Response on behalf of the estate of the late Roger Pike to the response to objections dated 26 February 2018

This is a response on to the various points/assertions made in the applicants' response document dated 26 February 2018 ("the Applicants' Response") on behalf of the estate of the late Mr Roger Pike, who passed away on 6 December 2017.

No responses are provided in relation to those parts of the Applicants' Response which relate to submissions made by RH & IR Craddock Ltd and Mrs Rosemary Sims. However, it should not be taken from the absence of any response to those parts of the Applicants' Response that those parts are accepted by Mr Pike's personal representatives.

Response to "*Goughs point 1 ... Point 4 ... Point 7*"

1. To the extent that the applicants wish to rely on evidence provided by people who have allegedly "*now completed 20 years*", i.e. where 20 years of usage as of right for lawful sports and pastimes could not be established from their evidence at the time the application was made, any such reliance is misguided. Under section 15 of the Act, the relevant date for establishing 20 years of usage is the date of the application (see *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 for confirmation of this). So it is irrelevant as to whether the applicants/local residents have used Church Field for sports or pastimes since the application was made.

2. "*[S]ocialising*" cannot reasonably be described as a sport or pastime and the applicants have not been able to point to any case law in support of their suggestion that socialising falls within the ambit of section 15 of the Act. It is submitted that the applicants' reliance on something as tenuous as "socialising" speaks volumes about the merits (or otherwise) of the application.

3. The applicants' reference to their belief that "*all members of a family are valid as different individuals*" is missing the point and is nothing more than a self serving statement. The points raised on behalf of Mr Pike are that if the evidence provided by additional family members does not establish 20 years of usage for lawful sports or pastimes then it adds very little, if anything, to the evidence provided by the primary evidence provider / family member. Moreover, if the evidence provided by the additional family members is essentially the same as that provided by the primary evidence provider / family member then arguably it should not be factored into an assessment of whether a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes for the purposes of section 15 of the Act.

Response to "*Goughs Point 8a ... Pike Point 4 ...*"

4. Evidence of the differences between Church Field and the Village Hall green area does not amount to evidence that lawful sports or pastimes were in fact taking place on Church Field throughout the requisite period.

Response to "*Goughs Point 2 ...*"

5. The fact that the land is unregistered does not mean that local residents and organisations would not have known that Mr Pike owned Church Field. Hilperton is a small place in which local knowledge is easily transmitted by word of mouth.

Response to "*Goughs point 2 and Pike points 3, 5, 6, 7 ...*"

6. There is a suggestion in this part of the Applicants' Response that the applicants have used Church Field "*in its entirety*". The evidence produced in support of the application does not establish that the applicants have used Church Field in its entirety.

Response to "*Goughs case study – Richard Naylor v Essex County Council v Silverbrook Estates Ltd ...*"

7. Although it is helpful that the applicants have confirmed that Church Field has been used throughout the relevant period for, as they put it, "*grasskeep or cattle*", this is a confusing paragraph in the Applicants' Response. It is incorrect to say that the "by right" principle established in the *Naylor* case does not apply to this case. *Naylor* was cited in support of Mr Pike's objection to the application because the applicants'/local residents' usage of parts of Church Field has been by right (not as of right) due to the existence of the rights of way across Church Field. In other words, the fact that Church Field has not been maintained by the Council is not determinative of the issue as to whether the applicants'/local residents' usage has been by right or as of right. The facts of this case do not need to be on all fours with those of the *Naylor* case in order for the same principles to apply.

Response to "*Pike Point 8 ...*"

8. The salient point here is that the applicants/local residents cannot have enjoyed an unrestricted and uninterrupted freedom to use all of Church Field given that the land was also used for grazing livestock, primarily cattle, throughout the relevant period.

