the parish council and villagers, and a website providing information on parish events.
- A Neighbourhood Watch scheme works with the neighbourhood police team who attend the Thursday coffee mornings in the village hall.
- A range of businesses including a light industrial estate, a narrow boat hire and repair company, a crematorium, and a charity helping people to live independent lives.
- The Somerset Arms provides a range of activities and festivals, such as Christmas and Easter parties for children, live bands, and quiz nights.
- Regular buses to Chippenham, Devizes, Melksham, Swindon and Trowbridge, and rail links in Melksham, Trowbridge and Westbury.

Up to April 27th 2016, a further feature of the village was Great Lees Field (which some know as Big Lees Field) which has been extensively used by villagers in the post-war period 'as of right' for a wide range of recreational, sporting and other activities. On April 27th 2016 the field was ploughed thereby preventing any of these 'as of right' uses, and causing a reduction in biodiversity in the village. This is the first time that the field has been ploughed in living memory; as one respondent put it: "for the first time in my lifetime, 60 years". It is the action of ploughing the field that has prompted this application to establish village green status for the field with the aim of enabling villagers to continue to carry out their recreational, sporting and other activities that they have enjoyed for so long.

The field

Great Lees Field occupies about 4Ha and lies at the western edge of Semington village between Pound Lane and the Kennet & Avon canal with the properties along Pound Close and Palmer Grove at its eastern edge and a field to the west of it. The field lies wholly within Semington parish but outside the village settlement boundary.

The southern edge of the field (along Pound Lane) is a mature hedge which has a gate in it near the south-east corner. This is the vehicular access point for farm-related traffic. The gate has been locked since the field was ploughed on April 27th 2016.

The eastern edge of the field runs along the back gardens of properties on Pound Close and Palmer Grove. A number of these houses have access to the field from gates in their garden fences.

The northern edge of the field is the Kennet & Avon canal. There is a Right of Way along this part of the field running from the swing bridge over the canal through to the village High Street. Although the ploughing has made walking along the Right of Way more difficult than before, it is still possible to do this. This footpath is used regularly.

The western edge of the field is a mature hedge that runs from Pound Lane north to the Kennet and Avon canal. There is a gateway in it near the south-west corner, but there is no gate. This gap in the hedge is of long-standing. There is also a gap in this hedge (near Pound Lane) which is of more recent origin. There is a World War II pill box along this boundary between the gateway in the hedge and the canal.

It will be clear from this description of the field that access to it has been possible in a number of ways: by using the:

- gate on Pound Lane
- gateway in the western boundary hedge approximately 90 metres north of Pound Lane (and the gap in this hedge about 20 metres north of Pound Lane)
- stiles at each end of the Right of Way running along the northern boundary of the field where it meets the canal
- back gardens of the houses along Pound Close and Palmer Grove
- Kennet & Avon canal

It is evident from the data collected that the field has been regularly accessed in the first 4 of these ways over the last 20 years; evidence for direct access from the Kennet & Avon canal remains anecdotal. Although, unsurprisingly, the images of the field on Google Earth do not show anyone using it, they do provide evidence of access via the gate on Pound Lane, the gateway in the western boundary hedge, and from some of the back gardens of the houses along Pound Close and Palmer Grove.

19.

Following the ploughing of the field on April 27th, printed notices were displayed on the Pound Lane gate saying that the land is 'private' and that there is no right of way. Around June 15th, more formal notices were placed on the gate on Pound Lane, and also at other access points to the field, some of which were newly blocked off. The details are:

I. the gateway in the western boundary hedge approximately 90 metres north of Pound Lane has a sign "PRIVATE FARMLAND No Public Right Of Way" and wire mesh netting now blocks access through the gap in the hedge.
II. there is a sign "PRIVATE LAND No Public Right Of Way" in the middle of the small gap in the hedge 20 metres north of Pound Lane
III. the wooden stile into Great Lees Field in the north west corner has a new "PRIVATE FARMLAND No Public Right Of Way" sign in the corner of the field. This may be an attempt to prevent use of the Right of Way running along the field's boundary with the canal.

It is significant that his multiple use of notices acknowledges that there are many ways that people on foot can enter the field, and it is the first time (in living memory) that such notices have been put up. That is, there has never been any previous attempt by owners or tenants to put up notices either saying that the land is private, or denying complete access to potential users.

Ownership

The field is owned jointly by [i] William Peter Stuart-Bruges and [ii] Arthur William Fitzjames Haythornthwaite. They live, respectively, in Kingsclere, Newbury, and Steeple Ashton. Up to the Spring of this year, the tenancy was held by John and Julia Masters of Manor Farm, Semington. The ploughing of the field was carried out by a new tenant farmer, but it's not clear whether anyone in the village knows who this is.

Only 20% of respondents said that they knew who the owner / occupier was. Although no one was able to name them, a small proportion of respondents (8%) knew that they were related to a long-established village family. More respondents, particularly those who have lived in the village for a long time, were able to name the tenants of the field (until early 2016), who do live in the village.

Data Gathering

Because there are a significant number of people who have lived in the village since the 1950s, there is considerable anecdotal evidence about the use of Great Lees Field by villagers 'as of right' since that time. In order to gather evidence more systematically, a questionnaire was drawn up by the informal group of villagers known as *The Friends of Great Lees Field.*

The only information provided to householders was this text on the front of the questionnaire:

> Great Lees Field on Pound Lane was ploughed on April 27th – for the first time in living memory. This great village asset has been used by many people over the years for exercise, sport, relaxation and recreation, and its loss has caused great regret and anger in the village. But we can do something about this by applying to Wiltshire Council to have Great Lees Field designated as a ***Village Green***. If approved, this would mean that the field would remain open for use by villagers forever and protected from future development. If you have used Great Lees Field at any time in the past, we hope you will support this move by completing this short questionnaire about this. If you have any photographs of the field being used, that's going to be particularly helpful.

The questionnaire asked about:

- the length of time (duration in years) they had used the field
- how access was gained
- whether permission was granted for general access or specific activities (if so, from whom)
- whether permission had ever been denied, or access otherwise prevented
- the reasons for going onto the field
- frequency of use
- knowledge of other people's use of the field and / or community activities on it
- frequency and pattern of personal use

A copy of the full questionnaire is appended. 385 were distributed to village residents on June 6th / 7th, with returns requested by June 11th. No reminders were sent, and there was no follow-up of non-respondents. No questionnaires were sent to anyone living outside the village.

66 returns were received by June 13th, a return rate of 16%. All were in support of an application to register

Great Lees Field as a village green.

The respondents

Respondents lived in all parts of the village. Whilst a majority came from the streets closest to Great Lees Field, others lived in much more distant parts of the village community illustrating the wide use of the field.

All respondents said that they had used the field during the past 20 years. One said that she had used it from the late 1930s, six from the 1950s, four from the 1970s, nineteen from the 1980s, eight from the 1990s, 22 from the first decade since the millennium, and 6 more recently. This is a good representation of the various lengths of time that people have lived in the village.

Activities

What villagers have done in Great Lees Field over the last 20 years (and more) is wide-ranging. It includes individual and family activities (which predominate) and more organized community events. When asked about the activities that they have *seen* taking place, villagers reported the following (showing % positive responses):

- dog walking – 99%
- people walking – 97%
- children playing – 91%
- picking blackberries – 86%

- kite flying – 53%
- bird watching – 46%

- football – 29%
- bike riding – 29%
- cricket – 23%
- fishing – 21%

Activities with a lower than 20% response were: bonfires [18%] picnicing [15%] annual parking for the village fete [15%] team games [11%] rounders [9%] drawing / painting [9%] and a route for the village fun run ("slog") [8%].

Other activities listed by fewer than 5 villagers included community celebrations, horse riding, picking mushrooms, running, jogging, picking damsons, children camping, Frisbee games, photography, fancy-dress fairs, the decoration and storage of carnival floats, gymkhana-related events, and rowing (presumably by using the northern boundary of the field as a launch point).

Villagers were also asked about the activities that they had engaged in personally (as opposed to observing others doing). There was a similar pattern of responses with dog walking, people walking, children playing, picking blackberries, and kite flying again being the most prevalent responses (in the same order as seen above). Football, cricket, bird-watching, picnicing, bike riding, the village fun run, and parking for the summer fête were all also mentioned.

When these responses are read in conjunction with the length of time that people have lived in the village, it is clear that the kinds of activity listed here have been happening for a long time; far longer than the 20 years since April 1996. Equally clearly, a number of these activities no longer take place. For example, responses indicate that Trowbridge Pony Club used the field for gymkhana parking from 1988 to 1998, and that there were bonfires (sometime associated with the Lions charity from the 1960s "up to 1976". More recently, however, parking for the village summer fête (held in the school) has been "from 2005 to 2015". It will not be used in 2016 because of the ploughing of the field.

This use of Great Lees Field by the village is fully in tune with rural life, with agricultural practice and the rhythm of the seasons. There are the seasonal community celebrations such as the spring village fun run "slog", the summer fête, the autumn carnival and bonfire night, and seasonal individual and family activities such as "kite flying every autumn", playing cricket with the children after "the grass was cut", and picking mushrooms, blackberries (and damsons and elderflowers) in the late summer / autumn. Added to these are the more frequent activities that people undertake with their families (or on their own) more or less all the time, with walking and dog walking being the most-reported activities whether by respondents themselves, or by other villagers.

One respondent [36] who ticked "walking" as one of the activities that he engaged in in the field, elaborated on that use, stating that this involved "exercise, relaxation, recreation, reflection, meditation, blackberrying, mushrooming, nature study, wildlife exploration" which brings home the point that Great Lees Field has a wide range of personal benefits. It is inconceivable that similar purposes were not widely shared by people who were also only "walking". This respondent added that he'd been doing this "for the last 32 years on a monthly basis". Another respondent [43] captured something of the significance of the field to children of all ages:

> *"I have used Great Lees Field regularly over the past 28 years. When my children were young we used to use the field for flying our kites. During summer holidays, village children would play in the field once the meadow had been harvested. The World War II pill box served as a play den, and has been a regular meeting place for teenagers wanting to be out of sight of adults."*

The following extract from respondent [3] shows what has been lost:

> *"We own a children's day nursery and use the field on a regular basis. We have vulnerable children who live in poor accommodation (ie, flats) with no access to outdoors without an adult being present. Having access to the field given them a chance to run and play with many friends that they would not normally have in a safe environment. Great Lees Field is like another classroom for the nursery [where] they can learn, play, and draw with freedom."*

Frequency

The data show that although the frequency of use varies, it can be quite regular, and very frequent. Villagers were asked how often they used Great Lees Field, and responses ranged from "every few years" to "6 times a day". Within these extremes, the following pattern of use way found:

- Every day (including the 6 times a day person, another who used it 3 times a day, and one twice a day) = 26%
- Every week = 47%
- Every month = 12%
- Every year = 5%
- Frequently / often / regularly = 9%

Within each of the weekly, monthly and yearly categories, there was also considerable variation. For example, *every week* includes those using it "nearly every day", those doing so "2 or 3 times" and those who went into the field "once a week". A similar pattern is found in the other categories. If all those who said that they used the field more than 4 days a week are added to the daily users, the % of users rises from 26 to 41.

Clearly, use changes over time. For example, from playing cricket in the field as a lad in the 1950s, to now merely walking on it; from taking children into the field two or three times a week when they were young, to now, on average, using it only once a week. There is also a clear seasonal change of use which is typified by this response: "in winter approx. 2 times a week, and at least 4 times a week in summer".

Access to the field

Respondents were asked how they got into Great Lees Field before it was ploughed and the gate locked. 80% said that they did this through the Pound Lane gate, and 25% said that it was through a gate in their back garden. A further 16% said it was through the gateway in the north-south hedge along the western boundary of the field, and 13% said it was from the canal, the right of way running along the northern edge of the filed or the stiles giving access to that right of way from adjoining properties. NB, numbers sum to more than 100 because 29% of respondents said that they used multiple entrances and exits.

It was those respondents living on Pound Close and Palmer Grove, whose properties adjoin the field, who were able to use the gates in their back gardens to gain direct access to the field. It is clear from the data that they did this, not only for a host of recreational activities, but also in order to keep their property in good repair. It seems equally clear that they have done so 'as of right'.

Many respondents who used he Pound Lane gate were at pains to point out that they went through an unlocked gate. "Through open gate" is a typical and frequent comment.

As of Right use

Specific questions were asked about whether permission had been sought or given for use of the field in order to check whether 'as of right' use could be substantiated. It is clear from the data that the owners of the field have never been asked for permission to use the field, and have never given or refused it to

respondents. This is unsurprising as, as been noted already, the owners do not live in the village and none of the respondents appears to know their identity.

Respondents were asked whether they thought that they had ever been seen on the land by the owner / occupier, and if so what was said. 14% said that they thought that this had happened, but none reported any conversation taking place.

Respondents were asked whether they had sought permission for specific activities on the land or had received such permission more generally. Six (9%) responded that they had specific permission from the tenant farmers for community activities, and five of the six confirmed that this related to car parking on the field on the day of the school summer fête. No respondent said that they had ever sought or been given permission to access the land for personal / individual use. There is no evidence that the field owners were ever asked for, or ever gave, any such permissions.

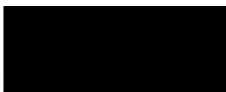
Respondents were asked whether any attempt had been made by notice or fencing or any other means to prevent or discourage the use of the land. 23% of respondents replied, 'yes'. Unsurprisingly, a large majority (over 80%) of these were commenting on the ploughing of the field on April 27th 2016.

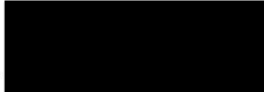
All the other responses were commenting only on the gate on Pound Lane which clearly has been locked (as opposed to its being merely closed) on a number of occasions over the years before the ploughing. The most cited reason related to stopping vehicular access by members of the traveller community. For example: "when travellers were around to stop them parking"; "when travellers were in the area"; and "when there was known traveller activity". It is not clear that this relates to the past 20 years. A very small number of agriculture-related reasons are also given, for example, cows and crop spraying. Again, detail on the timing of these uses was not supplied.

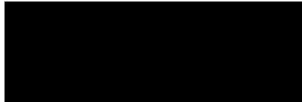
It is important here to note that complete access to the field has never been made impossible by all entry points (or entry discouraged through notices). Even when the Pound Lane gate was shut to prevent vehicles getting into the field, access through other means (the gateway in the western boundary hedge, the stiles at each end of the Right of Way running along the southern boundary with the canal, the canal bank, and the back gardens of the houses along Pound Close) has always been possible.

…………………………………………

This application is submitted to Wiltshire Council by the undersigned, who are members of the small group of villagers informally known as *The Friends of Great Lees Field*, and who acknowledge the vital support provided by the Semington village community in making this submission.







Steven Hall **Jon Jonik** **William Scott**

June 24th 2016

69. A number of points can be flagged up from As ‘Justification’ document.

(a) The user relied on is, as one might expect, predominantly that of walking, with or without dogs, together with children’s play.

(b) There is ample user covering the requisite 1996-2016 period: one person claims to have used the land from the late 1930s, six from the 1950s, four from the 1970s, nineteen from the 1980s, eight from the 1990s, twenty-two from the 2000s and six more recently.

(c) There has been occasional parking over the years for community events with the consent of the Masters which is not inconsistent with the use of such land as a TVG.

(d) It is claimed that the erection of prohibitory notices at the time of the ploughing (and later) was the first time anyone had seen such notices.

(e) It appears to be accepted that the Pound Lane gate was occasionally locked (although it is not entirely clear whether it is accepted that this occurred in the 1996-2016 window) and the reasons cited for this involve a risk of incursion by travellers or at times when the field was being sprayed (the Masters allude to spraying in their parents’ time in the 1980s when signs were evidently erected indicating that the field had been sprayed) or when cattle were in the field (which the Masters also say in their joint statement had lasted until the early 1990s), neither of which, in my view, would have been inconsistent with TVG use or indicative of an implied licence in favour of local inhabitants.

(f) Although As submissions and returned evidence questionnaires go into detail about most things such as why and how often the land is used and what others get up to on the land, there is next to no detail given as to precisely where on the field users go when they get there.

