

COMMONS ACT 2006

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND
KNOWN AS 'CHURCH FIELD' AT HILPERTON AS A NEW TOWN OR
VILLAGE GREEN**

Application number: 2017/01

Dated 19 November 2020

INSPECTOR'S REPORT

Preliminary matters

1. I am instructed by Wiltshire Council (WC') acting in its capacity as commons registration authority ('CRA') which is the responsible authority for determining applications to register land known as Church Field in the village of Hilperton (which will, as the context permits, be referred to in this report as either the 'application land' or the 'land' or 'the field') as a town or village green ('TVG').
2. The application was made by a local action group known as 'Church Field Friends' ('the applicants' or 'As') on an undated Form 44 delivered to WC on 24 April 2017. The application was returned and after correction of minor matters was accepted by WC and a notice in Form 45 was circulated on 21 July 2017 and objections were received from the landowner and others.
3. On 6 March 2019 WC's Western Area Planning Committee (which exercises the function of CRA within WC) resolved to appoint an independent inspector to hold a non-statutory public inquiry ('NSPI') to hear evidence and to provide an advisory report on the application to register to the CRA.

4. A NSPI was initially fixed for 23-25 June 2020 but had to be postponed because of the pandemic. It was tentatively re-scheduled for 29-30 September 2020 when the prospect of a face-to-face hearing at a local venue was still zero in view of government regulations placing restrictions on public gatherings for the protection of the public.
5. At my suggestion the CRA agreed that an inquiry could proceed on the basis that oral evidence was heard remotely with the remainder of the inquiry process being determined by way of written representations. There followed consultation with the parties at two pre-inquiry meetings on my Chambers Zoom platform (at the second of which counsel appeared for both parties – Horatio Waller for the applicant and James Marwick for the objectors (or ‘Os’), namely Carolyn Parkinson and her sister Elizabeth Pike who inherited the land from their father, the late Roger Pike) after which I issued directions for the NSPI on 21 July 2020. Although there were other objectors the eventual defence to the application coalesced in the case advanced by Os as owners of the application land.
6. The NSPI took place and oral evidence was heard remotely on 29-30 September 2020. The process was much assisted by the skill and ingenuity of both counsel who ensured that the inquiry (which is likely to have been the first of its kind where oral evidence was heard remotely) ran as well as might have been expected if it been held at a local venue, not least in relation to the inquiry bundles which were uniformly well prepared and informative. I am also indebted to counsel for their helpful and conscientious written submissions which I received on 14 October 2020. Last, but not least, I am grateful for the administrative support provided by officers of WC (Sally Madgwick and Sarah Marshall) which was indispensable to the smooth-running of the process in what were clearly testing and unique circumstances.

Legal framework

7. Section 15(2) of the Commons Act 2006 (‘CA 2006’) (under which subsection 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, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
 - (b) they continue to do so at the time of the application.
8. One then has to look at the various elements of the statute all 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 (Allaway) 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.
10. As this is not an application based on a ‘neighbourhood within a locality’ Mr Marwick is right when he says that the CRA need only be concerned with the sufficiency of use on the part of those living within the singular locality. Put another way, any use by individuals living outside the claimed locality will not count. The position is otherwise on a neighbourhood application (*Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438).

‘of the inhabitants of any locality’

11. The term ‘locality’ is taken to mean a single administrative district or an area within legally significant boundaries. On this application the objector agrees that the relevant qualifying locality is the village and civil parish of Hilperton

(which, as the context permits, will be referred to in this report as ‘Hilperton’, ‘Hilperton village’, or ‘the village’) which is only separated by a few fields from the north-eastern edge of Trowbridge. The population of the village was a little under 5,000 at the time of the 2011 census.

‘have indulged as of right’

12. The traditional formulation of the requirement that user must be ‘as of right’ is that the user must be without force, secrecy or permission (the so-called ‘tripartite test’). The rationale behind as of right is acquiescence. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit 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. Judging from Mr Marwick’s closing submissions the issue of an implicit licence is not pursued, nor does he suggest that the claimed use was, at any time, non-peaceable.

‘lawful sports and pastimes’

13. 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.
14. Difficulties arise where the predominant recreational use is that involving the use of paths (typically tracks crossing or running around the perimeter of 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] EWHC 12 (Ch) 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] and was also followed more recently in *R (Allaway) v Oxfordshire County Council* [2016] EWHC 2677 (Admin).

15. A helpful overview of the pre-*Allaway* cases is to be found in the village green 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.
16. *Dyfed County Council v Secretary of State for Wales* (1989) 59 P&CR 275 should also be noted. Here it was held that the use of a path for purposes ancillary to the recreational use of a lake did not give rise to a presumption of a public right of way. The principle appears to be that the use of paths cannot be excluded for TVG purposes where it is ancillary to LSP taking place on the land as a whole.
17. It is now tolerably clear in law that where a path or paths are merely being used for walking it would not normally count as it could not then be said that walkers were mainly using the land as a whole for general recreation. Such a state of affairs might arise, for instance, where, although some walkers were simply using the paths as part of a route from a point outside the land to another, the great majority were using the land for general recreation by walking on the paths whilst say their dogs ran all over the land and where others indulged in other forms of qualifying recreation elsewhere. The question at the end of the day is what a reasonable landowner would think from the totality of the walking and other recreation taking place on the land as a whole. If the position is ambiguous then it is correct in law that an inference should be drawn in favour of use which would indicate only an emergent right of way in which case it should be discounted. It would though be quite wrong to say that the use of paths should always be excluded and especially where such use happens to be integral to a pattern of much wider recreational use taking place across the land as a whole.

Use of a public right of way

18. The foregoing legal position is normally applicable to the treatment of emergent rights of way rather than to tracks which are already shown as public rights of way ('PROWs') in the Definitive Map and Statement for the area ('DMS'). The question is whether highway land is registrable as a matter of law? I consider this to be unlikely as qualifying use on highway land would be markedly constrained by the right of the public to use the land as a highway. This arises from *DPP v Jones* [1999] 2 WLR 625 which determined that the public can lawfully do anything reasonable on highway land provided it does not interfere with the public's right to pass and repass. In practice, most activities on highway land would not be qualifying LSP and what is left may either be too trivial to justify registration or else may amount to an interference with the highway and be unlawful and thus non-qualifying in any event. In my view, it would be legally correct for the CRA to proceed on the basis that the public's use of a PROW should be discounted as it cannot be classified as use which is 'as of right' but 'by right'. In this case the application land is crossed by four PROWs. I shall deal with this later.