Response to "*Goughs points 5, 6a, Pike points 1, 2 ...*"

9. The applicants have confirmed that "*local people would make alternative routes through Church Field to avoid the cattle.*" Firstly, this seems to support the submission made in opposition to the application that, to the extent that Church Field has been used by local people, it has been primarily as a way of getting from A to B (note the reference to routes through Church Field) rather than for sports or pastimes. Secondly, it also contradicts the applicants' suggestion that they have used Church Field "*in its entirety*" (they acknowledge that they have understood the need to avoid the cattle).

Response to "*Ref Goughs case law – The Queen on the application of Cheltenham Builders Limited v South Gloucestershire District Council*"

10. The contents of paragraphs 8 and 9 above are repeated here in response to this part of the Applicants' Response. For the avoidance of any doubt, it is not accepted that the contents of the 44 letters referred to adequately address the argument that the grasskeep and grazing arrangements in place for Church Field were interruptions of any uses for lawful sports and/or pastimes.

11. Again, the facts of the *Cheltenham Builders Ltd* case do not need to be on all fours with the facts of this case for the same principles to apply. The absence of any "*significant areas of trees or brambles which would prevent lawful sports and pastimes*" can hardly be said to amount to evidence that the whole of Church Field has been used for lawful sports or pastimes throughout the 20-year period.

Response to "*Goughs points 9, 10 ...*"

12. Putting to one side the concerns previously raised about the possibility that some of the evidence in support of the application might have been tailored/contrived, the most pertinent point here is that a significant amount of that evidence has been influenced by the real motivation behind it – that the applicants do not want Church Field to be developed/built on. The applicants have now accepted in the Applicants' Response that these motivations/opinions "*are not valid in terms of a village green application.*"

Response to applicants' references to *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 para 57)

13. In *R (Laing Homes Ltd)* it was held that village green rights could not be established where land was being used for the growing, cutting, drying, baling etc. of a hay crop. The Court found that the activities involved in gathering a hay crop interrupted the recreational use or enjoyment of a field since people had to avoid the machinery when it was in use and avoid disturbing the mown hay whilst it was drying. Messrs Fyfe and Vigar both provided evidence in their statements dated 2 October and 30 September 2017 respectively that they have entered into Grasskeep Agreements and Grazing Licence Agreements that allow them to mow the grass on Church Field for use as silage. In Mr Fyfe's case, these agreements were in place with Mr Pike for a 27-year period (so throughout the 20-year period that is relevant to the application). Any usage of Church Field by the applicants/local residents for sports or pastimes would have been interrupted by the mowing that was being carried out there. As per paragraph 9 above, it is also submitted that grazing livestock on Church Field would have been an interruption to any sports or pastimes indulged in thereon during the relevant period.

14. The applicants appear to argue that the reasoning applied in *R (Laing Homes Ltd)* is flawed and they point to the comments of Lord Hoffman in *Oxfordshire County Council v Oxford City Council* [2006] in support of that argument. The relevant passage from Lord Hoffman's judgment is as follows:

> "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 for the purposes of section 22 [of the Commons Registration Act 1965] if in practice they were not."

Lord Hoffman's comments in *Oxfordshire County Council* were obiter dicta and not, therefore, legally binding as a precedent. *R (Laing Homes Ltd)* remains good law. In any event, Lord Hoffman's comments should not alter the outcome in this case – His

Lordship was careful to use the words "*if in practice they were not*". In other words, His Lordship took the view that each case would need to be determined on its own facts, and that whether or not the low-level agricultural activities in question are inconsistent with use for sports and pastimes has to be decided on a case-by-case basis. Based on the evidence provided in this case, not only in support of Mr Pike's objection to the application, but also by members of Church Field Friends themselves (see, for example, Denise Harvey's statement about having to give a mother cow and herd plenty of space), it is submitted that the agricultural activities which have taken place on Church Field were in practice inconsistent with use for sports and pastimes on the whole of the site throughout the 20-year period.

Signed: .....[redacted]

Goughs Solicitors

(For and on behalf of the estate of Roger Pike)

Dated: 27 April 2018