(g) It is alleged that 80% of users access the land via the Pound Lane gate which, for this to happen, is presumably either left open or else is opened by users or even climbed over if it is locked as the hedgerow appears, at least for

most of the time, to have grown hard up to the gate on either side leaving no gaps for unhindered access (A/93).

(h) The preamble to the evidence questionnaire is, in my view, a positive invitation to those looking to prevent development to subconsciously exaggerate their use of the land in order to achieve this end.

70. At this point I should also mention the comprehensive analysis of the user evidence drawn up by Janice Green, WC's Rights of Way Officer, in her helpful decision report dated 1 December 2017, to the WAPC which recommended that the application should be taken forward to a non-statutory inquiry. The five appendices to this report contain an extremely thorough audit of the contents of the 66 evidence questionnaires which it would be difficult for me to improve upon (see CRA/1044-1060).

71. A small selection of photographs accompanied the application. We can see what the land looked like before it was ploughed in a number of them (see Supp/CRA/34 (not in As bundle), A/90-91 (2016), A/90 (May 2009) and A/93 (May 2009) from which it is plain that the land would have accommodated walking, with or without dogs, and, within reason, all manner of other recreational uses of the kind alleged in the questionnaire responses. One photograph is interesting. This is A/93 (May 2009) which shows the open gate at Pound Lane which is badly damaged, the causes of which are unknown. The grass shown is fairly long but certainly accessible for walking. The gate itself is without a central bar and a buckled lower bar and the gap is easily wide enough for able-bodied users to clamber through with their dogs. The photograph is all we have and there was, as I recall, much speculation at the inquiry about what might be gathered from the photograph which certainly indicates that the gate was in a state of some neglect in May 2009 and that this would have been obvious to anyone walking or even driving along Pound Lane. The gap in the western hedgerow shown in photograph A/95 (post-April 2016 – showing a growing maize crop) also shows what point 3 on P/3 would have looked like at this time with the hedgerow closing in on both sides. Note the damaged 'Private Farmland – No Public Right of Way' sign on the fencing within the gap (the location of the former 'Wiltshire gate' – see close-up of the

same sign at CRA/684). There was a similar, but undamaged, sign on the Pound Lane gate (A/94).

72. It would be useful if, at this point, I also mention the additional five photos attached to the statement of Graham Wyllie at A1/111. These show his dogs on various occasions in the years 2013-2014. The condition of the land in each case would have been fit for walking. I was particularly struck by the photo of three dogs running towards the larger of the two gaps in the western hedgerow (point 3 on P/3) which looks to have been well established and one can see why it was suitable for those walking within the field who might have been looking for a longer walk, perhaps to the swing bridge and back. Mr Wyllie gave oral evidence and was a daily user of the field between 1994 until it was ploughed in April 2016. In relation to this gateway, it was the oral evidence of Dr Scott that there were posts on either side but no actual gate before April 2016 and this is how it appears on the photo at A/111A which dates back to March 2014 although this is not incompatible with this having been a 'Wiltshire gate'.

73. As bundle has been carefully prepared. A1/tab 4 comprises the oral witness statements (numbering 21, of whom 2 no longer live in the village) with accompanying evidence questionnaires where available. A1/tab 5 comprises all the other witness statements (85), again with evidence questionnaires where available. By my reckoning, of the 66 evidence questionnaires 5 were signed by more than one party and a total of 21 were lodged in the names of two members of the same household. I have reviewed all of this material.

Applicants' oral evidence

Dr William Scott

74. Dr Scott is an organic chemist and has, I believe, lived at ███ Pound Lane since 1987. He is one of the three applicants and a co-author of the foregoing 'Justification' document. He is also responsible for the perimeter plan at P/3. His statement at A/117 deals with the steps taken to obtain user evidence from within the local community. It tells us that 385 questionnaires were distributed with 66 returned (16%), representing the views of 86 residents. In

terms of the witness statements, it was usually he and colleagues who prepared drafts for approval based on the questionnaire responses. In view of what Dr Scott says, it seems likely that most witnesses (although some provided their own statements) will no doubt have relied heavily on the draft statement provided for their consideration (no doubt some more than others) which were eventually signed after discussion with the witness after any necessary alterations had been made. Dr Scott said that he had attended another TVG inquiry at Marlborough where I was also the inspector and reliance was placed on the layout of the statements on that application.

75. In his oral evidence Dr Scott told the inquiry that the ‘Friends of Great Lees Field’ (for whom the three As act – there are apparently two others involved, all of whom were involved in the statement gathering process) have a constitution, bank and email accounts. Dr Scott is a parish councillor and also gave evidence on the application to amend the DMS. He also sat through the lengthy planning inquiry and drafted the preamble on the evidence questionnaire pro forma.

76. Dr Scott was at pains to point out that the TVG application (which was received by the CRA on 24 June 2016) followed pre-application consultation with Richborough Estates at Melksham Town Hall on 12 May 2016. Dr Scott attended that consultation as one of three parish councillors. At that stage the parish council had no prior knowledge of the development proposals. In the event, the three parish councillors reported back to the parish council at the next meeting on 25 May 2016. It was after this meeting that the Friends of Great Lees Field was formed and a TVG application was promptly made. The parish council’s support for the TVG application may be gathered from the email sent to the CRA on 14 October 2016 (CRA/539).

[It should be noted that as the TVG application was received by WC before the material application for planning permission was first publicised on 29 June 2016 it was unaffected by a relevant trigger event (CRA/485).]

77. Although Dr Scott accepted that people in the village remember the Pound Lane gate being locked on a number of occasions over the years (this is how it was expressed in the ‘Justification’ document at A/80), he says that he

never saw a padlock on the gate before 2016. He also said that he was one of the 80% who entered the field via the Pound Lane gate. He says he is a keen walker but is not a dog-walker. When in the field he would, as he put it, 'meander'. Dr Scott's son used the land extensively. His son's statement will be found at A/286. In 1996 Dr Scott's son, Jonathan, would have been aged 17. In his statement he says that he used the land at least once a month although Dr Scott said that his son's use would have pre-dated 1996.

78. I consider Dr Scott to have been a genuine and conscientious witness. It is my impression that he is the driving force behind the application to register.

Michael Hawkins

79. Mr Hawkins has lived at ■ Pound Lane since 2005 and he walks on the land two or even three times a day in the summer. He is self-employed and says that he is always at home. His statement will be found at A/35. Mr Hawkins says that he walked all over the field, playing with a frisbee for his dog to fetch. He also walked in the Masters' field through the gap in the western hedgerow which was never gated until fenced off in 2016 (i.e. point 3 on P/3). Going back and forth between the two fields was a regular occurrence for him and other dog walkers whom he saw doing likewise (Mr Hawkins says that he also used the road access into the Masters' field before using the gap in the western hedgerow (i.e. point 3 on P/3) to get into the land. He accessed the land through what he described in his statement as an 'unlocked Pound Lane gate' which is close to his home. He never saw any prohibitory notices and he says that the Pound Lane gate was never locked until 2016.

80. At times when the grass was being cut and baled (which took place twice in the growing season – in late spring and in early autumn) Mr Hawkins did not go into the field. He said that the grass was some 2-3 feet high when it was cut. The grass-cutting did not take long, say 2-4 hours maximum per day over a 2-3 day period when contractors were doing similar work in other fields. The grass was in the region of 2-3 feet long before it was cut.

81. When cross-examined he said that he kept to the perimeter of the field on his walks although he would have to retrieve his frisbee if his dog ran off. In

getting into the land he said that he opened the Pound Lane gate and walked through it. He never climbed over it. As this was developed he said that he could not say whether he had to push the gate to open it or whether it was on a latch (i.e. that it was secured to a gate post). He also never recalled the Pound Lane gate being damaged.

82. I am sure that Mr Hawkins regularly walked on the land over the years with his various dogs. What troubles is his written and oral evidence: (a) on the one hand, that he walked all over the field ('barely a square inch of field I have not walked across') and, on the other, his oral evidence that he kept to the perimeter; and (b) that he was unable to recall precisely how the gate opened, i.e. did the gate merely have to be pushed open or did it have to be physically detached from its locking mechanism on the gatepost? It seems to me that these aspects of his evidence reduce the weight that I must attach to his evidence which might otherwise have been compelling.

Christine Jones

83. Mrs Jones (with her late husband) has lived at ■ Pound Lane since 1987. Her statement is at A/41. She says that she and her late husband were regular dog walkers both on the land and within the Masters' field where they saw others recreating on the land. She says that there were never any notices saying that the land was private and that it was never (contrary to what the Masters' say about this) ploughed in 2000.

84. In her oral evidence it was clear that her own dog walking took place in the period 1991-2010 (since when she has not used the land) in which time she had three dogs although she also walked another. She appears to have used all the access points around the perimeter of the land although she says that there was no gap at point 2 on P/3. The Pound Lane gate was close to her home. It was a feature of her evidence that other than when crossing the land, presumably when walking between point 3, where she says there was a gap, and point 1 on P/3 on her way back home to Pound Lane from a longer walk to the swing bridge, she said that she kept to the perimeter within the field where there were tracks. She said that she did not like the long grass when it was wet and muddy. She also saw children playing on the land at weekends

and in the holidays (and she mentions seeing this in the area of the pill box) and she thinks they lived in houses backing onto the field. She said that walking in the field was a good way of keeping in contact with villagers.

85. When asked for more details about the Pound Lane gate she said that it was 'open or partly open – there was a latch which you could lift and close if necessary – I had no difficulty opening the latch if I had to use it – It would swing open and freely'. She went on to say that it was a 'normal farm gate lock – lift latch and then drop'. It was never padlocked.

86. Mrs Jones was also a conscientious witness. Her description of the Pound Lane gate is clearly consistent with the condition of the gate shown in the photo at A/93 (May 2009). My clear impression is that when she was in the field she kept to a circuit that took her around the edge of the field where the grass was shorter and walking conditions were no doubt firmer under foot which is perfectly understandable. She clearly speaks of others using the field for dog walking and children at play. She even saw people flying toy planes.

Colin Wade

87. Mr Wade has lived at █ Pound Lane since 1987 and his statement will be found at A/98. In it he says that when his children were young they used to walk and play in both fields. His children were born in 1990/1991 and he says they would have played in the field under supervision in around 1997/98 and on their own with their friends after 1998/99. The younger child's statement will be found at A/tab5/350. She makes it plain that she played in the field and loved watching the canal boats which is obviously a big draw for anyone, young or old, entering the Masters' field from the AL, whether sticking to SEMI/6 or not. She says that she usually entered the field 'through the unlocked gate on Pound Lane'. She lived at home until 2015. Her father thinks that she used the land until 2006-07 whilst still a teenager.

88. They entered the field via Pound Lane gate, which was not locked, before using the gaps in the hedgerow leading into the Masters' field. Mr Wade is sure that there were two gaps as shown on P/3, the one nearer Pound Lane being the narrower of the two which, in his oral evidence, he said he last went

through in 2005 and is now closed over. When the children were younger their walks took place two or three times a week. Later he said he walked in both fields on a weekly basis up to 2016 (he is not a dog walker). Other children and adults used the field for recreation but the Pound Lane gate was occasionally locked, for example, to keep travellers off the land and would have lasted for no more than two weeks. He also denies that there were notices saying that the field was private. He also says that on occasions (at harvest time) he has seen agricultural vehicles 'driven into the closed (but not locked) gate in order to nudge it open and give access to the field'. When pressed about this in his oral evidence he said he saw what happened from his front drive and it occurred on some three occasions the last of which would have been at least fifteen years ago.

89. Mr Wade says that the Pound Lane gate would have been locked with a chain and padlock on around six occasions in 30 years but not within the last ten years. He mentions that this occurred to keep travellers off the land when they were known to be in the area. He says that he could even enter the field by walking around the gate post (i.e. in the gap between the post and hedgerow) although the gate now in situ is a different gate to what had been there before.

90. Mr Wade was unaware that the Pound Lane gate had been replaced and padlocked in 2010 (I will deal with this again when I come to WS-B's evidence) although he accepts that the gate had been changed in 2016. He is unaware of any enclosure in the western hedgerow and has not seen signs on gates or on the ground. He thinks that the Pound Lane gate was damaged after 2010 (despite having been replaced in that year) and what he describes bears a close resemblance to the gate shown in the May 2009 photo at A/93 at which time he told me that he would have been using this gateway as a means of access into the field on a weekly or monthly basis. He recalls that the same gate in the late 1990s/2000s was attached to the receiving gate post by means of a loop of bailer twine.

91. Mr Wade certainly did his best to help the inquiry and was clearly a genuine witness. What came out of his evidence is that the Pound Lane gate was unlocked except on the rare occasions he mentions. It is also clear from his

evidence that the gate was kept shut using a loop of baler twine late 1990s/2000s and was, as he thought, also damaged after 2010 whereas there is evidence that the gate was actually replaced in 2010 and Mr Wade might have been muddling what he saw after 2010 with the gate before it was replaced in that year. There is also the reference to agricultural vehicles nudging the gate open which only happened on three occasions. I am disinclined to think that an experienced tractor driver will have damaged the Pound Lane gate in the manner shown in the May 2009 photo at A/93 although I am prepared to believe that at busy times a tractor driver might well nudge an already open gate further open to facilitate access into the field without having to get out of the cab. I think this is very probably what Mr Wade witnessed but without any damage occurring to the gate itself.

Elaine Arrundale

92. Mrs Arrundale and her husband and children have lived at ■ Pound Close (which is a corner site – see P/3) since 2008 and she used the land to walk her dog every day up to 2016, using the gate in their rear fence to access the land. In her statement at A/8 she says she saw others using the land for dog walking and children playing. She mentions kite flying and games of football and cricket and people picking blackberries. She did not see any prohibitory signs indicating that the land was private. She is a dog walker (in 2008 their dog was being walked on the land three times a day) and also saw 'lots of dog walkers and people walking along the canal'. She told the inquiry that her longer walks took her across the land into the Masters' field and back via the footpath. Her shorter walks (in the mornings and at weekends) kept her in the field, especially if there were no other dogs around. When I asked Mrs Arrundale how busy the field was she said at weekends it was very frequently used.

93. Mrs Arrundale runs full-time a day nursery in Trowbridge. She took groups of small children from the nursery to the land and, presumably their eventual destination, the swing bridge. Most of these children (I think only two of them) lived in Semington.

94. Mrs Arrundale was also a conscientious witness and I accept her evidence.

Peter Turner

95. Mr Turner has lived at ■ Somerset Way (which is just off the High Street) since 2012. His statement is at A/92. He is a dog walker and claims to have walked all over the land on a virtual daily basis until 2016, entering via the unlocked Pound Lane gate. He also walked through the gap in the hedgerow into the Masters' field. He looked out for birds and also saw others walking in the field with or without dogs. He never saw any notices.

96. In his oral evidence he accepted that he used the land 'mainly as a place of transit'. His normal route involved him entering the land via the Pound lane gate before cutting into the Masters' field and on to the swing bridge before returning to the village on the canal path along SEMI/1.

97. Mr Turner therefore used the field on his way to the swing bridge although he says that he sometimes stopped off to chat with other dog walkers.

98. Mr Turner's evidence was unhelpful to As as he accepted in his oral evidence that he did not use the land as a destination in itself for LSP but as part of his route to the swing bridge which was at variance with his statement in which he claims to have regularly walked 'all over' the field which was not the case.

Steven Hall

99. Mr Hall is one of the As. He is not a dog walker. His statement is at A/29. He has lived at ■ Pound Lane (whose entrance via the Pound Lane gate is only some 10m from his front gate) with his family (his daughters were aged 3 and 4 when they moved into the village) since 2003 and he used the land until 2016. They used the field (and also walked into the Masters' field through the gaps in the western hedgerow) every weekend and often several times a week which seems to have persisted until 2016. He played games of hide and seek with his children and they watched the birds. As his own children grew older they played on the land with their friends.