'on the land'

19. The expression 'on the land' does not mean that the CRA has to look for evidence that every square foot of the land has been used for LSP. Rather it needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land has 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 County Council v Oxford City Council* [2004] Ch 253 at [92]-[95]). Where areas of the land are shown not to have been used for LSP (and the whole of the land is, in this instance, accessible to walkers) the question is whether the whole of the land is still registrable. The answer to this, in my view, is whether the unused areas can be said to be integral to the enjoyment of the land as a whole although it is clearly a question of fact and degree whether the existence of large tracts of unused land would justify registration. 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’

20. The relevant period in this case is 24 April 1997 to 24 April 2017 (i.e. the date when the application to register was delivered to the CRA).
21. 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 [70] Patten L.J said that where competing uses can accommodate one another then time does not cease to run. In that case substantial drainage works meant that the public were wholly excluded from part of the land for some 4 months.
22. On this application there is an issue of competing uses arising from the use of the land for agricultural purposes. As say that the pattern of use when agricultural use took place was a classic example of where public recreation and low-level agricultural uses co-existed happily side-by-side.
23. 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.

Procedural issues

24. 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 CRA to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.
25. 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 registration authority 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.
26. The only question for the registration authority 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.
27. 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.
28. The procedure in this instance is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

29. 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.
30. 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

31. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.
32. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.
33. 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.
34. 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.
35. Under both Acts development is therefore prevented.

Inquiry bundles and appendices

36. For the avoidance of doubt, references to documents within the bundles will be to A/1 and so on in the case of the applicants' documents, OBJ/1 and so

on in the case of the objector's documents and CRA/1 and so on in the case of documents within the CRA's bundle.

37. Accompanying this report are four appendices. Appendix 1 ('App/1') is a map of Hilperton village. The application land is edged black and forms the gap between the settlement and Elizabeth Way and Trowbridge Road. The land covers 12.8 acres and is crossed by the PROWs identified on Appendix 2 ('App/2'). App/2 pre-dates App/1 as Elizabeth Way is not shown on App/2. Building work on the road began sometime in 2014 and the work was evidently completed on 21 October 2015 (A/190). Having scrutinised the aerial images it seems plain enough that none of the application land was needed for the new road which cut through the north-east sides of the two fields shown on A/189 with roadside fencing introduced on either side of the new road.
38. The PROWs identified on App/2 (coloured blue) are classified on the DMS as (i) HILP1 (which runs along the north-east edge of the land ; (ii) HILP2 (which crosses the land from north to south); (iii) HILP3 (which runs from the north to mid-way along the road boundary and is described as having a width of 0.6m or 1.96 feet) and (iv) HILP4 (which crosses the land in the south-east corner to the same mid-way point along the road boundary as HILP3). HILP33 is coloured green on App/2 and is a bridleway. This track is known as Middle Lane.
39. The PROWs are described as having a width in each case of 0.6m or 1.96 feet. HILP1, HILP2 and HILP3 were added to the DMS in 1952 as footpaths and have remained unaltered since that time. The bridleway, HILP33, was added to the DMS at the same time and is also unaltered.
40. Appendix 3 ('App/3') comprises a very helpful list and accompanying plan provided by As which tells us where the 13 access points are around the perimeter of the land which are described under the list of gates. In this report it will be convenient if I refer to the various access points by the numbering shown on the plan in App/3.

41. Appendix 4 ('App/4') comprises another very useful batch of documents provided by As which tells us where their witnesses (44) live (in a handful of streets close to the application land) within the 24 households identified on the plan. The list also includes the number of years which each witness claims to have used the application land.

Description of the application land and surrounding area

42. I carried out an unaccompanied inspection of the application land (which is classified as Grade 1 agricultural land in the local development plan) on 21 August 2020. The weather was overcast and damp but with good visibility. I spent time walking around and across the land and within the two fields on the south-west side of Elizabeth Way. I also visited Middle Lane and the recreation ground which sits alongside the village hall which is a formal open space. I also took a large number of photos which has helped me to recall the site as I come to my report. I also drove around the village and am satisfied that I saw enough of the application land and the surrounding area.
43. I think I should begin by speaking about Hilperton village which is separated by a few fields (known as the Hilperton Gap) from the north-eastern edge of Trowbridge (see plan at App/2). South of Hilperton village are large areas of housing constructed in the late 1990s (or even later) including the housing estate known as Paxcroft Mead within which there are amenity spaces for public recreation. The most prominent landmark in the village is the parish church of St Michael and All Angels which can be seen (as 'PW') just off the Knapp on the plan at App/1 beyond which is an enclosed graveyard which adjoins the application land. If one refers to the plan at App/2 one sees that HILP1 runs along a narrow path along the southern side of the churchyard until you eventually arrive at small gate leading into the application land which is a rectangular-shaped meadow which runs in a south-westerly direction up a gentle slope to the Elizabeth Road boundary.
44. The location is an extremely tranquil one with a strong sense of openness. I can readily understand that those who support the case for registration are likely to have a strong desire for Hilperton village to retain its own identity and

separation from its larger urban neighbour. However these are matters of town planning with which I have no concern.

45. When inside the field I walked in a clockwise (or south-easterly) direction alongside the boundary where there is a worn track in the grass in the position shown on App/2, some 5m or thereabouts inside the boundary. The ground itself was flat and seemed to me to be an ideal place for recreational walking. I also observed a cross-field track following the alignment of HILP2 shown on App/2 which follows a gentle upslope gradient towards Elizabeth Way at its junction with what is known as the Fieldways roundabout. The eastern boundary comprises a field hedge until one comes upon various dwellings with prominent gates where shown on the plan at App/3 between which there was a mix of boundary features including a brick wall of some age and mesh fencing. The perimeter path takes you to the made-up track and gate leading into Trowbridge Road at point 9 on App/3.
46. At the south-eastern corner of the land the perimeter path continues (again running clockwise around the field) along its southern boundary with Trowbridge Road. The path is again some 5 yards out into the field and I noticed that in places along this boundary some trees had been planted by, I gather, the parish council which was mentioned in the oral evidence. I might add that in the south-east corner at point 9 on App/3 I did notice a track in the grass (which was not particularly worn) running upslope following roughly the same alignment for HILP4 on App/2 which leads to the access mid-way along the boundary with Elizabeth Road which I will deal with later.
47. The track in the grass running alongside the Trowbridge Road boundary was well worn. It follows the perimeter of the field and there is a well-worn spur off it near point 11 on App/3 which leads to a 5-bar field gate alongside a smaller gate for pedestrian use. In the road outside there is a pavement leading back into the village. Looking back into the field at point 11 on App/3 I could see a worn cross-field track running along the same alignment for HILP2 with a cross-field view of the church tower being a notable feature on the landscape.
48. Alongside the boundary with Elizabeth Way there was more than one perimeter path. There was a track quite close to the undergrowth at the outer

edge of the field and another well-worn track further out into the field. There was a post and rail fence alongside the road although the boundary was heavily overgrown the nearer one got to the corner of the field at point 11 on App/3. However, running on clockwise to point 13 there is a pedestrian gate with an area just outside the field, say 20 yards wide, on which a vehicle may park alongside the road. In fact, whilst I walking at this point a vehicle did park just outside the field in this area from which a dog walker emerged who came into the field whom I observed walked the whole way along HILP4 to point 9 on App/3 and back again to her parked car.