100. He usually entered the field most days via the unlocked Pound Lane gate but he also used the stile leading onto SEMI/6 across the Masters' field. He also says he used the stiles at points 4 and 6 on P/3 when leaving the field. He

mentions seeing children playing or riding bikes in the field and people with and without dogs walking in the field or picking blackberries in season or playing in the snow. He also claims (on around six occasions) to have seen agricultural vehicles nudging the unlocked Pound Lane gate open when the grass was being cut and baled.

101. Mr Hall said that there were tracks on the ground across the field and from the road down to the far end of the field and around the perimeter around which he claims to have cycled. When it came to the Pound Lane gate he said that it was ‘free-swinging’ (this accords with Mr Waller’s note) and could be nudged open. His reference to the gate being lifted off its hinges is something which, on his evidence, would only have occurred after the gate is agreed to have been locked, i.e. after April 2016.

102. Mr Hall said that he has seen Mr Masters in the field, either observing others getting in the hay/silage crop, or doing work himself. He recalls seeing him in a tractor turning the hay once it had been cut or driving up and down Pound Lane. He said that the Masters are well known farmers in the village and run beef cattle on the other side of the canal.

103. When shown the May 2009 photo of the damaged Pound Lane gate (A/93) it was his evidence that the gate was replaced after that photo was taken. He said the gate had been damaged when they moved into the village in 2003 but was not as badly damaged as it became by 2009. Both gates (previously described as ‘free-swinging’), along with the new gate, had/have a spring bolt closing mechanism. He never saw the earlier gates locked although, when pressed on this, he suggested that he might have been away or on holiday when the gate was locked. He can though recall seeing barbed wire on the Pound Lane gate when the family moved to the village in 2003. As he put it: ‘There has always been barbed wire there’, something which can clearly been seen in the 2009 photo at A/93 (which, as I recall, had not been spotted before Mr Hall gave evidence about this). When asked about what implications might be drawn from the presence of barbed wire wrapped around the top bar of the gate he said that the barbed wire indicated that he should not climb over the gate and to his knowledge no one ever did. When

asked to look at the partially open gateway found in the photo at CRA/2/593, shortly after the field had been ploughed on 27 April 2016, he said that the arrangement for entry into the field was the same as the arrangement he found in 2003 and that the angle iron was still there. He also said that the gate was never strapped to the gatepost which has never been used.

104. I found that part of Mr Hall's evidence which concerned the condition of the Pound Lane gate somewhat challenging as no other witness up to this stage had suggested that one might access the land merely walking through a gap between the end of the gate and the hedgerow. I also thought that he underplayed the significance of the presence of barbed wire on the gate which, on his evidence, had been in place after 2003.

Graham Wyllie

105. Mr Wyllie has lived at ██ Highfield Close since 1994. He is a dog walker. His statement will be found at A/111. His statement discloses that he walked on the AL and the Masters' field every day, accessing these fields respectively via the unlocked gate on Pound Lane and the gap in the western hedgerow. He also saw others using the land for walks and children at play. He also introduced photos where light tracks are shown on the ground.

106. In his oral evidence he said that he sometimes walked around the perimeter or would cross the land on his way to the swing bridge via the gap in the hedgerow. His longer walks at weekends would see him returning into the village along the canal footpath whereas his shorter walk took him through the Pound Lane gate through into the Masters' field and then back via the stile at the northern end of the land. He explained that the land was a popular place citing ball games (at least occasionally and near the back of the houses in Pound Close), kite flying and even bonfires and that he roamed on the land wherever his dog took him. He said that he normally saw others on the land whenever he walked there and that it was primarily being used by dog walkers.

107. He recalls (without being able to recall when this happened) the gate being closed and having a sign on it on one occasion warning users that the field

had been sprayed but there was never any prohibitory signage. He says the gate would have been 'closed' for no longer than a month. The gate had been secured against an angle iron which meant that it leaned into the field whereas it would have to be forced back if it had been locked up to the main gate post although he could not recall a time when the gate was secured to the main gate post.

108. Mr Wyllie could not recall seeing the sign ('Private – No Right of Way') shown on the ground on O/108 (these were photos of the removed sign or signs at the Pound Lane gate), nor could he recall seeing barbed wire threaded along the top bar of this gate.

109. Mr Wyllie was generally a sound witness but it troubled me that he was unable to recall the barbed wire on top rung of the Pound Lane gate. It might be supposed that as a virtual daily user of this gate he would have noticed this. It will be recalled from Mr Hall's evidence that there had always been barbed wire on this gate (see 2009 photo at A/93). Other than his vagueness on this point, Mr Wyllie was a strong witness for As.

Diane Swaine

110. Ms Swaine has lived at ███ Pound Close since 1958 and was a very regular dog walker (at least twice daily, even after dark) on the land and in the Masters' field for the whole of that time until April 2016. She appears to have often walked on the land with a local friend who also had a dog and whose home backed onto the land. Ms Swaine's statement is at A/86. She says that she was only prevented from using the land when it was locked on rare occasions when cattle were in the field (in her oral evidence she said this occurred in the late 1980s and not otherwise). In her oral evidence she said that the gate was not locked when the field was sprayed but there were signs on three or four occasions over the years warning locals that spraying had taken place. At any rate, she never saw any notices forbidding entry but she kept off the land whilst the spraying signs were in place as she worried about the effect of the chemicals on her dog.

111. Ms Swaine's home does not back onto the land and she gains access via the Pound Lane gate. She says that she walked within the whole of the field and also around the perimeter and used the main gap in the hedgerow to go through into the Masters' field (there was no barrier preventing access between the two fields). She exited the field via the Pound Lane gate.

112. Ms Swaine said that as the grass grew to some 2-2.5 feet in the growing season people walked around the perimeter where there was a defined path. For around 3-4 weeks the grass was, as she put it, 'really long' and she kept to the perimeter.

113. She recalled that the gate onto Pound Lane was replaced over the years but was unable to recall when this happened. When questioned about the nature of the gate, she said that it was 'pulled close to the main gate post' (but not bolted). There was a sliding bolt which did not fit very well but when the gate was bolted it prevented her from going into the field. She certainly recalled the barbed wire attached to the top rung of the gate which she thinks would have been in place 'over the last 30 years or so'. In the period before 2006 she recalls that the gate would either be pulled up to the main gate post or else properly bolted in place. More often than not when she used the gate it had been left open. She went on to say that for a few years (a) before the gate was replaced in 2010, and (b) before the field was closed off in 2016, the gateway would have appeared as it looked in A/593 (i.e. with the gate sufficiently open as to leave a gap for entry into the field between the end of the gate and the adjoining hedgerow – she said that the angle iron 'has always been there'). She also made it plain that the gateway was not always in this state after 1994 as is suggested by Mr Wyllie.

Brian Smyth

114. Mr Smyth has lived at █ Highfield Close since 1978. His statement is at A/74. He has three children who were born in 1976 (Catherine), 1978 (Alison) and 1984 (Robert) who would have been 12 in 1996 at the start of the 20 year window. Mr Smyth normally entered the field via the Pound Lane gate and then via the gap in the hedgerow to enter the Masters' field or the other way around. Mr Smyth was a dog walker in the period 1979 through to 2003/04.

On longer walks with the dog he says he walked around the field 'and anywhere else'. After the last dog he says he walks in the field with his grandchildren and they sometimes walk around the field. He also walked up the canal path and to the end of Pound Lane which leads to a dead end in the countryside. His use of the field by 2016 would have been in the region of ten times a year and he accepted that his use would only have been occasional. His overall perception of the gate was that before 2003 it would have been left open. After 2003 his recollection was that the gate was left partially open leaving a small gap which you could walk through comfortably. As he put it: 'Most times the field was accessible without having to use the locking mechanism … the gate tended to be open a little bit … mostly easy to walk through although sometimes it would be a bit of a squeeze'. When shown CRA/593 he said that this was the gap there used to be when he was using the field and he vaguely remembers the angle iron. When shown CRA/40 (the 2009 photo of the damaged open gate) he said that he had actually ducked through this gate on occasions.

115. The only sign seen by Mr Smyth (and he saw it once or twice) concerned cattle in the field and this would have been in the 1990s. He did not use the field when there were cattle there or during cutting. He said his son (Robert) had three close friends in the village and they all played in the field.

116. My impression of Mr Smyth's evidence is that his own regular use of the field ended in 2003-04 and that he struggled to remember with any accuracy how the gate appeared in the period before its closure in 2016. His recollection of these things was vague but his distinct impression was that one could normally get into the field as the gate was usually left sufficiently open so that one could walk around it although, as he put it, it might be something of a squeeze on some occasions.

Philip Deverall

117. Mr Deverall has lived at ■ Pound Close since 1988. His property backs onto the land and there was a gate at the end of his garden. His statement is at A/21. He is not a dog walker but he used to walk on the land regularly, about once a week, until around ten years ago (2009) when he usually walked

straight across the field through the gap in the hedgerow, perhaps stopping in the field on the way to talk to someone he knew, and beyond to the swing bridge and then, as he put it, he would go elsewhere as he pleased (he never used the Pound Lane gate although he might have walked past it two or three times). His wife never walked on the field. He could though, from his home, see people (including children playing, flying kites (twice) and kicking balls around) using the field every day walking with or without dogs. He says that he saw 'a lot of people walking around all the time … usually someone out there'. The fact that the field was sprayed 'not very long ago' (canister on the back of a trailer spraying pellets in a dovetail) did not affect his own use of the field as the spraying did not take very long (half a day). He did not go into the field when the grass was longer.

118. Although he did not witness the collision, Mr Deverall did say that he heard a crash which he knew (as a former tractor driver) was tractor striking a gate although he did not say that it was the Pound Lane gate with which the tractor had collided.

119. Mr Deverall was a friendly conscientious witness who did his level best to assist the inquiry. Although his own use of the land was limited, as he lives close by he had a clear view of what was happening on the land and his evidence about this is very clear.

Angela Mills

120. Mrs Mills has lived at Pound Lane since 1993. Her statement is at A/59. She has three children Paul, Kirsty and Josh (whose statements I have also read) all of whom played on the land. Josh, the youngest, would have been aged 8 in 1996 (the elder two children would have been aged 17 and 18 in 1996). The family lived at Wessex Close (on the south side of Pound Lane) until 1998 when they moved to ■ Pound Lane.

121. In light of Mrs Mills' oral evidence it seems that all her children played in the field and in the Masters' field (especially in the summer) and did so with their friends unsupervised when old enough to do so. They were obviously drawn to the swing bridge and canal. The youth club was popular in the village in the

1990s and Josh was involved in this and they used to play cricket and rounder's in the middle of the land in the summer unless the grass was too long in which case they would do other things such as play hide and seek (the youth club met twice a month). Mrs Mills mentioned that a couple of families used to let fireworks off. She also used the land herself after 1998 for walks with, I think, mainly her friend Brenda. It seems that they used the field gate into the Masters' field before walking over to the swing bridge and then back along the canal path either going on into the village or returning for a cup of tea at her friend's home which was just opposite the Pound Lane gate.

122. In relation to the condition of the Pound Lane gate, I think Mrs Mills surprised us all by saying that she was unable to recall seeing a gate before 2016. She said that 'the way was always open … you went through it… I can't recall a gate' even though she told us that she used the field up to 2016 with her grandchildren. In re-examination she explained that she walked around the land and returned home via the gap in the hedgerow, exiting via the Pound Lane gate. She then went on to say that occasionally she walked around the perimeter of the land, entering at the Pound Lane gate. Before the Ship Inn closed she walked into the village via the gap in the western hedgerow and then along the canal path via the swing bridge, returning home by the road.

123. When I put the May 2009 photo to Mrs Mills (showing a damaged gate partially open) she had no recollection of this gate. She said that she could not remember being prevented from obtaining access into the field through the Pound Lane gate.

124. Mrs Mills was also a conscientious witness who did her best to assist the inquiry but her very poor recollection of the Pound Lane gateway means either that her evidence cannot be accorded a great deal of weight or that her use of the land via this entry point was so infrequent that she simply cannot recall these things with the accuracy which is demanded by an inquiry of this nature. My own impression is that her use of the land was very probably much more frequent when her children were young since when her own use is liable to have been sporadic.

Kenneth Clark

125. Mr Clark has lived in the village since 1939 and at ■ Pound Close since 1967. His home backs onto the land where there is a rear gate. His statement is at A/15. He retired in 1994 and had a dog in 1996. Whereas in his statement he said he walked his dog all over the field, in his oral evidence he said he cut across the field from his garden gate and went through into the Masters' field via the gap in the hedgerow (he said he did not walk around the field). He recalls a Wiltshire gate in this gap in around 2000 which was not always closed. When the gate was across the gateway (and he said that it was rarely closed) he would lift a wire up to get through (he never used the Pound Lane entry). He cannot recall the AL being ploughed in 2000 and would have noticed this if it had happened as the field is just outside his house. Mr Clark said that the field 'never got overgrown' and was cut for hay and silage twice a year.

126. Mr Clark was another genuine witness. However, his evidence is of limited weight as his use of the field was limited to a cross field walk.

Jack Woodward

127. Mr Woodward has lived at ■ Pound Close since 1980. He is able to access the field through a gap between his shed and a brick wall in his back garden. His statement is at A/105. He is not a regular user of the field, nor is he a dog walker. His three children would have been aged 14, 12 and 9 in 2000 and they would have played in the field, including cricket after the grass had been cut. He also disputes that the field was ploughed in 2000. He says in his statement that they had a regular circular walk to the canal and back, returning along Pound Lane and to their front door at Pound Close. He does though say that he regularly saw people walking in the field with or without dogs and children playing there.

128. He says that the Pound Lane gate was occasionally locked although, as he put it, he has 'no clear memory' of when it was locked (although he said that you could see it padlocked) and when it was not locked.

Objectors' evidence

Written evidence

129. Os have lodged a lengthy bundle containing a large number of statements dealing with the TVG and DMMO applications (in fact I have five statements from WSB between July 2016 and October 2019). There are also photos and correspondence involving the DMMO and submissions from Miss Stockley and her predecessors all of which I have read. A good deal of this material was also addressed at the inquiry. Additional statements were introduced from Chris Awdry (O/438A), James Holloway (O/438C) and Nicholas Grout (O/438D) all of whom gave oral evidence.

Oral evidence

Chris Awdry

130. Mr Awdry is a local farming contractor and gave evidence that he ploughed the land in 2000. He recalls meeting Michael Bruges ('MB') (the late father of Richard Bruges and William Stuart-Bruges' uncle) and he recalls being let in by the gate being unlocked. The process involved clearing the overgrowth (which took around 2 weeks) followed by spraying, power-harrowing, drilling to plant new grass seed followed by rolling to firm up the land as an aid to germination. He said that MB wanted him to sort the field out. The process, about which Mr Awdry went into in some detail, would have taken, as I understand it, at least 4 weeks. He thinks that the field would have been fit for a resumption of dog walking after around another 2-3 weeks, by which time the new grass seed would have germinated. He said the ground would have looked different before the new grass germinated although it would not have impeded dog walking.

131. Although he no longer has any records of this transaction he was sure the ploughing took place in 2000. He said that was able to recall this as he divorced in 1999 and also took over a friend's contracting business at around this time. It was Mr Awdry who was contracted by William Stuart-Bruges ('WS-B') to plough the field in April 2016 (when a maize crop was planted) and in successive years.

132. When asked to comment on the photo at O/153 taken by Sally Madgwick on 28 April 2016 showing the gate secured against the angle iron, leaving a gap for walkers to enter the field, Mr Awdry said it was possible for his driver to have left the gate secured in this way and so avoid having to keep it closed with a lock and chain. He said it would have been safer to keep the chain in the cab whilst the driver worked in the field. He also thought that the angle iron (which he said was concreted in) could have served as the original gate post (or an old shifting post as he described it) which would have been left in place once a new gate post had been installed although the hedgerow would have come up to the angle iron to create an enclosure otherwise any animals in the field could have walked straight out into the road.

133. I accept Mr Awdry's evidence. I accept that the field was ploughed in 2000 and that the gate had to be unlocked to allow him into the field. I am also inclined to think that he is probably right when he said that at one time the angle iron served as an informal gate post up to which the hedgerow would have grown. It will be recalled from the written evidence of the Masters that there were cattle in this field until the early 1990s.

James Holloway

134. In 2014 Mr Holloway, who lives in Trowbridge, was looking at a plan to buy land within the curtilage of the land for a self-build scheme. His statement is at O/438C. To that end Mr Holloway visited the field on, he thinks, around five occasions in the March-May period (he has the dates for two of these visits). He recalls that on one of these visits he had to climb over a locked Pound Lane gate which he recalls was topped with barbed wire and in good condition and was secured, he believes, by a padlock and chain to a substantial galvanised post. He says that they would not have been able to squeeze around the side of the gate which he said was locked up to a gate post and not secured against the angle iron. He was with his wife and small child and he remembers his wife passing him the child over the gate in order that she might climb over the gate herself. On other occasions they entered the field via the canal side footpath and stile from the adjoining field.

135. I accept Mr Holloway's evidence. He was clearly an honest and genuine witness and is independent of the parties.

Nicholas Grout

136. Mr Grout's evidence will be found at O/438D. In September 2015, when employed by Savills, Mr Grout, who is an FRICS, was involved with WS-B in seeking out a promoter of the land for development. Mr Grout says that he visited the land on 14 September 2015 in order (in effect) to judge its potential for development and to have a good look at the site. He says that he had to climb over the Pound Lane gate as it was locked. He took a number of photos that day some of which he produced at the inquiry (the remainder are still with Savills, that is, if they still exist). They show that the field had recently been cut and there are bales of silage scattered within the field. There is no one in the field and, of course, any tracks on the ground might well have resulted from the passage of agricultural vehicles on the soft grass (for instance, Mr Grout noted that the photo at O/438D(xiv) disclosed signs of the remnants of historic drilling). On the other hand, tracks by those on foot might well be discernable in some of the photos, notably in one or two places around the perimeter and between the Pound Lane gateway and the gap in the hedgerow on the western side (where he recalled seeing the remains of the Wiltshire gate which he says was 'folded back into the nettles'). At any rate, these tracks were very faint and would no doubt be open to debate if judged solely by what we can actually see in the photos.

137. What was of interest, however, was the photo at O/438D(v) (which was taken within the field) showing the Pound Lane gate. It had been my initial note that Mr Grout had said that there was a lot of undergrowth around the gate and he could not be sure whether it was locked. When we came back to his evidence on this point Mr Waller told the inquiry that it had been his note that he had been asked (I think by me) whether he could be sure the gate was locked and that his answer had been that if he had been able to open the gate he would have done so although he could not recall seeing any lock. It was Miss Stockley's note that Mr Grout had said he had climbed over the gate but could not recall seeing whether the gate was locked in view of the undergrowth. In

other words, both counsel appear to agree that Mr Grout had not said that the gate was unlocked merely that he could not recall seeing any lock. In the result, it seems probable that because Mr Grout had to climb over the gate (and especially as it had barbed wire threaded around the top rung) it is more likely to have been locked in view of his evidence (as noted by Mr Waller) that if he had been able to open the gate he would have done so. At any rate, Mr Grout looked at the photo of the Pound Lane gate and it was his evidence that at the time of his visit on 14 September 2015 the gateway was more overgrown and the undergrowth had been trimmed back by the time of his later visit mentioned below.

138. Mr Grout also attended on site in March 2016 with WSB and his cousin Richard Bruges (who lives nearby at) when the gate was open and one was able to walk straight into the field. He recalls seeing the angle iron.

139. Mr Grout says he advised WS-B to pay particular attention to the perimeter, and in particular to the point of entry at the Pound Lane gate in view of the risk (in effect) of the accrual of informal rights.

140. Mr Grout was a competent professional witness whose evidence I accept.

Richard Bruges

141. The written evidence of Richard Bruges is at O/43. Mr Bruges is a cousin of WS-B on his father's side. His late father, a chartered surveyor and partner in Humberts, owned the adjacent land (including the paddock) at (the curtilage of this property is shown edged blue on the plan at O/47 – the paddock land is on the south-west side and is let separately). His parents lived at between 1968 and 2003. I gather that his father returned every week to keep an eye on the property, which was let, until he died in 2013. In 2012 Mr Bruges and his family had gone to live at .

142. Mr Bruges says that his father warned WS-B to ensure that his tenant (i.e. the Masters) kept the Pound Lane gate locked at all times. WS-B had told him about this. Mr Bruges recalls seeing barbed wire on the gate to discourage people from climbing over it as well as signs on the former gate indicating that

the land was private on his regular visits to his parents in Semington. In his oral evidence he said that he visited his parents at intervals of around a month or every 6 weeks. He can distinctly recall seeing a handwritten 'private land' sign ('or something like that') tied to the earlier Pound Lane gate (at one point he said that the handwritten signs were rather like the signs shown on O/108 but he later conceded that he was unable to recall whether these were in fact the signs seen by him, or even like them, erected on what he described as the old gate) which he says was usually shut whenever he saw it whilst his parents lived in Semington (i.e. pre-2003). In the period 2012-16 he thinks he walked down Pound Lane once a month but it appears from his oral evidence that he cannot recall seeing signs on this gate since he moved to live in Semington (other than recently).

143. He recalls an older gate being replaced and can recall seeing it locked with a chain and padlock wrapped around the gate post. He does not recall seeing the Pound Lane gate left open, nor did he ever see the gate locked by being affixed to the angle iron. He also remembers that the gate had barbed wire on it. He has also seen the Wiltshire gate both shut and open (it contained two strands of barbed wire). He said it was shut when there were cattle in the field (but not in the last 8 years). He cannot recall seeing a sign on the Wiltshire gate. He admits that he has seen a few dog walkers walking around the edge of the field but no one playing games on the land, nor children playing around the pill box (in his statement he says that he has never seen the field being used for recreational purposes). He also said that since 2012 he rarely bumps into anyone using the PROW running along the northern end of the field even though he walks this way with his dog every day.

144. Mr Bruges believes that to the extent that any use of the land by local inhabitants took place at all then it was confined to the 'outer perimeter' of the field. Mr Bruges closed his evidence by saying that if you lived in the country you respected people's gates. If there was a double wired fence across a path most people would assume that it was not a right away and would not walk around the edge of the field. In response to my questions, Mr Bruges agreed that the Masters' were responsible for managing the land which belonged to absent landowners and that these factors resulted in locals having unhindered

access onto the land. I took him to be suggesting that the Masters' were too lax in their approach to managing the land.

William Stuart-Bruges (WS-B)

145. WS-B is a joint trustee owner of the land (along with his nephew Arthur Haythornthwaite). I hope that Mr Stuart-Bruges will forgive me for using the shorthand 'WS-B'. He has in fact put in a total of five witness statements on the TVG and DMMO applications.

DMMO	O/73 (25/07/2016)
	O/145 (18/08/2016)
TVG	O/59 (17/11/2016)
	O/55 (06/03/2017)
	O/35 (02/10/2019)

146. WS-B helpfully gave us a brief family and land ownership history. The land belonged to his grandmother who acquired it with other land in 1951. She died in 1956 and the land passed to his father who died in 1984. Ownership of the land thereafter passed to his four children in 1987. Because of capacity issues affecting an elder sister the land passed to WS-B (who lives in Kingsclere) and his nephew (who lives in Steeple Ashton) in 2015 (when the land was first registered) who currently hold on trust for members of the family on terms that are of no relevance to the inquiry. As previously indicated, since the surrender of the farming tenancy in 1987 the field was rented out to the Masters' family until the end of 2015 on a succession of grazing/annual grass keep licences (with a gap of one year in 2000) under which they assumed responsibility for keeping the gates and fencing in good order.

147. By 1987 the Pound Lane gate consisted of a metal 5-bar gate on which WS-B later threaded barbed wire along the top rung as the gate had been damaged and he had wanted to discourage people from climbing over it (the gate posts might well have been wooden at that point). A Wiltshire gate had also become established in the gap in the hedgerow on the western boundary although he considered that there was no agricultural need or legal requirement to maintain a locked gate in this location (other than to define the boundary), nor

were there cattle on the land after the early 1990s. WS-B also says that he purchased a chain and padlock for use by the Masters in order to keep the Pound Lane gate secure. He also erected (on the advice of his cousin Michael) 'amateurish' signs ('Private Land – No Entry') made of plywood in order to deter people from entering the field but they were removed within a couple of years and had to be replaced (1989).

148. WS-B thought that he would normally have visited Semington once a year after 1987 and, with the exception of what he found on his visit in 1997, the Pound Lane gate would have been locked and chained (the Masters always had a key as did WS-B and his cousin). It seems that in practice he left it to his cousin to keep an eye on things in his absence. However, when he visited in 1997 he discovered that the gate had been lifted off its hinges with the lock and chain still wrapped around the gate post to which they had been attached. WS-B said that half of the gate was lying on the ground and rungs were broken. He spoke to the Masters about it and, by common consent, it was agreed that the gate had (as WS-B put it in his oral evidence) passed its sell-by date and needed to be replaced. In cross-examination WS-B said that the gate had been in such a poor state of repair for at least a year before its replacement that it may have become impossible to keep it properly locked. His cousin also told him that the gate needed replacing. WS-B said that the damage to the gate was caused by people climbing over the gate and lifting it off its hinges. In his statement dated 25 July 2016 (para 16) WS-B says that Julia Masters told him that people lifting the gate off its hinges or damaging it by climbing over it had always been a problem. She said that you could always tell when people had been climbing over the gate because the bottom bars had become bent. She also told him that the Wiltshire gate had also been damaged over the years.

149. We then come to the invoice of Matthews and Jefferies dated 12 February 1998 (which was recorded as having been paid 3 days later) under which this firm supplied WS-B with a new 'Super 7 14F gate' plus hanging and latch posts which, with transport and installation to dig out and cementing in holes, came to £259.11. With the new gate installed, WS-B says that his cousin, Michael, encouraged him to put up signs only for the Masters to tell him that

this would be a waste of time. Signs were again placed by WS-B on the new gate indicating that the land was private (he recalls using wood from cutting up an old tea chest). He also wound barbed wire around the top bar to prevent people from climbing over it, just as he had done with the former gate in 1987. It assists, I think, if I mention at this point that I noted that Mr Waller agreed that the fence post shown on the photo at O/153 (taken on 28 April 2016 and showing the gate secured to the angle iron and leaving a gap wide enough for people to walk through into the field) was the same one which had been replaced in 1998.

150. On 18 April 1999 (O/117) WS-B wrote to Julia Masters asking whether they wished to rent the field again that year and that if this was not the case they should return the key to the lock of the gate and should confirm that the gate had in fact been left locked. In fact an agreement was taken up with the Masters for the 1999 season (CRA/800).

151. In his oral evidence WS-B said that he did not visit Semington in 1999-2000 but on his visit in June 2001 he found the Pound Lane gate to be locked and chained with the barbed wire still in place on the top rung of the new gate. However, the signs had been removed. When he visited in June 2002 the position had not changed. WS-B said that looking at the gate was something he would normally do on each visit to Semington.

152. On 7 April 2002 WS-B wrote to Thomas Masters (who I think may be more commonly known as John Masters) thanking him for his letter of 3 April and enclosing an agreement for the new season. In the letter WS-B said that he hoped that the gate was:

> still in place and working, and that you still have the key? Let me know if not – I am happy with the rent staying at £500, if you will continue to agree to keep it locked.

153. On 7 April 2003 Julia Masters wrote to WS-B asking whether they could rent the field again in 2003 (O/115). She said this:

> The gate is locked and we still have the key although it will need to be locked the other end as people keep lifting it off the hinges.

154. WS-B replied on 12 April 2003 (O/114). After saying that he would be pleased to rent the field again that year, he said this:

> Regarding the gate, I would be most grateful if you could do something to prevent it being lifted off. Maybe a stiff wire, or a permanently locked chain?

155. By 2003 the position had, however, changed within the family in that the wife of WS-B's cousin had become ill and they relocated to Bath which meant that Michael Bruges would no longer be around to keep an eye on things when it came to the field. This prompted WS-B to erect, as he put it, 'heavier and better' signs on both the Pound Lane and Wiltshire gates. However, despite doing this, on his visit to Semington in 2004 (on his way to Bath to attend the funeral of his cousin's wife) he found that the signs on both gates had still been interfered with and he took photos of the dislodged signs lying on the ground in the hope of using them to catch the culprits. It is not entirely clear whether these signs were re-erected at the time but it seems probable that they would have been and I shall assume this to have been the case. These photos will be found at exhibit 9 to his statement dated 25 July 2016 (O/108) where signs (and I think there were two of them) saying 'Private – No Right of Way') are shown lying on the ground to which heavy galvanised wires were attached through holes in the plywood (WS-B says that these wires could only have been removed with a wire cutter). Photos of the signs which had been removed from the Wiltshire gate will also be found at O/110, being exhibit 7 to the same statement. On his visit in 2004 WS-B thinks that the barbed wire was still in place on the Pound Lane gate.

156. WS-B said that he continued his roughly annual visits to Semington between 2004 and 2010. It was apparent that people were still using the gate to enter the field as by 2009 the gate was in a state of neglect. Damage is shown in the *Google* image taken in May 2009 image (CRA/40 and O/119) by which time the lock and chain had gone although barbed wire was still on the gate. WS-B said he discussed the matter with the Masters and correspondence for 2010 was produced.

157. On 27 May 2010 Thomas Masters wrote to WS-B saying that they would like to rent the field again in 2010 (O/113). In the letter he noted:

The old gate has been replaced by a new one and padlocked.

In cross-examination WS-B said that the new gate (for which the Masters paid) was more substantial and a much better gate. He also said that he did not believe that a tractor driver would have been 'so careless and stupid to damage a gate'. Indeed, the suggestion that agricultural vehicles would nudge the gate open and cause damage to it in the process was rejected by the Masters in their joint statement at O/52 (para 8).

158. In his reply dated 8 June 2010 (O/112) WS-B said this:

I confirm that we are prepared to keep the rent at the same value as the last three years - £500 - and thanks for replacing the lock and padlock.

159. There were no signs on the new gate as the Masters told WS-B (and they said much the same whenever he discussed signage with them) that it was a waste of time as they would only be ripped down again. WS-B said that he would have added barbed wire to the top rung of the new gate on one of his trips to Semington. He said that the gate looks the same as it does today (see photos at CRA/41 and the Hall's photos at O/212-3).

160. In his oral evidence WS-B said that on his 'at least' annual visits to Semington the Pound Lane gate was 'always perfectly locked' in the period 2010-2016. He said that he would drive along Pound Lane to check on the gate and barbed wire threaded along the top bar. There was no signage after 2010 as he said he had 'given up on signage', concentrating instead on seeing that the gate was locked and chained. He also pointed out that he never saw anyone on the field at the time of his visits.

161. When asked to comment on the Halls' photo taken on 6 April 2016 at O/158 showing the new gate attached to the angle iron rather than the gate post, he said that he not seen the gate secured in such a way against the angle iron until he saw the Hall's photo (Note: whereas the gate is certainly attached to a gate post on the photo taken by the Halls on 5 May 2016 (O/156) which was described by them as a 'new gate post'). He also suggested that the photo at O/153 (showing the gap between the angle iron to which the gate was attached and the gate post, a gap wide enough for people to have walked

through) was taken after the hedge had been cut back although he could not say who had done this. He asked Mr Awdry about it and it had not been him although the latter had cut the rear hedge in 2016 and, for their part, the Masters had carried out hedge trimming over the years (see cl.6(c) at O/102 – keeping the hedges properly cut and brushed).

162. WS-B was shown the photo of the (Private Farmland – No Public Right of Way) damaged sign (it has been slightly buckled) attached by galvanised wires to the mesh closing off the gateway of the former Wiltshire and he said that this sign (which is made of thick plastic) would probably have been erected in July 2016 after the TVG application had been made.

163. WSB said that it was common knowledge in the village that the land was private to which the public had no right of access.

164. In cross-examination WS-B agreed that he had never lived in Semington but that his cousin 'was around the corner' (between 1988 and 1996 he lived in Warwickshire). At para 61 above, reference is made to the fact that WS-B also tried to get Julia Masters to provide evidence and he evidently met her in June/July 2018 but his efforts were not fruitful. When asked about this WS-B noted that the Masters never told him that they were also making a planning application to develop land which they owned in the village.