49. I should perhaps mention that point 12 on App/3 is not a current gate and is given to mark the location of the field gate which used to exist at this location before Elizabeth Way was built. This was the point where cattle used to pass between the adjoining fields and the ground still gently dips away where it had become worn over decades of previous usage by cattle.
50. Although beyond point 13 on App/3 a well-worn perimeter path runs on quite close up to the fencing installed by the road contractors there was another track, albeit much less worn, running around the perimeter further out into the field. Both tracks continued around the perimeter, one more worn than the other running closer into the dense hedgerow, with the other less worn track running much further out as it rounded the north-west corner of the field.
51. At point 1 on App/3 there is a somewhat run-down field gate with barbed-wire threaded along the top rung to prevent people clambering over the gate where the oral evidence suggested that it could be opened at the latch without too much difficulty (I did not try this) and was a well used point of access into the field. The oral evidence suggested that this gate (which leads into Middle Lane) is used by vehicles gaining access to the graveyard. If one refers to the plan at App/3 one can see that the outline of the field changes in this corner where it accommodates the graveyard which is surrounded by a tall planted hedgerow with a 5-bar gate for vehicular access shown at point 2 on App/3.
52. Having walked around the perimeter of the field I investigated the inner areas of the field. In doing this I walked over much of the field and it seemed plain enough to me that outside the above-mentioned tracks crossing the field

(which were consistent with the alignment of the PROWs shown on the plan at App/2) there was no other obvious wear and tear on the ground other than, in some places, marks consistent with the passage of vehicles which is unsurprising as I was told that the grass is normally cut for silage in June/July.

53. Before I close on my own inspection of the field I should mention that in the time I was there I must have seen in the region of say half a dozen dog walkers who, with the exception of the walker who had parked her car outside the gate at point 13 on App/3, walked around the edge of the field.
54. My own inspection of the field in August 2020 broadly mirrors the position shown in the images on *Google earth* in the years 2006 and 2014-18 where the predominant activity appears to be that of walking on the PROWs and around the perimeter of the field. My impression on my visit was that the PROWs were not as readily discernable on the ground as is likely to have been the case if, say, I had been walking on trodden tracks through longer grass whereas, at the time of my visit, the grass had only been cut a month or so before. Although I am unsure whether one can place too much reliance on the accuracy of the monthly dating shown on the online images, it seems to me that the aerial images for 2006 and 2018 clearly show tracks on the ground and my impression is that these images were probably taken when the grass was much longer than it was on my visit. I might add that I viewed all the images for the application land online which are very much clearer than the copies in the applicant's bundle. In the current context it is, I think, reasonable to speculate that there are going to be subtle shifts in the actual locations of the tracks from one year to the next depending upon where, on the ground, walking resumes once the grass has been cut each year and/or where muddy areas are bypassed by walkers.

Photographs

55. The applicant's bundle contained a number of photographs (the objector produced no photos). These are set out below along with the witnesses who produced them.

- (i) Two undated photographs of pre-school children playing in the field (Sonja Kotevska at A/62-63).
- (ii) Three photos taken on same day in 2002 of child, dog and adult in field (Mr Kehily at A/95).
- (iii) Single photo of Hart family taken on date unknown walking on snow in field (Heidi Hart at A/85).
- (iv) Two photos taken in June 2015 by Chris Hart showing longer grass and wild flowers at A/87 and enlarged at A/155-156).
- (v) Photo of field (assumed to be taken in February 2016) at gateway on point 9 on App/3 showing muddy start of HILP4 running upslope Andrew Pike at A/115).
- (vi) A batch of photos collected together at A/119-186. Those of interest include the following:
 - Six aerial photos of dog-walkers walking mainly outside the various tracks on same day in Feb/2018 (A120-125). Even though these photos post-date the qualifying period (which ended in April 2017) they are still relevant as they show (i) large sections of the perimeter track on its north-eastern and north-west sides; (ii) HILP1 running (in this instance as two tracks running parallel with one other along the field's north-east boundary) between points 3 and 9; (iii) HILP2 and HILP3 running out across the field from point 3 on App/3; (iv) the convergence of HILP3 and HILP4 at point 13 on App/3; and (v) the perimeter path where it runs up the boundary with Elizabeth Way.
 - A batch of photos taken in July/2017 (at A/126-132). Although these photos again post-date the qualifying period, they are still helpful in that they show the length and nature of the uncut meadow grass in various parts on the field before and after it was mowed. For instance, the photo at A/126 (4b) shows the worn perimeter path running alongside what must be Trowbridge Road with the uncut grass on either side. At A/127 (4c) one can see the length of the grass running

crossfield in the direction of the church. There is a useful photo at 6b showing a group of dog-walkers walking through unbaled grass cuttings towards point 3 on App/3 on what I suspect is roughly the same alignment as HILP2. At A/131 we have a 1993 photo (which pre-dates the start of the qualifying period in 1997) showing 6 cows, an adult and a child on the southern side of the field.

- At A/133 we have a couple throwing a frisbee to one another in May 2016. They appear to be standing on a worn track in the approximate position of HILP1 on App/2.
- At A/135-142 we have an undated batch of photos provided by Lesley House showing a snowbound field, children and their parents on the field in warmer weather and a particularly interesting photo at A/138 showing the use of worn tracks and uncut meadow grass on either side. The field is obviously rich in buttercups. This photo can be viewed alongside the two photos at A/153 which are likely to have been taken at the same time by Rob Coles in March 2013.
- At A/145-146 we have children playing in the snow in Feb/2009. At A/146 (bottom) we have a walker using a section of worn grass and at A/147-152 we have photos of adults and children in the snow in 2009 and 2010.
- At A/154 there is a photo of Maggie Coles with her two dogs on the north-eastern boundary of the field in 2012 in the approximate position of HILP1 shown on App/2.
- At A/157-174 we have photos of children and adults again playing in the snow in 2009-2010. Within this batch are photos of J Clark's dogs (A/163 & 166).
- The batch of photos at A/175 onwards includes photos taken in 2018, 2019 and 2020 which again post-date the end of the qualifying period and are no doubt intended to be indicative of previous use. Of some

interest, however, is (i) at A/178 a photo of a group of walkers taken sometime in 2017 by Heidi Hart stood on the perimeter path alongside Elizabeth Way; (ii) at A/177 a photo of a model aeroplane also taken by Heidi Hart in March 2017 showing, in the foreground, a worn path running across the field in the approximate position of HILP1 and is consistent with the alignment of the same worn path I saw on my own viewing which is still a few yards out from the boundary (the inner path close to the boundary shown on A/121 was barely noticeable on my visit); (iii) at A/186 there is a photo of a group of people with dogs taken by Chris Hart on 15 June 2020 which, in the foreground, shows a worn track in what could well be the approximate position on the ground of HILP1; and (iv) at A/183 there is another photo taken by Chris Hart on 21 June 2020 showing what looks like a child on a miniature motor bike riding across the field within a worn section of grass with unmown and much taller grass on either side.