165. WS-B accepts that when he saw Mr Grout in 2015 he was already aware of the need to secure the boundaries of the field.

166 WS-B also said that there was no way of stopping those living in the eight properties in Pound Close which had rear gates from gaining access into the land. When it came to the Pound Lane gate he said he relied on the Masters to keep the gate locked which was reinforced by the annual agreements which obliged them to prevent trespass and to keep the gates and fencing in good order and, after 2003, to keep the gate 'closed and locked' (O/98). WS-B said that he thought that the Masters would stop people coming onto the land. There had been no prior discussion with the Masters about the introduction of an obligation to lock the gate. WS-B said that he felt that he had done all that he needed to do to prevent trespass. Of some importance, he said that he

thought that the Masters would have stopped recreational use if it had been significant.

167. I should mention that on two occasions after 2010 consents were given by the Masters which allowed the field to be used for car parking at the time of the combined church and school fete. WS-B was aware of this and appears to have raised no objection.

168. I have dealt with WS-B's evidence at some length in view of the absence of the Masters. His evidence is clearly important. He was, in my view, a helpful and conscientious witness who I am sure tried his utmost to assist the inquiry. It was, I think, obvious that he found the inquiry process something of an ordeal but I was impressed by his command of the facts in what was a lengthy narrative in which he had effectively been an absent landlord. Nonetheless he had made periodic visits to the village over very many years and was able to speak clearly as to what he found. I have no hesitation at all in accepting his evidence.

Closing submissions

Applicants (Mr Waller)

169. Mr Waller says that witness statements from 105 residents were before the inquiry (many of which have accompanying questionnaire responses) and that oral evidence was heard from 14 residents with respect to their personal use of the field and the use they saw by others on the land. Additionally oral evidence was given by Dr William Scott in relation to the process by which As gathered evidence to support their application. I agree with him when he says that that process was comprehensive and fair.

170. Mr Waller is also correct when he says that I indicated at the close of the inquiry that it was my preliminary view that the agricultural use made of the field in the material 20 year window (i.e. between April 1996 through to April 2016) was insufficient to displace qualifying TVG use and that this was not an incompatibility case. I still adhere to this view. Mr Waller helpfully deals with the agricultural user under a separate heading which, in my view, cannot be said to have been inconsistent in any material sense with qualifying TVG uses

allowing for give and take on both sides and would be allowed to continue even if registration was found to be justified. Mr Waller rightly cites from the speech of Lord Hoffmann in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 at [57] where he said that he did '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.' Mr Waller is also right to refer to the later case of *Lewis v Redcar and Cleveland BC No 2* [2010] UKSC 11, in which, at [28], Lord Walker said that he saw great force in Lord Hoffman's judgment in this respect, adding that 'taking 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'. Whether it is one or two cuts of hay and/or for silage it is I think clearly settled now that such low-level agricultural uses are mere interruptions and by themselves would not count as a legal barrier to the registration of land as a TVG in a proper case. The allegation that the field was ploughed in 2000 (which As accept happened) merits separate consideration although Mr Waller thinks that it was not necessarily fatal to his case as it did not on the evidence, as he puts it, 'obstruct recreational use taking place on Great Lees in any meaningful way'.

171. In the first part of his submissions Mr Waller deals with the facts and evidence given by witnesses which, as it seems to me, have already been sufficiently covered by my report, if only in outline, but with due regard to the necessity to record those parts of the oral evidence which are likely to be material to the outcome of this application. Not all the evidence given falls within this category. However, much of what Mr Waller says is common ground and he is clearly right when he says that informal recreation undoubtedly took place on the land. The question, as always, concerns (a) the nature and extent of the use during the qualifying period, and (b) if As can overcome the first hurdle, whether that use is precluded from being qualifying use on the ground that it involves non-peaceable use, a factor which occupied a great deal of the time of the inquiry.

172. Pound Lane gate: I am in agreement with Mr Waller's case that the gate was replaced in 1998 and again in 2010. I also agree that the gate installed in

2010 is the one in place today but that the galvanised steel post to which the 2010 gate is secured was probably the one installed in 1998 to serve the gate erected at that time. The suggestion of newness created by the Halls' email (O/155) can only sensibly be explained by an overgrown hedge which, by 2016, had covered up the galvanised steel post installed in 1998. Further, there can also be little doubt that the angle iron is of long standing and pre-dates the commencement of the qualifying period.

173. Mr Waller makes detailed submissions on the enclosure of the Pound Lane gate on which I am required to make findings. A significant point he makes is that the condition of the gate must have been so poor by 1998 and again by 2010 that there would have been periods when it might not have been capable of being locked and chained to a gatepost. He also addresses the recollections of his witnesses (both oral and written and his analysis of the documents show that there are 68 witnesses who fall within this category) who regularly used this access into the field and who claimed to have walked through an unlocked or open gate. He also suggests that of those who mention locking, all refer to it as occurring only rarely (such as when the field was being sprayed or when travellers were known to be in the vicinity) and even then for a limited period (of whom there are, he says, 19 residents although Miss Stockley would put the number at 18). At any rate, most of As witnesses say they used the Pound Lane access as they were able to do so as the gate was unlocked which one presumes meant that the gate was left open or because there was a gap between the angle iron (to which the gate was secured, as shown in O/153, CRA/593) and the main gate post through which people could walk unhindered into the field which is, of course, a matter on which I have to make a finding.

174. Mr Waller makes the following points in order to justify why I should find, firstly, that the Pound Lane gate was locked only occasionally and, secondly, that when not locked a gap existed allowing unimpeded access between the angle iron (i.e. when the gate had been secured to it) and the galvanised gate post erected in 1998. The point is important as it is conceded that some 80% of users gained access to the field via the Pound Lane gate although I have clearly not overlooked the fact that this was not the only access into the field.

(a) He says that the arrangement of securing the gate to the iron angle would have been convenient given the relative positions of the galvanised steel post, the iron angle and the hedge, the frequent poor condition of the gate and the overgrowth in the hedge.

(b) As the field has not been in use for pasture since the early 1990s, the Masters are unlikely to have been concerned by a gap of around 3ft created by this arrangement.

(c) The fact that the Masters admit in their joint statement at O/52 (para 10) that it was possible to go *round* the locked gate.

(d) The evidence of a gap explains why it is that local inhabitants were able to freely use the gateway.

(e) Mr Grout's warning to WS-B that he should secure the site might well have implied that this was not the case on his visit in September 2015.

175. Mr Waller then goes on to deal with the gap in the western hedgerow (i.e. point 3 on P/3). No one disputes that there was a gap in the hedgerow at this point which, since 2016, has been blocked off by Os. Mr Waller rightly says that none of the residents who gave oral evidence recall any obstruction within this gap which would have precluded access into the Masters' field. There was some evidence of wiring indicative of the presence of a Wiltshire gate but it was, as Mr Waller suggests, limited. He mentions Mr Clarke seeing two barbed wires stretched between the gate-posts at point 3 and it was his view that these wires were in *situ* only 'very rarely' and perhaps only when the Masters kept horses on their field. Mr Grout also recalled a Wiltshire gate rolled up next to the hedge when he visited in September 2015. Richard Bruges also recalled two wires present at point 3 on occasion but nothing like what we see at the moment in this gap.

176. Mr Waller reviews the evidence of signage and barbed wire. I have already dealt with this in the case of WS-B's evidence.

177. Mr Waller questions why it is none of the claimed signs were ever seen by As witnesses. Mr Waller does not suggest that evidence was given dishonestly

by WS-B. What he says is that any signs which were erected were not erected securely or on suitably long-lasting material and were not erected in a suitable location and that such signage was admittedly amateurish (as WSB accepts). He says that WS-B visited infrequently and that no obligation was placed on the Masters to maintain the signs (although they had undoubtedly been under an obligation since 1988 (O/89 at para 6(a)) not to permit trespass). Mr Waller also points to the absence of a metal gate at point 3 (or even a Wiltshire gate throughout) on which he might have erected signs.

178. Mr Waller very helpfully summarises the findings of fact which he invites me to make.

(a) The location and features of Great Lees made it ideally suited during the relevant period for residents of Semington to recreate upon.

(b) The field has been used by a significant number of the inhabitants of the locality of the Parish of Semington for a variety of qualifying TVG uses continuously throughout the qualifying period.

(c) TVG use was carried out compatibly with the agricultural use made of the field during the same period.

(d) The Pound Lane gate was frequently unlocked allowing unimpeded access into the field.

(e) When locked (infrequently and for agricultural reasons) the Pound Lane gate was secured invariably, or almost invariably, by locking the gate to the iron angle, and this created a gap through which pedestrians could pass around the locked gate.

(f) There is no doubting the fact that those living on the perimeter of the field at Nos.29 to 36 Pound Close will have had unimpeded access into the field.

(g) Nor was there any obstruction through point 3 into the Masters' field. The only impediment to access through this gap (such as it might have been) would have been limited to two pieces of wire hung across the former gateway on rare occasions when horses were in the fields.

(h) Barbed wire wound around the top bar of the Pound Lane gate at various occasions throughout the qualifying period was intended merely to prevent people from climbing over the gate.

(i) Only amateurish signs were erected on the Pound Lane gate. The content of these signs is unclear but they were prohibitory in nature but they were not securely fixed, nor were they of long-lasting material, and nor were they fixed at suitable locations.

(j) Any signs on the gate were lost or removed shortly after being erected by persons unknown.

The concessions made in (h), (i) and (j) above are clearly important.

179. Mr Waller also addresses the questions which I invited the advocates to deal with in their closing submissions.

(a) The steps taken by the landowners to demonstrate to local inhabitants that he did not welcome trespass on the field.

(b) Were these steps reasonably sufficient to demonstrate the landowners non-acquiescence (in light of *Winterburn v Bennett* [2017] 1 W.L.R. 646 and *Taylor v Betterment Properties (Weymouth) Ltd* [2012] P&CR 3?

(c) Did the locking of the Pound Lane gate give rise to a material interruption (by analogy with the fencing off of part of the site in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] P&CR 3)?

(d) Can the CRA be satisfied that, for practical purposes, the whole of the field was used for informal recreation during the qualifying period?

180. Mr Waller took points (a) and (b) together: put shortly, he said the question is whether the landowners acquiesced in the use of the field for TVG purposes? Mr Waller says clearly that on the evidence Os acquiesced and that reasonable users would not have been aware that Os did not welcome or otherwise encourage local inhabitants to come into the field (save by use of the PROW).

181. Under this head Mr Waller deals with WS-B's reliance on the annual grazing agreements, the signage, barbed wire wrapped around the top rung of the gate and his annual inspections. As was posed in the *Betterment* case, had the landowner taken reasonable steps to advertise his opposition to the use of his land by local inhabitants such that reasonable users would have been made aware that their use was contentious? It is Mr Waller's case that Os have fallen short of what it is they must demonstrate in order to show that use was non-peaceable and thus non-qualifying. What Mr Waller seems to be saying is that greater steps, if taken, are more likely to have brought it home to users that they were not welcome on the field. The fact that none of As witnesses saw any signs affords grounds for supposing that Os did not do enough, indeed not nearly enough, to demonstrate their opposition to the use of their land by local inhabitants for recreational purposes. Mr Waller is, I think, suggesting that there should have been more clearly-worded and securely fixed signs which should have been re-erected with greater frequency. It is suggested that as WS-B's presence on site was so infrequent he should have seen to it that someone else should have dealt with signage in his absence. He also cites the absence of prohibitory signage elsewhere. Mr Waller says that the reasonable landowner would have placed signs on all potential points of access for the public (although the PROW at the northern end of the field would have precluded this). He also suggests that signage such as 'Private No Right of Way' or 'No Right of Way' might be construed as prohibiting access onto the field at that particular point of access, i.e. as right of way, and not as a general prohibition extending to points elsewhere around the perimeter of the field.

182. In relation to the wrapping of barbed wire around the top bar of the Pound Lane gate, Mr Waller says that this cannot be demonstrative of non-acquiescence especially as, on occasions, when the gate was locked, access remained possible through the gap between the end of the gate and the hedgerow and at all times from other locations around the perimeter. He says the existence of barbed wire in this context might reasonably have been understood to count as an expression of Os opposition to the gate being climbed over. Mr Waller also contends that the locking of the Pound Lane

gate, even if it was secured to the galvanised steel post, was not *per se* indicative that access of the land was prohibited. He says that the natural inference a reasonable person would draw was that the owners did not want vehicles accessing the land but that there was no objection to pedestrian access through the various alternative points of access that remained unimpeded and which were (in relation to those access point in the rear of the properties in Pound Close) obviously in use by residents.

183. The case on interruption: Mr Waller says that even though the gate would have been locked from time to time, it was always possible to access the land via the gap between the angle iron and the hedgerow which presupposes that the gate would have been locked to the angle iron. Also there were alternative access points which meant that this was not a total exclusion case. Interruption is accordingly denied.

184. The next issue is whether, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period, always bearing in mind that qualifying use will be heavier in some areas than in others. Mr Waller says that it would have been.

185. Under the same head (even though it is in fact a separate point germane to the nature of the claimed user), Mr Waller asserts that Os are, as he puts it, incorrect to argue that the primary use of Great Lees is attributable to the assertion of a public right of way rather than a community asserting general recreational rights over the land. He does though concede that some of As witnesses gave evidence which was consistent with the use of the field (as he puts it) as a convenient route to transit to other locations. As previously indicated, the true question is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to a lesser right, i.e. a right of way. This is clearly critical to this case as we have a popular cross-field track leading eventually to the canal and swing bridge which is an attractive location for walkers looking to proceed westwards along the canal PROW or return along the canal path PROW back into the village. The position is to be

contrasted with a situation where users veer off the track and play or meander leisurely over and enjoy the land on either side, which is referable to use as a green. This is no doubt As case and the burden lies on them to establish that this was in effect the nature of the user in this case. Mr Waller says that the vast majority of the use that took place is only consistent with the assertion of a right to indulge in LSP across the field as a whole and a reasonable landowner could only consider this use to be referable to use as a TVG. He also makes the point that whereas many dog walkers use the perimeter areas, other dog-walkers choose to take a perimeter or linear route through the field and others stray off these path. It is clear, he argues, that the full extent of the field, or at least most of it was traversed by dog-walkers. He also mentions children's' games such as cricket, football, hide and seek, fox and hounds, frisbee, kite flying and aeroplane flying which are not activities that one would associate with the lesser use of the land as a right of way along a defined route or routes. It follows, Mr Waller argues, that even were one to discount perimeter walks or cutting through the evidence of qualifying TVG use remains extensive.

186. Miss Stockley also raises other arguments which Mr Waller wishes to address.

(a) The opening of the Pound Lane gate on special occasions would have been permissive. This must surely be right when it came to parked vehicles during the occurrence of village events. For his part, Mr Waller speaks of the absence of overt acts. Secondly, he says that access as of right would have been available elsewhere around the field from which he says it follows that any case based on an implied licence is founded on a false premise.

(b) That residents causing damage to the Pound Lane gate were, in any case, using the field by force. Not surprisingly, Mr Waller cites the fact that there are 104 residents whose user evidence confirms that they did not cause any damage to access the site, nor did they see any notices saying the land was private. He also argues that, as a matter of law, the fact that the Pound Lane gate may have been damaged by a person or persons unknown will not of itself render the use by these 104 residents by force. I doubt whether he is

right about this as the law is now clear, namely that notwithstanding the fact that an individual trespasser may not himself/herself have broken a fence and/or forced an entry through a locked gate and/or removed a prohibitory notice, their use remains forcible. See *Taylor v Betterment Properties Ltd.* [2012] EWCA Civ 250 per Patten L.J at [38] and at [60]-[63], where he spoke of the principle that rights of property cannot be acquired by force or by unlawful means).

(c) Mr Waller is, however, at pains to point out that the veracity of As evidence was not challenged at the inquiry and that it is not open to the Objectors to suggest now that their use of Great Lees Field was by force or for the inspector to so conclude. I am content to draw inferences about this where necessary from the evidence I have heard and I certainly do not regard Miss Stockley as having been under an obligation to cross-examine As witnesses on all details of the parties' respective cases. He also says that a plausible explanation for damage to the gate may lie with the agricultural contractors accessing the land over the years.

187. Accordingly, Mr Waller invites me to recommend that the application to register be allowed.

Closing submissions

Objectors (Miss Stockley)

188. Miss Stockley rightly contends that for the application to succeed, it must be established, pursuant to the Commons Act, section 15(3) (which is the relevant sub-section on this application):

(a) that the Land has been used for LSP for a period of not less than 20 years;

(b) that such qualifying use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(c) that such use has been as of right; and

(d) that the application was made within one year of the date of cessation of the qualifying use.

189. She also rightly points out that the burden (and the standard is the usual civil standard) lies on As to justify all the elements necessary for the registration of the field as a new TVG. She also reminds me of the often repeated observations of Lord Bingham in *R. v. Sunderland City Council ex parte Beresford* [2004] 1 AC 889 who noted that Pill LJ. had rightly pointed out in *R v Suffolk County Council ex parte Steed* (1996) 75 P&CR 102, 111 that the registration of land as a TVG was no trivial matter and that it was necessary that all ingredients of the definition should be met before land was registered.

190. Miss Stockley accepts that the relevant 20 year window is the period from 27 April 1996 through to 27 April 2016. She further acknowledges that the application to register dated 24 June 2016 and received by the CRA on that date would have been made within the requisite one year period allowed for this. She also accepts that this is a locality case concerning the civil parish of Semington (whose boundaries are shown on P/2).

191. Miss Stockley also sets out those elements of the statutory definition which are in dispute on this application, namely (and I deal with them in the order in which they arise in Miss Stockley's submissions):

(a) whether the qualifying use has been non-peaceable and therefore not as of right;

(b) whether the qualifying use has been permissive and thus not as of right;

(c) whether the qualifying use has been interrupted during the relevant 20 year period and so has not taken place for full 20 year qualifying period;

(d) whether, and to what extent, the qualifying use has amounted to the assertion of recreational rights over the field as a whole in contrast to the assertion of public rights of way across and/or around the perimeter of the field; and

(e) whether the qualifying use of the field as a whole has been demonstrated by As to have been carried out to the requisite degree and extent by a significant number of the inhabitants of Semington Parish throughout the relevant 20 year period.

192. Miss Stockley begins with use by force (or non-peaceable use as it is also known). She begins with the legal principles which I have already covered at para 13 above and it is unnecessary to replay all these matters. Suffice to say that I agree with her analysis of the law. Clearly use that is either violent or contentious will not justify registration as it will not be use which is *as of right*.

193. It is though necessary to deal with one case concerning signage which reached the Court of Appeal (and went to the Supreme Court on a separate issue) and is in point on this application. It is that of *Betterment Properties (Weymouth) Limited v. Dorset County Council* [2012] EWCA Civ 250 At para 8 Patten LJ stated that:-

> if the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in.

He went on to state at para 60 in relation to the removal of signs:

> It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?

And further at para 63:

> It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger on Redcar (No. 2)) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated

demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. **If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.**" (The emphasis is Miss Stockley's).

194. The question is whether Os took sufficient steps to demonstrate to local inhabitants that they were not acquiescing in the trespass by local inhabitants.

195. Miss Stockley then deals with the importance of the Pound Lane gate to the case and the concession made that 80% of As witnesses entered the land via that gate which she rightly said was consistent with the oral evidence.

196. Miss Stockley then addressed the evidence of Os conduct in terms of the locking of the gate, the replacement of the gate when damaged, the placing of barbed wire along the top of the gate, and the erection and replacement of signage on the gate during the relevant 20 year period. She rightly says that the evidence of Os conduct should be considered as a whole in determining whether it was sufficient to demonstrate to local inhabitants that Os were not acquiescing in the trespass which was taking place on their land.

197. The following evidence is noted.

(a) It is alleged to be significant that locking of itself is not in dispute; what As dispute is the frequency of such locking before 2016. A number of As witnesses who provided oral and/or written evidence in support of the application speak of a locked gate.

In terms of the As oral evidence:

Colin Wade stated in chief that he had seen the gate locked on around 6 occasions, usually by means of a chain and padlock.

Graham Wyllie stated in chief that he recalled the gate being locked by means of being chained to the main gate post.

Diane Swaine stated in chief that she recalled the gate being locked.

Brian Smyth stated in cross examination that even if the gate was closed, *'he could duck down and climb through the gate which I've done on occasion'*, indicating that it was locked from time to time.

Kenneth Clark stated in cross examination that he saw the gate locked. He went on to state that although he did not access via that gate, he was aware from *'hearing it on the grapevine'* that it was sometimes locked. Such evidence confirms the statement in As 'Justification' document and also Dr Scott's evidence that it was known in the village that the gate was locked from time to time. Miss Stockley says that Mr Clark's evidence is also noteworthy for the fact that he used the field to walk from the rear garden of his house to the gap in the western hedgerow, i.e. point 3, where he said in chief that there was always a gate which he climbed through when it was closed *'by lifting the wire up. There was always a means.'*

Jack Woodward acknowledged in cross examination that the Pound Lane gate was "*locked on occasions*" with a padlock. It is further of note that he was aware of such locking despite his access to the Land being primarily via his rear garden.

In terms of As written evidence, the following witnesses refer to the gate being locked before 2016 The numbered references are to documents within A/tab/5 (save where the contrary is stated).

Martyn Jansen *aka Jan Jen* (171)
Jenny Lockyer (204)
Mr G Callaghan (36)
Mrs G Callaghan (36)
Mr E Noad (CRA/97)
Nicola Houghton (140)
Simon Restall (253)

Ray Heard (122)
Mandy Robinson (271)
Kevin Lockwood (198)
Rose Lockwood (198)
Christopher Reed (247)
Sue Hardy (110)
Martin Hardy (110)
Philip Deverall (A/tab1/24)
Christine Deverall (A/tab1/24)
Gemma Brimson (30)
Tyler Brimson (30)

198. Miss Stockley says that the written evidence of Martyn Jansen *aka Jan Jen* is worthy of special note. He states in his user form that he has used the field around once a week from 1987 until 2016 and that his means of access was to "*climb over gate*" (box 6). He goes on to state (at box 16):

> ***For many years** the gate has been illegally padlock [sic] &/or topped with barbed wire'.*
> (Again, Miss Stockley's emphasis).

Miss Stockley goes on to say that that evidence is entirely consistent with Os evidence.

199. Miss Stockley says that even on As own evidence the primary access point into the field has been locked on a number of occasions to the extent that a total of 25 of As oral and written witnesses make specific reference to it. I am, however, inclined not to attach a great deal of weight to the evidence raised in the 'Justification' document which I think was largely drawn up by Dr Scott following the assembly of the written evidence. When one looks at the 'Justification' document (A/80) there is admittedly a reference to the Pound Lane gate being locked 'on a number of occasions over the years before the ploughing'. However, the same document then goes on to give instances of when this happened all of which were covered in the oral evidence and I do not read this document as an admission by As that there was a regular pattern of gate locking over the years although they are certainly saying that it happened at times when travellers were known to be in the locality or when

cattle were in the field or when spraying took place. Miss Stockley is, I think, saying that these events which justified locking the gate should not be given any or any great weight. She says that spraying with dry pellets would not justify locking the gate and there is nothing to corroborate traveller movements within the locality. At all events, Miss Stockley is saying that the issue of gate locking is primarily one of frequency on which I am required to make findings.

200. Miss Stockley deals with the evidence of Chris Awdry, James Holloway and Nicholas Grout which I have already covered all of whom gave evidence of a locked gate at various times over the years, namely in 2000 (Awdry), 2014 (Holloway) and 2015 (Grout). As did not challenge the evidence of these witnesses. Miss Stockley also deals at length with the evidence of WS-B who, she says, gave very credible and largely unchallenged evidence as to his significant efforts to ensure the gate was locked which I will not repeat. Miss Stockley also accepts that the written evidence from the Masters will not have been tested by cross-examination. It seems to me, however, that it would still be open to me to give it some weight where it was consistent with other evidence that was put before the inquiry such as that which was given orally by WS-B. For instance, they say at paras 5 and 6 of their joint statement (O/51) that they always did their best to keep the gate closed and locked (except for the periods when silage was being made) but that over the years the gate was damaged and vandalised.

201. Miss Stockley also deals with inconsistencies in the evidence when it came to whether the gate was left open. She notes that Michael Hawkins recalled opening and shutting the gate whereas Christine Jones stated that she recalled there being ‘a normal farm gate latch which you lifted up and dropped to close’. Further, Diane Swaine referred in cross examination to pushing the gate to open it whilst Angela Mills stated in cross examination that she did not recall a gate ever being in situ at Pound Lane until 2016, evidence which I recall surprised us at the time.

202. Miss Stockley asks me to bear in mind the context in which the 2009 open gate photo was taken which, she says, shows a badly damaged gate which was replaced the following year, a gate which had been installed as a new gate only in 1998. She also asks me to bear in mind that the photo of the gate attached to the iron stake at O/153 followed the end of the relevant 20 year period at a time when the land would have been under cultivation and as such might have been left in that position to suit the contractor's convenience whilst such work was in progress. What Mr Awdry actually said was that it was possible for his driver to have left the gate secured in this way and so avoid having to keep it closed with a lock and chain. He said it would have been safer to keep the chain in the cab whilst the driver worked in the field. He also thought that the angle iron could have served as the original gate post (or an old shifting post as he described it) which would have been left in place once a new gate post had been installed although the hedgerow would have come up to the angle iron to create an enclosure otherwise any animals in the field could have walked straight out into the road. Contrary to what Miss Stockley says about this, Mr Awdry did not cut back the hedgerow at this point in 2016. WS-B was asked about this and he suggested that, whilst the photo at O/153 was taken after the hedge had been cut back, he could not say who did this. He asked Mr Awdry about it and it had not been him although he had cut the rear hedge in 2016. In other words, the evidence was not quite as expressed by Miss Stockley.

203. Miss Stockley also questions, in effect, the obvious incompatibility between, on the one hand, Os alleged acquiescence in the use of the land by local inhabitants for informal recreation and, on the other, the presence of barbed wire over the top of the gate throughout the whole of the 20 year period (indeed it is still there). There was no dispute over the presence of barbed wire on the gate. Indeed, Diane Swaine said it had been there for over 30 years (see evidence of Steven Hall, Diane Swaine, WS-B and James Holloway).

204. Miss Stockley also asks me to bear in mind, in effect, the totality of the steps taken by WS-B in the period 1987 through to 2016, evidence which I need not repeat. She asks me to consider the letter written by Julia Masters to WS-B on

7 April 2003 stating that the gate 'will need to be locked the other end as people keep lifting it off the hinges', something which the Masters also say in their witness statement at para 6. She invites me to link such conduct with people similarly damaging the Wiltshire gate and creating a new gap in the western hedgerow at point 2 on P/3 which is reported in the officer's report (with photos) in the DMMO applications at O/218 (Pictures 5/6). Miss Stockley also rejects the notion that the Pound lane gate would have been damaged by agricultural vehicles. Looked at in the round, she argues that the landowners took sufficient steps to indicate that they were not acquiescing in the trespass which took place on the land. She says that this conclusion would also be consistent with the findings of the surveying authority in rejecting the application for a DMMO on the ground that the primary use of the land had been by force and so not as of right.

205. Miss Stockley also raises, in the alternative, an issue of implied permission which would also negate use as of right. She argues that the regular locking of the Pound Lane gate implies that the use of the land by local inhabitants on other occasions would have been by virtue of an implied consent, consistently with the well known dictum of Lord Bingham in *Beresford* at [5] where he said precario might be implied whenever a landowner periodically excluded the inhabitants where he wishes to use the land for his own purposes. Such a case would, of course, be radically incompatible with Os main case on exclusion. At any rate Miss Stockley argues that the locking of the gate amounted to an *overt act* by the Landowner in the sense contemplated by Lord Bingham in *Beresford* and by Lewison LJ in *TW Logistics Ltd v Essex County Council* [2019] Ch 343 at [87], and not to mere inaction as arose in the latter case. Indeed, that locking was sufficiently regular, even on As own case, for it to be clearly known to locals.

206. Miss Stockley also raises the question of interruption arising from signage and locking (when use cannot have been as of right seeing as it would have been contentious) and ploughing in 2000 (when that particular summer had been a wet one). Interruption is clearly a question of fact but Miss Stockley reminds me that in the *Betterment* case ([2012] EWCA Civ 250 at [68]) an interruption lasting for 4 months where the land was cut off and unavailable for LSP was

held to have stopped time running. She says that the material interruptions in this case would have lasted for at least 4 months and, she says, for much longer than this.

207. Miss Stockley also raises the issue of the sufficiency of qualifying use over the whole of the land. She cites from the well-known cases under this head, namely *R (Laing Homes Limited) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) at [102], and at first instance in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102]. She points (a) to the primary use of the land being that of dog walking, and (b) to the oral evidence of what she says was the vast majority of the witnesses who indicated that their use of the land was as a transit route, walking across the land from their point of access to point 3, or around the perimeter of the land, rather than using the land as a destination in itself on which to recreate. Such use, she argues, is more akin to the exercise of a right of way and would not support registration. Miss Stockley summarises the evidence which falls within this category:

- Michael Hawkins stated in chief that he ‘followed the boundary’ of the land.
- Christine Jones in chief stated she used the land as part of a longer walk.
- Colin Wade stated in chief that he used the Land to walk to the canal which was his destination.
- Peter Turner in chief and in response to the Inspector’s question stated that he ‘only’ used the land between points 1 and 3 ‘as a place of transit’ to get to the swing bridge which was his destination.
- Steven Hall stated in chief he used the land ‘as a cut through to the village’ and did not regard it as a destination for dog walkers.
- Graham Wyllie confirmed in chief that he used the land merely to transit for both his short and long walks.
- Brian Smyth stated in chief he either walked across the land between points 1 and 3 or walked around the perimeter.
- Philip Deverall stated in chief that he used the land as a means of transit from his rear garden access to point 3 in order to access the swing bridge.

- Kenneth Clarke stated in chief he walked across the land to point 3 as part of a longer walk; and
- Richard Bruges gave evidence that he had only seen very occasional use of the land by dog walkers walking round the perimeter of the land.

208. Miss Stockley argues that there was a distinct lack of evidence regarding use of the land as a destination on which to recreate. She says that such use was clearly referable to the assertion of a public right of way and not to general recreation over the Land as a whole and must accordingly be discounted from the qualifying use. She says this position is consistent not only with the case for a DMMO but with the aerial photos which show defined tracks across the land between the Pound Lane gate and point 3 on P/3 and from the rear gardens of the Pound Close properties again to point 3 showing that the land had been used as a means of transit along these defined routes. She goes on to say that if one discounted such evidence what is left would be insufficient to justify registration. Indeed she mentions a lack of photos and the further fact that even the video produced by Graham Wyllie during the summer months showed no one else on the land. She also mentions the evidence of Michael Hawkins and Christine Jones both of whom appear to attribute children's play within the field to use by children living in the houses backing onto the Land. Further, she says that such evidence is consistent with the evidence of WS-B who never saw any recreational use of the land during any of his visits, whilst Richard Bruges only saw occasional dog walking round the perimeter.

209. Accordingly, Miss Stockley argues that once the appropriate discount of footpath use has been carried out, the recreational use of the land has been extremely limited. She says it has not been demonstrated by As that the land as a whole has been used by a significant number of the inhabitants of Semington Parish throughout the relevant 20 year period. She therefore says that I should recommend that the application to register the land as a TVG should be rejected.

Discussion

210. The quality of As oral evidence was generally poor. This is not to suggest that any one of As witnesses attended with a view to telling untruths. All of them used the land and gave the impression that they were safeguarding it. I think that all of them were attempting to describe matters as they genuinely saw them.

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

212. It is also true that where an activity has been carried on in the recent past, it is easy to believe that the activity has been carried on longer and/or more often and/or more continuously than it really has. I must therefore be cautious about the oral evidence which was given about events occurring in the early stages of the qualifying period.