56. The photos are helpful when it comes to the length of the unmown grass at the height of the growing season which can, I suspect, grow somewhere in the region 1-2 feet and would generally be too long to walk through in comfort (especially when there were trodden tracks nearby) although a dog could certainly chase through it (see A/126-127, A/130-131, A/138, A/140, A/142, A/153, A/155-156 and 183). I also accept that the height of the grass in the growing season would not be consistent across the whole of the field and would probably be lower on the periphery of the field (see A/126, A/138, A/154 and A/163). Judging from the photos, where the grass is long and unfit for walking users very probably stick to the established tracks where the grass is more convenient for walking (see A/126 (photo 4b), A/138, A/153, A/183 or even the picture of J Clark's dog in 2015 at A/163 which is walking quite close to App/3 where one can see that even where the grass is not especially long there is still a worn track curving around the corner of the field in a north-easterly direction along the Trowbridge Road boundary). It is undoubtedly true, however, that there are photos of instances of recreational use taking place outside the established tracks such as during the snow or before the start of the growing season when the height of the grass makes

walking much easier across the whole of the field although it is to be expected that where the established tracks become muddy pedestrians will normally walk outside them.

The objectors evidence

The written evidence

57. I shall begin with the evidence of the late Roger Pike who died in December 2017. Mr Pike used to own the application land (in fact the Pike family owned around 500 acres in and around Hilperton village, including the land on which the Paxcroft Mead development was built) which is now vested in his two daughters, Elizabeth Pike and Mrs Carolyn Parkinson, both of whom gave oral and written evidence objecting to the application.
58. The late Mr Pike's statement is at OBJ/26 and is dated 2 October 2017. Until he retired Mr Pike was a local dairy farmer. He confirms that in the period 1990-2014 the application land was being used by the late Richard Fyfe for grazing livestock during the summer and autumn seasons. Following the construction of Elizabeth Way he says that Mr Fyfe (who I understand died in 2018) used the land only for silage.
59. Mr Pike accepts that dog-walkers have been using the land. He makes the point that 'cattle and dogs do not mix very well' such that there would have been around four months each year where dogs were not being walked on the land. He says that even if dog walkers were using the land at the same time as cattle were in the field they would not have been able to roam where they wanted.
60. Mr Pike agrees that he allowed grave diggers access to the graveyard with their equipment via the gate on Middle Lane (point 1 on App/3) and for camping and 'other extracurricular activities' by school pupils at Hilperton School on special occasions although he denies that the school would have gone onto the land 'whenever they like without running it past me first'.
61. The late Richard Fyfe's statement is dated 2 October 2017 and will be found at OBJ/15. Mr Fyfe deals with the arrangements which enabled him to graze

the land and to mow it for silage or a hay crop. He produces the grass keep agreements for the seasons in 2011-2014 which he says are just some of the agreements which he had with Mr Pike over the years in 'the 27 years or so' he used the land. He says that he mowed the land for silage in around June and grazed livestock there for the rest of the time (in the case of the agreements between 2011-2014, the right to graze endured between 1 March and the 31 December which is likely to have been the norm whilst Mr Fyfe used the land until the end of 2014. The last of the three grass keep agreements produced was made with Mr Pike and his two daughters who by then were joint owners of the land – in fact the 2014 agreement was more costly and extended to 23.56 hectares whereas the earlier agreements had involved only the application land which extended to 12.87 acres. Mr Fyfe says that with Elizabeth Way splitting the land it was no longer convenient to use the land for grazing although he continued to take a cut of silage up to 2017 when he retired from farming.

62. There follows at OBJ/121 a statement from a Richard Vigar who farmed locally and whose firm J.H Vigar & Son took a grazing licence from the late Mr Pike for a period of 9 months ending on 30 November 2017. It is to be observed that he also took a hay crop and a cut of silage in the 2017 growing season.

The oral evidence

63. Richard Vigar's daughter, Jacqui Browne, gave oral and written evidence. Her statement is dated 10 September 2020 and will be found at OBJ/11. She confirmed that the Vigar family took over the land under an agreement which lasted between 1 May to 30 November 2017 and which has continued to date. The grass is cut for hay and silage in June/July and is not used for grazing. Mrs Browne says that she only visits the field a few times a year before it is cut. In her statement she says that she observed people walking on the paths through the field rather than through the longer grass. She says that the grass 'is far from ideal' and one of the reasons for this is that the field is used by 'a lot of dog walkers'.

64. In her oral evidence Mrs Browne said (and she was, I think, speaking in general terms) that dog-walkers follow paths, where there may be no grass, even though their dogs may be off the lead. In the case of the application land she said that the paths would have been 'permanently obvious to walkers any day in the year as the grass is flattened by frequent walking'. She said that you could not avoid seeing 'trodden footpaths around the field'. The crop (be it hay or silage) would have been 'between' the paths was not of good quality and it was not as if it was a 'new ley' (i.e. land put down to grass for one or more years as opposed to permanent pasture). She said that there was no grass to cut on the tracks within the field.
65. Mrs Browne said that there were always dog walkers in the field on her infrequent visits. Dog-mess had also been a concern (although she herself had not seen any) with the result that none of the silage cut in the field is fed to their cattle within 6 months of being baled.
66. I accept the evidence of Mrs Browne who was a conscientious witness, although her own observations of people using the land were necessarily limited as her visits were only occasional. The thrust of her evidence, however, was that the tracks within and circling the field were flattened ground indicating where regular walking must have been taking place.
67. The firm of R.H & I.R Craddock Ltd were also initial objectors to the application to register. A letter of objection from this dated 31 August 2017 will be found at OBJ/28. In the event Mr I.H Craddock (who was born in the village in 1961) gave oral evidence (R.H Craddock is his father). The Craddock's have a farm in Hilperton and Mr Craddock is familiar with the application land. The Craddock objection is based on the fact that any use of the application land by local inhabitants is limited to the four PROWs.
68. The Craddock land is extensive and includes the arable and pasture beyond Middle Lane along with other land on the south-east side of Hilperton to the north of Devizes Road. Mr Craddock said that he only walked with his own dog on the application land 'once or twice'. Indeed since 1997 he has lived in Hill Street which is not especially close to the land.

69. Mr Craddock accepted that a lot of (as he put it) 'dog activity' takes place on the application land although he also said that there are 'also a lot of footpaths, so it's a good place to walk a dog'. Mr Craddock is aware of the importance of footpaths as he says that he marks out the paths on the Craddock land once a crop has been sown. One can see from the plan at App/2 that HILP5 and HILP54 crosses arable land belonging to the Craddocks (see also the 2014 image from *Google earth* at A/189). He also says that he is 'very quick to jump on anybody not walking in the right place'.
70. In dealing in chief with what he observed taking place on the application land, Mr Craddock accepted that he had seen dog walkers walking between the PROWs. When cross-examined about this he said that the dogs he had seen 'were wandering freely across the land'. In terms of cattle on the land, he said that after the silage has been cut there may be a batch of up to 30 cattle on the land.
71. I find that Mr Craddock was a genuine witness. What I think he probably meant when he gave evidence in chief about dog walkers walking between the PROWs was that he saw dogs wandering all over the field. This is what he claimed in cross-examination. I doubt this matters very much as I find that Mr Craddock was not a regular visitor to the application land and that his observations of dog-walking were limited to what he saw on his occasional visits to the land. He is, I think, unlikely to have gathered very much about where, precisely, people were walking on the land if he was relying solely on his view of the application land when looking across from the Craddock land.
72. Elizabeth Pike gave oral and written evidence. Her statement will be found at OBJ/10.
73. Ms Pike told the inquiry that she was brought up in Hilperton. She and her sister left the village in the 1990s. In her case she returned home to visit her parents on a very regular basis (I think she lived firstly in Melksham before moving to Chippenham). In their retirement in the 1990s her parents, having farmed in the village at Church Farm, moved to live in Nursery Close which is very close to the application land. Ms Pike said that she visited her parents most weeks. Although her mother died in 1999 she continued seeing her

father regularly, certainly after 2012-13 when he became more infirm, until his death in December 2017.