213. For example, if a witness says that he/she saw no lock and chain on the Pound Lane gate and has never been prevented from accessing the land through this gate, then I should treat such evidence with care in view of the contemporaneous documents (such as the Masters/WS-B correspondence) which corroborated Os evidence.

214. I begin by dealing with those elements of section 15(3) of the Commons Act 2006 on which there is no dispute. Firstly, that the relevant qualifying period was between 27 April 1996 and 27 April 2016. Secondly, that the application to register dated 24 June 2016 was made within the one year period allowed for this. Thirdly, that this is a locality case involving the civil parish of Semington whose boundaries are shown on P/2.

215. The core issues on this application are these: (a) whether there was significant qualifying use by local inhabitants; (b) whether it was such as to suggest to the reasonable landowner the exercise of a right to indulge in LSP across the whole of the land (and any use which is more than occasional or

sporadic normally would be); (c) whether that use is precluded from being qualifying use on the ground that it involves forcible or permissive use; and (d) whether that has been a material interruption; in other words, whether time stopped running because the land was closed off, or was interrupted at a time when it could not have been exercised as of right, or where the competing uses of the landowner and the local inhabitants could not have sensibly co-existed on the same land (which is unlikely to arise here as the agricultural use was at an extremely low level after 1996).

216. These issues can, I think, be divided into discrete sections:

(a) Did a significant number of local inhabitants go onto the land?

(b) Did they use the whole of the land for qualifying LSP?

(c) Did they do so for the whole of the 20 year qualifying period?

(c) If the answers to (a)-(c) are YES then the question is whether that use is precluded from being qualifying use on the ground that it involved forcible or permissive use?

I now propose to deal with each of these issues in turn.

Did a significant number of local inhabitants go onto the land?

217. The sufficiency of use point is perhaps the least difficult as it is, I think, obvious that a significant number of local inhabitants used the land, but not the whole of the land, for informal recreation during the qualifying period. As have produced witness statements from 105 residents (many with accompanying questionnaire responses) and oral evidence was heard from 14 residents who spoke of their own use and the use they observed of others on the land. Indeed, the analysis of As evidence, as disclosed by the very useful ‘Justification’ document, shows that the user relied on is, as one might expect, predominantly that of walking, with or without dogs, together with children’s play. In my view, a significant number of local inhabitants used the land throughout the qualifying period.

218. It is, however, a common complaint in proceedings of this nature that although As submissions and the returned evidence questionnaires go into detail about most things such as why and how often the land is used and what others get up to on the land, there is next to no detail given as to precisely where on the land users actually go when they get there.

219. It is also asserted in this case by As (despite there being a number of other access points around the perimeter of the land) that some 80% of users accessing the land did so via the Pound Lane gate. For this to have happened a number of possibilities arise (and occurring at various times during the qualifying period). First, the gate would either have had to be left open or could be opened with relative ease. Second, it might have been feasible for users to climb through or over the gate (in the case of those users were prepared to clamber over the barbed wire running along the top of the gate). Third, if the gate could be avoided altogether by users simply walking through a gap between the end of the gate and the adjoining hedgerow. This would have been because the gate was secured to the angle iron at a time when the hedgerow had been cut back leaving a gap for unhindered access into the field. The photo at O/153 taken on 28 April 2016 suggests that this might have been the case for a short time but is not generally supported by the oral evidence, nor is it inherently likely anyway as there was a perfectly usable gate post only 2/3 feet away. It is, I think, more likely that the gate would have been attached to the angle iron as a temporary expedient when work was taking place in the field. It will be recalled that when Chris Awdry was asked to comment on the photo at O/153 he said it was possible for his driver to have left the gate secured in this way and so avoid having to keep it closed with a lock and chain. He said it would have been safer to keep the chain in the cab whilst the driver worked in the field.

220. At all events, what seems clear is that most users were able to get onto the land via the Pound Lane gate. Having said that, access into the field would also have been available (a) midway along the western hedgerow at point 3 on P/3; (b) at the northern end of the field via the two stiles (i.e. at points 4 and 6 on P/3); and (c) by those whose homes in Pound Close had the

advantage of a gate leading straight onto the land at the rear of their properties (i.e. those living at Nos.29 to 36 Pound Close).

221. It is, I think, probable that local inhabitants were using the field more often than on an occasional or sporadic basis as it is close to a settlement comprising a sizable community which, as it seems to me, is lacking in accessible open space for walking, with or without dogs, and although the area is admittedly well-served by PROWs it is not the same as having a field down to grass on one's door step. It is also an obvious place of transit (via the Masters' field) to the swing bridge, canal and towpath which are attractive destinations for walkers on long or short walks. For those not wishing to walk as far as the canal but who are looking instead for a walk closer to their homes or, perhaps, a shorter circular walk taking them back into the village via the PROW (SEMI/1), one can see the attraction of a walk around the perimeter of the field where the ground will probably be firmer and the length of the grass less of a problem during the growing season. It is also material that the land was ploughed in 2000 (this is now agreed) which means that it would have been much softer in the central areas where the post-2000 aerial images disclose precious little evidence of the impact of human feet on the ground.

222. Where it is alleged that undeveloped areas are in regular use by local inhabitants one would normally expect to see some, perhaps even limited, evidence of tracks on the ground. It will be recalled that my own analysis of the aerial imagery from *Google earth* does not assist As case.

223. The image for 2001 shows obvious linear tracks leading from the Pound Lane gate and from 32 Pound Close across the field to the gateway at point 3 on P/3. There is also the faint sign of a track around the eastern perimeter but with much clearer signs of usage on the northern boundary consistently with those walking to and from the swing bridge from the village. Judging by this image the land appears to be used as a crossing point into Masters' field in conjunction with SEMI/6. The 2001 image shows heavy use of the perimeter on the eastern and northern boundaries and a faint cross field path from point 3 on P/3 joining up with the main track crossing the Masters' field which is

SEMI/6. The image for 2002 is much the same as described above for 2001 but with the addition of a track leading from point 2 on P/3 (the second gap in the western hedgerow) to the cross field track running out from 32 Pound Close. There are also very faint tracks in the eastern corner which are very probably associated with the use by two of those dwellings which have gates onto the land. The image for 2006 is broadly similar but the effect is lessened by recent mowing and the image for 2014 is unclear although there is a linear path between the Pound Lane entry and point 3 on P/3 on the western boundary. The image for 04/2015 does not really have sufficient clarity to work with.

224. The written evidence therefore discloses that a significant number of local inhabitants were using the land and it is my finding that such use would have been more than occasional or sporadic. The photographic evidence is of some assistance to As but there are few photos in this case but those we have do show what the land would have looked like before it was ploughed in 2016 and would have accommodated walking within the field and all manner of other recreational uses of the kind alleged, at least when the grass was short. I have previously mentioned the photos produced by Graham Wyllie which date back to 2013-2014 and the condition of the land in each case would have been fit for walking. One of these photos clearly shows a well established gap in the western hedgerow at point 3 on P/3 and one can easily see why it was suitable for those walking within the field who might have been looking for a longer walk on to the swing bridge. It was the oral evidence of Dr Scott that there were posts on either side of this gap but no actual gate before April 2016 and this is how it appears on the photo at A/111A which dates back to March 2014 although this is not incompatible with this having been, at some point, a Wiltshire gate.

Was the whole of the land used for qualifying LSP?

225. It is my finding that the land was mainly used as a place of transit for walking, with or without dogs, to destinations elsewhere or as a place for walks across and/or at the edges of the land. This was either into the Masters' field via the gap in the hedgerow at point 3 or the stile at point 4 on P/3 or via the stile at

point 6 on P/3 which leads back into the village which we walked on the accompanied site visit.

226. There would have been children's play but I doubt very much whether this was significant and I agree with Miss Stockley when she says that the evidence of use by children is limited. She mentioned the evidence of Michael Hawkins and Christine Jones both of who attribute children's play on the land to the children who lived in the houses that backed onto the land in Pound Close. This is not a case where one has a copse or deep hedgerows in which one will find dens where children will tend to congregate and play. The land itself is open and bounded by fencing or traditional hedgerows fit only for picking blackberries on the few weeks in the year when this is feasible. When I looked at the WWII pill box it seemed to me to be obvious that it would not count as a destination in itself for children's play. I think it unlikely that children, and especially when accompanied by their parents, are going to spend much time in recreating on the land and are more likely instead to be using it as a place of transit to the canal, swing bridge and towpaths.

227. Reference has been made to the *Laing Homes*, *Oxfordshire* and *Radley Lakes'* cases in paragraphs 14 through to 17. These cases are relevant to the issue of whether certain activities are referable not to LSP and a right to enjoy recreation over the whole of a wider area of land, but to the exercise of a putative or supposed right of way along a defined route or routes. The question is how the user would have appeared to a reasonable landowner on the spot. Clearly where, as here, tracks have distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other and which leads (as here) either to an attractive view point or back into the village, then user confined to the track may readily be regarded as referable to user as a public highway alone. The question might be different where users veer off the track and play, or meander leisurely over and enjoy the land on either side which is more likely to be referable to use as a green. Lightman J noted in *Oxfordshire* that where there was any doubt about the matter the inference should be drawn in favour of the exercise of the less onerous right rather than the more onerous right to

use land as a new green. In other words, the landowner gets the benefit of the doubt in the case of doubt.

228. It is clearly relevant here that in 2016 an application was made to add three footpaths to the DMS. The application plan is at P/5 and it shows that a perimeter path was being sought around most of the land (less a short stretch on the western boundary) (this is the green route: A-B-C-D-E-F-G-H). It was also claimed that a linear path should be added to the DMS commencing at the Pound Lane gate running directly to the gap at point 3 on P/3 and continuing across the Masters' field before joining up with SEMI/6 in the north-west corner of the Masters' field just short of the swing bridge over the canal (this is the blue route: A-H-M). These applications failed but it seems to me that most of the claimed use of the land in the TVG proceedings would be consistent with the rights of way which were claimed in the DMMO process (inclusive of the use of the stile at point 6 on P/3 as a way back into the village for those interested in a longer circular walk). What user would be left once the putative right of way user was discounted would not, in my view, have been of such a character and frequency as to justify registration.

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

230. I am assisted by Miss Stockley's submissions, with which I agree and which I have set out in detail at paragraphs 207 to 209 above. What she has done is to point to the evidence of ten of As witnesses who indicated, in their various ways, that their own use of the land was as a transit route in the sense that they either walked across the land from their point of entry onto the land to point 3 on P/3 or else around the perimeter of the land rather using the land as a destination in itself on which to recreate. Such use, she argues, is more akin to the exercise of a right of way and would not support registration. She

says that there was a distinct lack of evidence regarding use of the land as a destination on which to recreate which would also be consistent with the evidence of WS-B who never saw any recreational use of the land during any of his visits, whereas Richard Bruges only saw occasional dog walking round the perimeter.

231. Miss Stockley therefore invites me to find that once footpath use has been discounted what is left when it comes to recreational use over the remainder of the land is too limited and infrequent to justify registration. I agree. She also says that it has not been demonstrated by As that the land as a whole has been used by a significant number of local inhabitants for LSP throughout the qualifying period from which it must follow that I should, on this ground alone, recommend that the application to register should be rejected. I agree and am bound to say that with land of this size (around 4 ha or nearly 10 acres) it was always going to be something of a challenge for As to show, on the evidence laid before the inquiry, that it could sensibly be said that the whole of the land had been used for LSP for the relevant period even allowing for the fact that qualifying use will be heavier in some areas than in others. Indeed, it is not as if the unused areas can be said to be integral to the enjoyment of the land as a whole such as might arise perhaps in the case of areas which are unused as they have been landscaped or are under cultivation such as might arise in the case of planted borders, water features and the like.

Whether the use relied on is precluded from being qualifying use on the ground that it involved forcible use?

232. The starting point is the evidence of WS-B whose evidence I accept (note my assessment of his evidence in paragraph 168 above). The narrative in his case begins in 1987 once ownership had passed to he and his siblings where WS-B appears to have taken the leading role.

233. By around 1987 WS-B says that he had threaded barbed wire along the top rung of the Pound Lane gate in order to discourage people from climbing over it. A Wiltshire gate had also become established in the gap in the hedgerow on the western boundary which is more than likely as there were cattle on the

land until the early 1990s. WS-B says that he also purchased a chain and padlock for use by the Masters in order to keep the Pound Lane gate secure. He also erected signs on the gate (‘Private Land – No Entry’) made of plywood which any reasonable user would understand to mean that the land beyond was off limits. These signs were, he says, removed and had to be replaced within a couple of years, say by 1989. It would, in my view, have happened sooner if he had been visiting Semington more often than once a year.

234. It is WS-B’s clear evidence that, with the exception of what he found on his visit in 1997, the Pound Lane gate would have been locked and chained (the Masters always had a key as did WS-B and his cousin, Michael Bruges). It seems that, in practice, he had left it to his cousin to keep an eye on things in his absence. WS-B can, of course, only speak about what he found on his annual visits but I find that the gate would have been locked or, at least, was usually left locked by the Masters until around the time of WS-B’s visit in 1997 (that is, when locking the gate was still feasible which may not have been the case for around a year before WS-B’s visit in 1997, i.e. until not long after his previous visit) when he found the gate to have been lifted off its hinges at one end (i.e. off the hanging post on the left hand side as one looks at the gate from the road) with the lock and chain still wrapped around the latch post on the other side of the gateway.

235. In his written evidence (statement dated 25 July 2016 (para 16)) WS-B says that Julia Masters told him that people lifting the gate off its hinges or damaging it by climbing over it (resulting in damage to the lower bars) had always been a problem, something which also affected the Wiltshire gate on the western boundary. We then come to the February 1998 repair involving the installation of a new gate plus hanging and latch posts. This was accompanied by fresh signage on the new gate indicating that the land was private. He also wound barbed wire around the top bar to prevent people from climbing over it, just as he had done with the former gate in 1987 (it is agreed that the latch post shown on the photo taken on 28 April 2016 was the same one replaced in 1998. It is, as I find, likely that the new gate was also locked as on 18 April 1999 WS-B wrote to Julia Masters asking whether they wished

to rent the field again that year and that if this was not the case they should return the key to the lock of the gate and should confirm that the gate had in fact been left locked. In the event, an agreement was taken up with the Masters for the 1999 season which implies that WS-B was satisfied that all was in order when it came to the gate.

236. In his oral evidence WS-B said that he did not visit Semington in 1999-2000 but on his visit in June 2001 he found the Pound Lane gate to be locked and chained with the barbed wire still in place on the top rung of the new gate. However, the signs had been removed. The position was the same in June 2002. This is consistent with what WS-B said in his letter dated 7 April 2002 to Thomas Masters in which he said that he hoped that the gate was, as he put it, 'still in place and working, and that you still have the key? Let me know if not – I am happy with the rent staying at £500, if you will continue to agree to keep it locked'. On 7 April 2003 Julia Masters also wrote to WS-B asking whether they could rent the field again in 2003 saying, as she put it, 'The gate is locked and we still have the key although it will need to be locked the other end as people keep lifting it off the hinges' which meant that lifting the gate off its hinges at the hanging end was still something of a problem. WS-B's reply was an exhortation to the Masters to, as he put it, 'do something to prevent it being lifted off. Maybe a stiff wire, or a permanently locked chain?'

237. The departure of WS-B's cousin, Michael Bruges, to Bath sometime in 2003 prompted WS-B to erect, as he put it, 'heavier and better' signs on both the Pound Lane and Wiltshire gates ('Private – No Right of Way'). However, on his visit to Semington in 2004 (on his way to Bath to attend the funeral of his cousin's wife) he found that the signs on both gates had been removed and were lying on the ground. I find it to be more probable than not that he re-erected these signs. It is clearly material that someone had deliberately cut the heavy galvanised wires which would have attached the plywood signs to the two gates. Despite the removal of the signage I find that barbed wire was still in place on the top rung of the Pound Lane gate (it is worthy of mention that Steven Hall, who has lived at 14 Pound Lane since 2003, said that the barbed wire had always been there).