74. Ms Pike has always had a dog and regularly took it for walk on the application land when she visited her parents. She says that she saw dog walkers in the field having accessed the land at any one of points marked 1, 3 and 9 on the plan at App/3. She says that she used the perimeter path. She says that in general people walked on the paths within the field. She says there were more dog walkers on the field after the development of the Paxcroft Mead estate (see location plan at App/4 – she said that walkers from the estate entered the field at point 11 on the plan at App/3 whereas villagers whom she knew would usually enter the field at points 3 and 9).
75. Ms Pike says that her father paid for, as I understand it, a number of the pedestrian swing gates and 5-bar gates which were kept locked. She particularly mentioned the 5-bar gates off Middle Lane and into the graveyard where a key/keys was/were kept by the Parish Council and/or the contractors in order to facilitate the digging of graves. She also mentioned instances of overflow parking (involving as many as 100 cars) permitted by her father within the field at times near to the gate at point 1 on App/3 when there was what she described as ‘Open House’ at Hilperon House which is located just in front of the church. I doubt whether this happened very often as she mentioned such events occurring only in June 2015/June 2016. I also gather from her oral evidence that pre-arranged parking within the field also took place from time to time in the case of weddings and funerals although in view of her cross-examination replies it seems probable that this would have occurred, as she put it, ‘back in the day’ or in the 1980s/90s rather than in recent years. She says that her father was, as she again puts it, ‘a very giving person to the village’ and he always gave his consent to his field being used for these purposes. (It is worth noting that Ernest Clark, as Chair of the Parish Council, said that he had no recollection of the field being used for car parking at the time of weddings or funerals during the qualifying period from which it may be reasonable to infer that when she said ‘back in the day’ Ms Pike probably meant before 1997.)

76. Ms Pike says that her father was a quietly-spoken man who did not look for trouble. She doubted whether he would ever ask someone to stick to the PROWs crossing his land if they were walking outside these paths. She said that he just 'let things go – he was liked in the village'.
77. In relation to the grazing cattle, Ms Pike said that before Elizabeth Road came (and, as already indicated, the road works severed the application land from the two fields which adjoined it on its south-western side (A/187)) cattle would move around between these fields once the silage had been cut.
78. Ms Pike was a conscientious witness. She not only visited the field regularly but also had a very clear recollection of what she observed when in the field and generally gave her evidence with great care.
79. Carolyn Parkinson also gave written and oral evidence. Her statement is at A/9. Mrs Parkinson left Hilperton more than 30 years ago. Mrs Parkinson lived locally for a while before moving to the Isle of Wight in 2001 where she still lives. She said that she visited her father once a month and would generally stay for a couple of days. On her visits home she often walked her dog in the field if he had accompanied her on the trip. If she met up with her sister they would walk the land together. She said that unless on a lead the dogs in the field would run off with their owners following them. She also said that most people walked around the outside of the field unless they wanted to walk further in which case they walked across the field. Mrs Parkinson gave clear evidence that 'most people stuck to the tracks', meaning on the PROWs or the perimeter path.
80. Although not as regular a visitor to the field as her sister I find that Mrs Parkinson was, like her sister, a genuine witness who was clear in her evidence that walkers in the field kept mainly to the established tracks.
81. Before leaving the objectors' evidence I also take into account the letter of objection dated 30 August 2017 which was sent in by Mrs Rosemary Sims of Hilperton Marsh who complains (in effect) (i) there is already adequate amenity space in the village; (ii) the field is not of high value in ecological terms; (iii) the field will not be maintained as well as it is at the present time

(presumably she means if it is registered as a TVG); and (iv) the only reason the land has been selected for possible registration is that it will at least limit any development taking place within the Hilperton Gap.

The applicant's evidence

The oral evidence

82. Nicola Walker was the applicant's first witness. Mrs Walker's statements will be found at A/29 (17 August 2020) and A/89 (undated). Mrs Walker lives at 16 Church Street, Hilperton. This address is at number 16 on the plan at App/4. Mrs Walker has lived in the village since 2007 and has been a dog walker in the field daily since 2008.
83. In her 2020 statement she says that she has walked her 'dog daily around the field for his health and mine'. She mentions 'a well trodden track around the field, at a distance of five or more meters from the edge in places'. When cross-examined she said that most walkers used this path. She says that there are a significant number of dog walkers using the field even when cattle have been kept there. She thought that there was usually only around a 'dozen or so' cattle in the field at any one time and that cattle would have been in the field (and I understood her to mean annually – no doubt after the silage had been cut in June/July) for some '8-12 weeks'. She said that the cattle were not particularly intrusive and that they moved around 'as a herd' and it was easy to walk around them or to change direction as necessary to avoid encountering them. However whenever cattle were in the field she said that she kept her dog on the lead.
84. Mrs Walker said that she mainly accessed the field via the gate at point 3 on App/3. Only rarely would she walk through into the adjoining fields before Elizabeth Way was built. When on the field with her dog she says that she followed the path going round the field and that she rarely used the cross-field paths. She says she has made many new friends on the field over the years and meets up with other dog-walkers using the field at the same time.
85. Mrs Walker's step-son was only 6 when she moved to Hilperton and, usually in the summer, they played ball games on the field. In the winter when it

snowed they built snowmen (I have no precise details as to when the field would have been covered in snow although there are photos of snow in 2009-10 although Mrs Walker conceded that it would not have been possible to build a snowman every year). The playing of games would have taken place outside the tracks mainly at the northern end of the field.

86. Mrs Walker stated that the length of the grass did not affect her use of the field as there was always 'a very defined track around the perimeter of the field'. There were also people 'crossing or walking a direct path across the field without dogs' (and she agreed that there are a number of PROWs within Hilperton Gap – for instance, one can see from the plan at App/2 that HILP3 continues right into Trowbridge via TROW47). She considers the use of the PROWs to have reduced since Elizabeth Way was built which, as I understand her evidence, means that most people using the field are using it as a destination for recreation.
87. In chief Mrs Walker dealt with other activities observed by her on the field such as people picnicking, sunbathing or just sitting on the field, frisbee throwing and ball games. The clear impression I got from Mrs Walker's evidence is that none of these activities took place with any frequency and even then occurred only in small pockets of the field, usually around the periphery when the grass was growing or in the central areas after it had been cut. Indeed, when cross-examined she accepted that whereas the PROWs were used regularly by walkers (with or without dogs) it was only occasionally that other recreational activities take place on the field. She noted that organised sports took place at the recreation ground (as a member of the Village Hall Committee until 2010 Mrs Walker would have been aware of what took place at the recreation ground and how it was run).
88. Mrs Walker was a genuine witness and I accept her evidence. Her evidence was clearly to the effect that the field is mainly used by dog walkers who walk on the established path running around the outside of the field. It was also her evidence that other recreational activity outside the various paths would have taken place only occasionally.