238. Despite these measures it seems plain that people were still using the gate to enter the field as by May 2009 the gate, which had been installed brand new in 1998, was in a state of some disrepair (see photo on CRA/40 and O/119) with the lock and chain gone. The gate is seen to be left open although barbed wire was still on the gate.

239. The issue was raised as to whether the damage shown in these photos was caused by agricultural vehicles nudging the gate open. I reject this possibility which the Masters dispute in their joint statement. It is, I think, wholly unlikely that experienced tractor drivers would have driven into this gate and caused the damage shown which involved the complete removal of the middle bar and the buckling of the bar below it which seems to me to be more consistent with damage caused by people clambering over or through a locked gate. At any rate, on 27 May 2010 Thomas Masters wrote to WS-B saying, as he put it, that the 'old gate has been replaced by a new one and padlocked.' There is no reason to suppose that this never happened and in his reply dated 8 June 2010 WS-B thanked him for, as he put it, 'replacing the lock and padlock'.

240. There was no prohibitory signage on the new gate as by then he and the Masters had given up on signs (concentrating instead on seeing that the gate was locked and chained) as they were only going to be ripped down again. WS-B said that he would have added barbed wire to the top rung of the new gate on one of his trips to Semington and that the gate looks the same as it does today. At any rate, WS-B continued to make annual visits to Semington and the Pound Lane gate was, as he found, 'always perfectly locked' in the period 2010-2016. This evidence is consistent with the evidence of James Holloway, and Nicholas Grout both of whom climbed over the Pound Lane gate in, respectively, 2014 and 2015, as the gate would have been locked.

241. The evidence of Nicholas Grout is also of interest on the state of the hedgerow at the latch post end of the gate. It was his evidence that at the time of his visit on 14 September 2015 the gateway was more overgrown and the undergrowth had been trimmed back by the time of his later visit in March 2016 which suggests that the galvanised latch post erected in 1998 (which Mr Waller agrees is the same one in situ today) might well have been obscured

from time to time by the adjoining hedgerow which may have led Mr and Mrs Hall to think that it had in fact been newly installed in April/May 2016. For his part, Mr Holloway also said he would not have been able to squeeze around the side of the gate which he said was locked up to a gate post and not secured against the angle iron. He was with his wife and small child and he remembers his wife passing him the child over the gate in order that she might climb over the gate herself. I think this evidence is consistent with the angle iron being used only temporarily whilst contractors were in the field in 2016 and not before-hand. It follows, I think, that the photo taken in April 2016 showing the gate attached to the angle iron leaving a gap for people to walk into the field is something of a red herring. I agree with WS-B that the photo on CRA/593 is more likely to have been taken after the hedge had been cut back although it is not clear who did this yet the Masters had admittedly been responsible for keeping the hedges properly cut (their last agreement had lasted until the end of 2015).

242. WS-B's evidence was that when it came to the Pound Lane gate he relied on the Masters to keep the gate locked (pursuant to their obligations in the several grazing/annual keep agreements) and to stop people coming onto the land. As they were on the spot and as WS-B was an absent landowner (and of course his cousin had left the village in 2003) there was nothing unreasonable about this. Clearly the Masters had been far too lax in their management of the land which is bound to have contrasted with the position when they had cattle in the field until the early 1990s. In my view, it is more probable than not that they knew that local inhabitants were using the land for walks, with or without dogs, and chose, for their own reasons, to do nothing about it although I think it likely that whenever they cut/sprayed the grass they would have unlocked/locked the gate to the latch post.

243. It is also material that As are not disputing that from time to time the Pound Lane gate would have been locked. In her skeleton Miss Stockley identifies oral and written evidence adduced by some of As witnesses which deals with this which I have covered in paragraphs 197-198 above. She is clearly right when she says that such evidence is consistent with Os case on regular locking. I also agree with her that the evidence of Martyn Jansen of Wessex

Close is worthy of special note in that he says in his questionnaire responses at A/tab5/170 that the gate had been 'illegally' locked 'for many years' (he claims to have used the land around once a week between 1987 and 2016 which he says he accessed by climbing over the Pound Lane gate.

244. It is not possible for me to say how long, throughout the qualifying period, the gate would have been continuously locked but it seems to me that, on the evidence, it is likely to have been locked intermittently for months, if not years, at a time and that reasonable users who were regularly using this means of access onto the land would have been aware of the existence of the lock and chain and ought to have appreciated that the land was private and off limits to the public. There were, of course, also instances when the gate itself was removed from its hinges on the hanging post. Any use arising out of such unlawful conduct (and I find that it is bound to have been significant over the years as the Masters complained about this and WS-B himself discovered an uplifted gate on a visit to Semington in 1997) cannot possibly justify registration notwithstanding the fact that an individual trespasser may not himself/herself have been responsible for this. The position is the same in the case of those whose use only came about as a result of an entry having been forced through a locked gate or by virtue of the removal of a prohibitory sign. Again, this is, as I find, bound to have been significant over the years.

245. The evidence in relation to the prohibitory signs suggest that they are only likely to have been in place on the Pound Lane and Wiltshire gates for relatively brief periods. Such signs were erected by WS-B in 1987, 1989, 1998, 2003 and in 2004. By 2010 at the latest there were no further prohibitory signs on the new Pound Lane gate or the Wiltshire gate. It seems plain, however, that WS-B had probably given up on signs long before this as he and the Masters took the view that it was never worth it as they would only be ripped down again and I find that this is what must have happened. At any rate, I find that prohibitive signs were in place and would have been seen by those entering the land after these dates via the Pound Lane gate (to which a sign or signs would have been attached) and by those coming and going through the Wiltshire gate.

246. I have already advised on the law of forcible (or non-peaceable) use. It is clear that forcible use is not use as of right and will not justify registration. We are dealing here with use that is either by force or else is contentious, even if not accompanied by physical force. The erection of a fence or a locked gate to enclose or secure land or a suitably placed prohibitory notice will usually be such as to render use forcible. The fact that these steps taken to resist trespassory use are disabled (such as by removing locks or notices or, as occurred here on various occasions, by actually lifting the gate off its hanging post) will not negate the effect of those steps in terms of rendering use forcible (see *Taylor v Betterment Properties Ltd.* [2012] EWCA Civ 250 per Patten L.J at [38] and at [60]-[63], where he spoke of the principle that rights of property cannot be acquired by force or by unlawful means).

247. As previously indicated, it follows that notwithstanding the fact that an individual trespasser may not himself/herself have forced an entry through a locked gate and/or removed a prohibitory notice and/or lifted the gate of its hanging post, their use remains forcible in law. In other words, if prohibitory signage is not seen as it has been wrongfully removed or if a gate has been forced open or otherwise rendered easier to use, by whatever means, as a place of access onto the land then an applicant for registration would not be entitled to rely on the evidence of users whose ignorance of such signage or whose use of a gate which has been interfered with has been made possible in such circumstances. In such cases the user would be non-qualifying.

248. The question, therefore, is were the steps taken by WS-B/Masters sufficient to indicate that trespassory use was resisted. In my view, they were more than adequate to do this. I might add that even if those steps were interfered with/disabled/ignored a landowner is not then required by law to take further steps to resist on-going trespass (see *Winterburn v Bennett* [2016] EWCA Civ 482 at [36]-[37]). It is also the case that even if use is rendered forcible by actions taken by the landowner <u>before</u> the commencement of the twenty-year qualifying period (in this instance before 27 April 1996, and I have already highlighted the actions of WS-B taken in 1987/89) trespassory use within the qualifying period will remain contentious unless there is clear evidence

that Os changed their position such that they were no longer contesting the use. No such evidence arises in this case. The issue was addressed in *Winterburn v Bennett* which was a notice case. The notice had been erected before the commencement of the qualifying period yet the CA held (see [37]) that that step remained sufficient to render use in the qualifying period trespassory.

249. I also think that in placing barbed wire on the top rung of a gate a landowner is sending out a clear message that he does not welcome trespass beyond the gate. This is not a step taken by a landowner who is acquiescing passively in the assertion of a right by local inhabitants to go onto the land and to use it for informal recreation. Barbed wire, in combination with a lock and chain and prohibitive signage (whose meaning would have been obvious to a reasonable user) over many years is, I think, ample evidence to negative any suggestion that, with open eyes, Os indulged in the use of their land by local inhabitants. I find that it follows that any use of the Pound Lane gate by local inhabitants after 1987 would have been non-qualifying for TVG purposes. Since the overwhelming majority of those using the land would have done so via this gateway it must surely follow that the application must also fail on this ground as it is my finding that the remaining use did not pass the threshold of being of sufficient quantity or quality to harden into a legal right.

Permissive use

250. The next question is whether Os can resist registration on the ground that the recreational use was, by necessary inference, permissive. Miss Stockley relies on the principle stated by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at [5] on the footing that local inhabitants, at least those wishing to enter from Pound Lane, were being excluded from the land (by means of a locked gate) on those occasions when Os had no particular need for the land. The implication of a licence requires some overt act on the part of the landowner. Would locking the Pound Lane gate suffice for these purposes?

251. In *R (Mann) v Somerset County Council* [2017] 4 WLR 170 the landowner occasionally held a beer festival and funfair on part of the land for which he charged an entrance fee. It was held that the exclusion of members of the public (except for those who paid the entrance fee) for a few days in the year was sufficient exclusion to demonstrate that public access to the land for the rest of the year was permissive.

252. By contrast in *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin) the court found that a landowner who laid out football and rugby pitches on the land (which would have prevented simultaneous use by the public for recreational purposes) did not do enough to confer an implied licence at times when the pitches were not used. Sir Wyn Williams held that, in essence, the principle of co-existence negatives the grant of permission. In other words, that the marking out pitches did not deprive the recreational use of its character of being use as of right.

253. It seems to me that Os cannot have it both ways. They cannot sensibly be heard to say, on the one hand, that the gate was locked and had barbed wire along the top bar and that prohibitive signage was in place and, on the other, that such use as may be found to have occurred at other times when the gate happened to be open or was utilised in some nefarious way as a means of access into the land would have been subject to an implied permission.

254. The point being made here by Os is that it is not possible to register a TVG on land that was available for recreational use upon a part time basis. It seems to me, however, that the defence under this head bears no relation to the factual position in this case in circumstances where (a) forcible use is being advanced, and (b) where the Pound Lane gate was not even the only access into the field such that any exclusion from the land would only have been a partial one.

255. In my view, one could not really categorise the locked gate and the prohibitory signage in this case with overt acts involving, say, temporary exclusion from which it might be inferred that the landowner was permitting access on other

occasions when the gate was usable. The exclusion in this case, though only partial, is, in my view, far from the kind of exclusion to which Lord Bingham was referring in *Beresford* which seems to me to apply in those cases where periodically the landowner is regulating access to and use of his land. I do not see how in this case that by closing off the gateway in the manner in which WS-B and/or the Masters did the landowner was communicating to local inhabitants their permission for LSP to take place on the land. I therefore take the view that the case on implied permission fails.

Interruption

256. The case under this head is really this: on the assumption that, at times during the qualifying period, the Pound Lane gate was periodically inaccessible to 80% of those who claim to have been using the land on a regular basis, would it necessarily follow that the land had not in fact been used for LSP for 20 years?

257. It is essentially a matter of fact and degree whether land has been so used for LSP throughout the 20 year period. Clearly, in light of WS-B's evidence, the gate will have been locked for prolonged periods throughout the qualifying period. In *Taylor v Betterment Propertries (Weymouth) Ltd* [2012] EWCA Civ 250 at [71] Patten L.J spoke of an ouster of local inhabitants where the disruption would have been inconsistent with the continued use of the land as a green. In that case the public had been excluded from part of the land for around four months and it was found that that interruption would have been sufficient to stop time running.

258. In this case the exclusion had the effect of curtailing the use of one of a number of access points around the perimeter for a prolonged period, quite possibly for a great many months if not for years. It was not as if, by locking off the Pound Lane gate, there was a cessation in the use of the whole of the land. In my view, the principle of interruption is likely to arise in practice where local inhabitants are (a) deprived of the use of the whole of the land; or (b) where the disruption is, for whatever reason, inconsistent with the continued use of the whole or parts of the land as a TVG; or (c) where, in a case where

the landowner was also using the same land for his own purposes, it would not be possible for the respective rights of the landowner and of the local inhabitants to co-exist, at least not sensibly; or (d) where qualifying use of the land could not have been exercised as of right as, for instance, where the land is temporarily used under licence. It seems to me that none of these things arise on the present facts and that the case against registration is better explained by reference to questions involving the sufficiency of qualifying use and non-peaceable use precluding use as of right.

Findings of fact

259. The core findings I make are these:

(a) A significant number of the local inhabitants of Semington used the land, but not the whole of the land, for LSP throughout the qualifying period.

(b) The land was mainly used as a place of transit for walking to destinations outside the land rather than as a destination in its own right for LSP over the whole of the land. Any remaining use of the land itself would have been confined largely to walking, with or without dogs, around the perimeter of the field.

(c) It follows that the land would have been mainly used for the exercise of putative or supposed rights of way along a defined route or routes. Such use would not justify registration. It follows that the whole of the land has not been used for qualifying LSP.

(d) Any use not falling within category (b) (i.e. once the footpath use has been discounted) would not justify registration as it was too limited and infrequent.

(e) The As are precluded from relying on use through the Pound Lane gate as it involved use which was forcible in law and therefore not as of right and would not justify registration as a matter of law. The use of the land by others who had entered it through different entry points was insufficient to justify registration.

(f) WS-B threaded barbed wire on the top bar of the three Pound Lane gates after 1987. In doing this his intention had been to discourage local inhabitants from using this gate as a means of entry into the land. Reasonable users of the Pound Lane gate should have known that the presence of barbed wire in these circumstances meant that the land was private and off limits to the public.

(g) Throughout the whole of the qualifying period the Pound Lane gates would have been continuously locked for months, if not for years, at a time except on those occasions when the Masters wished to go onto the land for their own purposes. Reasonable users who were regularly using these gates as a means of entry into the land should have been aware of the existence of the lock and chain around the latch post and should have appreciated that the land was private and off limits to the public.

(h) If the Pound Lane gate had been left open at any time it was either because it had been inadvertently been left open for short periods by the Masters or, prior to at least 2003, because the gate had been wrongfully lifted off its hinges on the hanging post by persons unknown allowing local inhabitants to enter the land.

(i) Prohibitory signs were erected by WS-B on the Pound Lane and Wiltshire gates in 1987, 1989, 1998, 2003 and in 2004. By 2010 there was no further prohibitory signage on the Pound Lane gate. Such signs are likely to have been removed within a relatively short period by persons unknown and Os were justified in the circumstances in not re-erecting replacement signage on a continual basis as it was likely to be torn down within a short period.

(j) The foregoing signs would have said ‘Private – No Right of Way’ or similar. They were located where they would be seen by reasonable users and would have conveyed the clear message that the land was private and off limits to the public.

(k) If any one or more of the three gates had been secured to the angle iron and had not been locked to the latch post it would have occurred on only a few occasions when contractors were working in the field. Any entry into the

field by local inhabitants on these occasions would have been very limited and would not justify registration.

(l) Any damage done to any of the Pound Lane gates will have been caused by persons unknown using the gate as a means of improper entry into the land and was not as a result of the ordinary passage of agricultural vehicles through the gateway.

(m) The Wiltshire gate was usually open during the qualifying period as were the stiles at the northern end of the land.

(n) The land was ploughed in 2000.

(o) The grass on the land was cut twice each year (late spring and early autumn) during the qualifying period and prior to cutting would have been in the region of 2-3 feet long.

(p) The cases of Os on permissive use and interruption are rejected for the reasons given.

Recommendation

260. In light of the above discussion, I recommend that the application to register the land as a TVG (being application number 2016/02) should be **rejected** on the ground that the applicable statutory criteria laid down in section 15(3) of the CA 2006 have not been satisfied.

261 Put shortly, in order to justify registration As had to show that a significant number of the inhabitants of Semington indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years before the application was made and, in my view, they failed to do this for the reasons explained.

262. Under reg 9(2) of the 2007 Regulations, the CRA must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be ‘the reasons set out in the inspector’s report dated 7 February 2020’.

William Webster

3 Paper Buildings

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