89. The next oral witness was Tasha Harvey who, until a couple of years ago, lived at 3 Nursery Close which backs onto the field to which access is obtained via its own gate (see point 6 on the plan at App/4). She now lives at Victoria Road in Trowbridge which appears to be only a short walk from Middle Lane. Her statements are at A/33-36.
90. Ms Harvey was born in Hilperton in 1996 (at a time when the family were living at an address at Hill Street in Hilperton). She says that the application land 'has been part of my life for as long as I can remember'. She mentions playing in the snow with her sister and friends, flying kites, games of rounders or playing hide and seek with friends who lived locally. One can imagine how simple it would have been for Ms. Harvey, when only a small child, to play in the field within such a short distance of the back gate to her home. She says that as she became more independent she would use the entire field, wandering off the paths picking flowers, flying her kite, playing in the snow or taking the dogs of neighbours for a walk (she walked a number of dogs belonging to various people on the field – she said that she walked on and off the paths). When she was old enough she says she walked into Trowbridge across the fields before Elizabeth Way was built.
91. In her oral evidence she recalls playing rounders in the field between the ages of 5/6 until she was 16 although when asked about this it never occurred more than around 7-8 times a year and would have been less often after the age of 14 when her main playmates would have been her friends at her secondary school in Bradford-on-Avon. It seems that the area in which she played rounders would have been outside her home although her flower-picking took her further into the field. She says that she gave cattle a wide berth whenever they were in the field. They never prevented her from being able to use the field for whatever reason she wanted, nor did the grass-cutting in the summer.
92. Ms Harvey said that she used the field for walks with or without her neighbours' dogs. She did though observe a number of dog-walkers using the field either on the paths or walking outside of them for different reasons such as the presence of grazing cattle which she says numbered between

15-20 max. She said that the field was mainly used by dog-walkers in her time at Nursery Close. Of some significance she said that any other activity taking place in the field would have depended on the grass by which, I understand, she meant the length of the grass.

93. Although I find that Ms Harvey was a genuine witness I consider it to have been more likely than not that her use of the field would only have been regular in the period when she was old enough to play unsupervised (such as when she was playing rounders near her back gate) at a time when she was living in Nursery Close and only then when she was still attending the local primary school. At other times, I suspect that the frequency of her use of the field would have been limited mainly to those occasions when she walked dogs belonging to others around the circular path although I do not doubt that the dogs she was walking ran off the lead to various parts of the field and that she would have run after them if she felt inclined to play with them. In my view, it is probable that when walking in the field she kept mainly to the paths. Nor am I suggesting that she did not roam around the whole of the field when picking flowers. It is just that I find that this activity probably happened only occasionally when she was a small child, rather like her kite-flying, building dens and playing hide and seek or even playing in the snow at those times in the qualifying period when there was enough snow on the ground.
94. Robert Coles lived at 4 Nursery Close between 1978 and April 2016 when the property was sold to the Hart family. This is the charming property shown in the remarkable photo at A/148 showing a perfect rainbow overhead. One can see the gate into the field in this photo. His statement is at A/37. It is worthy of note that until Nursery Close was developed this property (which used to have a Church Road address) enjoyed no vehicular access for which he had to obtain consent from Mr Pike to use the access off Trowbridge Road at point 10 on the plan at App/3 (which has fallen into disuse but still affords access to 4 Nursery Close if required).
95. Mr Coles and his wife have two children who were aged 15 (boy) and 13 (girl) in 1997. Mr Coles frankly admitted that his children probably stopped

using the field as a play area when they were aged around 14. In the period 1990-2015 the family had two dogs who were walked daily in the field. He was asked about his regular walking route and he said that it would have been around the perimeter of the field (they walked further afield when the dogs were younger). The dogs were usually off the lead unless there was cattle in the field in which case they would walk around them. Sometimes he would see someone he knew and would walk over to speak to them.

96. Mr Coles said that most people walked around the field although there were times when this was not the case and he cited the photo at A/148 which was taken further into the field or when kicking a ball about with his son Michael who was 15 in 1997 and which I doubt would have been a regular occurrence in the qualifying period. Mr Coles also mentioned sunbathing or people kicking a ball around in the summer before the grass got too long. There is also the photo of Mrs Coles sitting on the ground with her dogs in 2012 which shows them in the field just outside HILP1. The second photo is another 'in the field' photo showing a local mother and Mr Coles's daughter playing with a cow not far from their back gate but still further into the field than HILP1.
97. Although Mr Coles accepted that there was more walking in the field with the expansion of the Paxcroft Mead development he said that people (and I took him to mean dog walkers) 'always walked around the field'. He said that the field was mainly used by dog walkers. He also mentioned kite flying, in which his own children indulged, which he observed several times a year although he did not give any further details about this. Although in his statement Mr Coles mentioned watching visiting hot air balloons, helicopter landings and kiteboarding these are most unlikely to count as qualifying activities.
98. I accept the evidence given by Mr Coles who did his utmost to assist the inquiry. It is plain from his evidence that the field was mainly used by dog walkers who walked around the field. Whilst it is true that parts of the field would have been used for other recreational activities, the impression I gained from his evidence is that the field was mainly used by dog walkers. It was obviously a great blessing for the Coles' family to have had such ready

access to this field. It was obviously a safe haven for the Coles' children but, as Mr Coles recognised, by the start of the qualifying period (1997) his children were of an age when they were, or were soon to become, interested in other things rather than playing around in a field with the limited attractions which this field has for young children.

99. Sonja Kotevska currently lives in the property at point 19 on App/4 (4 Copper Beeches) which is close to the Trowbridge Road entry at point 9 on the plan at App/3. She has lived in the village since 1990. Her statements will be found at A/43-49. From around 2008 Ms Kotevska has been the Lead Practitioner/Manager of St Michael's Pre-School which is based at the Village Hall at Whadden Lane. She produced the photos of children running around the field at A/46-47.
100. Ms Kotevska said that from sometime in the 1990s (and continuing) children from the Pre-School (mainly in the warmer weather) visited the field in small groups for nature studies/recreation (up to around 20 times max each year and involving groups of 14 max with 4 accompanying adults). She said that the children (3/4 year olds) would have been on the field for around half an hour at a time. She said that she had accompanied the children to the field on these nature/recreation trips even before she became Lead Practitioner/Manager of the Pre-School although she doubted whether she would have accompanied the children to the field as early as 1997 although her predecessor would have done so.
101. Ms Kotevska also gave evidence of her own walking on the field (after 1998), once or twice a day, with dogs (sometimes four at a time) belonging to others depending on whose dog she was walking. She says that she usually walked across the field and did not stick to the paths. Sometimes she had to walk outside a path in order to bypass waterlogged areas (this was a reference to the south-east side of the field). She says that she also walked in the centre of the field to avoid groups walking around the outside path. She also said that other dog-walkers walked outside the paths. She also said this in chief: 'When I'm walking I see people walking off the outside path most of the time'. I have not overlooked her written evidence that when using the field she has

also seen (as she puts it) 'villagers using the whole field to take exercise, flying kites, dog walkers and joggers using the whole field'.

102. When cross-examined Ms Kotevska said that the Pre-School had not asked for permission to use the field although there were risk assessments in place (which she did not produce). Although Ms Kotevska accepted that she had met the late Roger Pike in the village she denied that she had ever sought permission from him in relation to the Pre-School's use of the field for the purposes of their nature/recreation trips.
103. I was concerned by elements of Ms Kotevska's evidence. Firstly, I find it hard to accept that permission was not obtained by the Pre-School at some point for children as young as this to be allowed to use the field whilst attending Pre-School. A risk assessment would be the norm in a situation such as this which, as it seems to me, is bound to have raised the question of landowner consent. It might also have asked whether the landowner had insurance cover in place for normal accidental risks. It seems to me that a visit to a field used for agricultural purposes (albeit only occasionally) by upwards of around 14 children aged between say 3-4 along with 4 supervising adults (a trip of some distance for such young children and along busy roads), would not have been a stroll in the park but an undertaking of some magnitude for a Pre-School and doubtless took a great deal of organisation and very probably also required parental consent. Ms Kotevska did not say that she had looked through the available papers or had spoken to her predecessor to ask whether there had in fact been an initial permission (which I am sure Mr Pike would have given) which I think she ought to have done in view of the importance of this evidence. All she said was that she had never asked Mr Pike for permission (even though she accepts that she had met him in the village). In my view, this is not a satisfactory answer. Of course, if he had ever given permission then the use of this field by these children and the accompanying adults who lived in the village would not be qualifying use.
104. The second concern I have about Ms Kotevska's evidence is that she said that whenever she was on the field she saw 'people walking off the outside path most of the time'. This was said by her in the context of her other

evidence that she had seen other dog-walkers walking outside the paths. This is important evidence. What she was saying was that dog-walkers did not stick to the paths which is not consistent with the weight of the evidence from other witnesses which is to the effect that they usually did. In the circumstances, and especially in light of her evidence on the permission point, it is, with regret, that I am bound to advise the CRA that it should not attach great weight to the evidence of Ms Kotevska.

105. Ernest Clark is Chair of Hilperton Parish Council. He lives close to the field at point 7 on the plan at App/4. Mr Clark is also a District and County Councillor for the Hilperton ward. His written evidence is at A/39-42 and at 81 (I have also noted his wife's statement at A/98). He has lived in the village since 1992 and within a short time he became a regular visitor to the field, initially (weather permitting) with his children when they were young and, since 2002, as a dog-walker (he has had two dogs since 2006 which have been walked by he and his wife). He has three children who were aged under 10 in 1997, two of whom (now living out of the area) have provided supporting statements at A/97 and at A/100.
106. His written evidence is to the effect that he and the children used the whole of the field for recreation and not just the PROWs. He also speaks of what it was like before Elizabeth Way was built when he was a regular user of the adjoining field to the south-west where his dogs continued to roam. He also says that the grass cutting does not hinder use of the field as it takes only a short period of time to cut and bale the grass and he avoids the vehicles involved in this work if he is using the field at the same time. The position was similar when cattle were grazing in the field (and they were never there for extended periods) although he kept his dogs on their leads and kept away from the cattle. Mr Clark also spoke of children 'running around the field', joggers and others picnicking in the field or sitting around in collapsible chairs. He concludes his written evidence by saying that on most of his visits to the field there was usually one other walker (usually with a dog) using the field but 'not on any of the public footpaths'.

107. In his oral evidence Mr Clark said that his children walked with him around the perimeter as 'the hedges were more interesting'. He also said that the exact route of the circular path 'would vary' and he instanced the introduction of new trees planted in around 2010 which would have affected the location of the perimeter path alongside Trowbridge Road which is now further into the field than used to be the case. The position was the same in relation to what he called the 'trodden paths around the field' which he said were not in the same place every year although he conceded that they were 'roughly' in the same place. He claimed that he was not 'a great user of the ways'.
108. It emerged that he took longer walks if (as he put it) he was 'feeling more energetic' (which I took to mean beyond the field into the adjoining fields before Elizabeth Way was built) although he said that he now walked 'one or two laps' of the field (which he explained in cross-examination meant walking around the field twice) although he paid 'no regard' to the trodden paths. As previously indicated in the case of Ms Pike's evidence, Mr Clark could not recall the field being used for parking during funerals and weddings during the qualifying period and I accept his evidence about this.
109. When in chief he was asked where he walked in the field he said that he walked both on and off the 'trodden paths'. In the case of others, he observed that some people used the perimeter path whereas others (like himself) followed their dogs 'rather than a track on the ground'. He did though accept that the PROWs were 'being used but not by a lot of people'.
110. When cross-examined Mr Clark said that children would have played outside the perimeter path. He also explained that his routine when going for a walk in the field started with entry at point 9 on App/3. He then let the dogs off the lead and followed them, aiming to intercept them as and where he could. He said that he did walk on part of the perimeter path 'when [he] needed to do so'.
111. When asked by me to explain his reference (in chief) about walking 'laps' of the field Mr Clark said that, having entered the field (off Trowbridge Road) at point 9 he walked on it in (as he put it) a 'haphazard way following the dogs

around, sometimes on the permitted path but mostly off it, but where I go is not governed by the presence of paths or where they take me'.

112. The evidence of Mr Clark has troubled me as I think that he subconsciously exaggerated the extent to which he walked outside the trodden paths, not least the perimeter path, which is where one might reasonably expect him to walk, or mainly walk, if, as he claimed, he walked 'one or two laps' of the field. It also seems to me that it is inherently unlikely that he regularly walked all over the field until the grass was cut in June/July as the grass was probably too long to make it worth the effort when there were trodden tracks all around the field.
113. Mrs Hart and her family moved to the village in 2007 living initially at 221 Church Street (between 8/18 on App/4) and, since 2016, alongside the field at 4 Nursery Close. Her statements are at A/55-57. She and her family have used the field throughout their time in the village. Her daughter Phoebe learned to ride her bike on the field. Mrs Hart was happy to allow her children to play unsupervised in the field with their large group of friends in the village by the time of their final year at primary school. When living at Church Street she would normally wander down to the field to check up on them and/or to get them home for their tea. Mrs Hart says that the children played in most of the field although, as it seems to me, she cannot really cannot be sure where her children would have played on the field if she was not with them.
114. The family have had a dog since 2009 (one following the death of another) and (weather permitting) she, along with the children when they were younger, walked with the dog daily on the field with the dog off the lead unless, that is, there were cattle grazing in the field (she said that she only used the field occasionally before they got a dog in 2009). She says it was a case of following close after her dog so that she could scoop up any mess. She says that if she was meeting friends she might only walk on the trodden paths. Indeed she said that if she saw people she knew walking on the perimeter path she would do likewise from which I infer that this is where her dog walking friends mainly walked when in the field. At other times, when walking on her own or with the children, she said that they did not stick to the

paths and (as she put it) walked 'randomly'. She said that she has never 'stuck to the track' which I take to be a reference to the perimeter path. She says that on a normal day (since 2016) as many as 100 dogs use the field – 'They all use it differently and randomly'. Mrs Hart described it as a 'massive amount of dog-walking'. Although at one time she counted as many as 15 separate families using the field, she agreed that the field was predominantly used by dog-walkers who, as she said, wandered everywhere although people do go 'round the outside'. Mrs Hart also said that the location of the tracks might shift because of mud.

115. Mrs Hart did not consider that the length of the grass impeded her use of the whole of the field. She said that the grass was not long for very much of the year. Children also used to cycle on the field and she has regularly seen people flying kites ('dozens of times') and on one occasion I think she even saw someone kite-surfing whose identity is unknown.
116. Mrs Hart has taken a leading role in the application to register. It was she who signed the statutory declaration in support. She canvassed support and asked for statements from people in the village and the application came to be made in the name of the 'Church Field Friends'. She also corrected typos in the helpful online survey usage document (August 2020) at A/193-202 (which generated 93 participants and additional comments from 43 individuals) where we were told Alison Hoskins on A/196 should in fact be 6 and not 20 years use and Adam Ingham on A/195 should be 24 and not 88 years. I am quite satisfied that the application and evidence-gathering process was undertaken by Mrs Hart and her colleagues with great care and with all due propriety.
117. Mrs Hart is undoubtedly very committed to the application to register. However, it was my impression that she, in common with Mr Clark, subconsciously exaggerated the extent to which she walked outside the established paths across and around the field. For instance, she claimed that her children used the whole of the field even when she was not with them. Further, her evidence that she might only walk on the trodden paths if she was meeting up with friends or that if she saw people she knew walking on

the perimeter path she would join them is not entirely credible. It seems to me that she probably only gave such evidence in order to stress how little she used the established paths. I also doubted her evidence that the growing grass did not restrict her use of the whole field when clearly it must have done and for months at a time during the growing season. Although her evidence clearly demonstrates that a large number of people in the village used the field it is not, in my view, compelling when it comes to the central issue on this application, namely as to exactly what parts of the field she and others used when they were there walking with or without dogs.

118. Graham Kehily has since 1998 lived at 109 Church Street which is at point 5 on App/4. His statement will be found at A/53. He has two children, boys, who were born in 1999 and in 2002. The family had a dog between 1999-2013 and in his statement Mr Kehily said that he used the field extensively for walking the dog and that his sons often came with him. He said they would walk across the field and that the dog would run around and the children played ball games. He said cattle (which he put at around 30-40 cows – although he said that cattle had not been there for several years) would have been in the field for ‘a few weeks’ at a time when the grass would be trampled down. Mr Kehily said that the tracks are more noticeable now than they were 10-15 years ago although when cross-examined he said that he was not ‘conscious’ of the tracks going back to 2000.
119. Mr Kehily says that he used the field as an ‘open space’ and that he did not stick to the path, playing ball games with his children (which he said was ‘a weekend thing’) within, as I understood him, the wider area outside the tracks. It appears that his sons left the village in 2005 although the dog stayed with him. This change meant that dog walking reduced to around 2-3 times a week whereas his wife had taken the dog out more often than this. He also said he jogged around the field in the period 2007-14.
120. In cross-examination Mr Kehily said that there had been ‘a perimeter track at most times’. It was, he said, largely where he ran when he was jogging in the field. When taking the dog out he reiterated that he walked across the middle of the field, outside the tracks, to get to the other side of the field. He was not

especially clear what he did once he had walked across the field. As he put it, 'It's been let's go for a walk to the field'.

121. Although Mr Kehily was a genuine witness his evidence was not as detailed as it might have been. The impression I get is that for a limited period before 2005 he and his wife walked the dog in the field and for an even shorter time whilst his sons were old enough to play ball games, quite possibly around the periphery of the field seeing as this is a very large field and the boys were still very small even by 2005 (certainly Shaun who was born in 2002 whereas his brother was still only 6 in 2005). After 2005 Mr Kehily says he walked the dog some 2-3 times a week in the field until 2013, or perhaps earlier than this as the dog would have been getting on in years by the time it no doubt died in 2013 and the field would have been a longish walk for an old dog. Other than dog walking after 2005, Mr Kehily jogged around the perimeter path between 2007-14. It seems to me that, reduced to its essentials, Mr Kehily's evidence is probably of some value to the applicant's case but it does not greatly help to deal with one of the main issues on this application which is where local people generally walked when they used the field for informal recreation. I am also puzzled by Mr Kehily's assertion, when cross-examined, that he was not 'conscious' of the tracks going back to 2000 whereas it is probable that there would have been there. One only has to look at the images on *Google earth* in 2002 and 2006 to see where established tracks ran on the ground at this early stage in the application timeline although they were admittedly less clear on the ground in 2002 than they were in 2006, at least in the photo but I suspect that they would have been clear enough in 2002 to anyone walking across or around the land.

Applicant's documents

122. I have read the documentation which accompanied the application and I have also read the written evidence contained in the applicant's inquiry bundle. I have already dealt with the photos and the appendices speak for themselves. I have also looked again at the note handed in by Mr Waller (OBJ/218-227) entitled: 'Note on Paxcroft Mead Development' which has a number of useful documents attached to it. This document is intended to

show that the new development (which was built out in three phases in the late 1990s (or even later) following an outline grant obtained in 1995) will have led to an increase in the use of the application land. There is a plan showing the Hilperton parish boundary (which was altered in 2017 following a boundary review) which now aligns with the A361.

123. In my directions I asked the applicant to provide me with a summary of their user evidence. In the event, at A/203-211, I was provided with an extremely helpful schedule containing the names of 41 witnesses with the added headings: (i) *Period of use in years*; (ii) *Years of use in rel. period*; (iii) *Nature of own use*; (iv) *Nature of observed use*; and (v) *Notes*. I have decided not to add these additional sheets to the appendices but the applicant may be rest assured that I have studied them with care. At A/203 there is an explanatory note which tells us that the applicant's user evidence summary derives from a table produced by Sally Madgwick when the matter was first looked at by the CRA. I gather that her summary was based on the evidence of the 33 statements which accompanied the application. What the applicant has done is to update Sally Madgwick's summary by drawing on the evidence contained in a further 8 statements. At the end of the day the CRA is left with a very helpful summary of all the applicant's written evidence.
124. The applicant also produced the results of an online survey at A/193-201. It was generated on various dates in August/September 2020 and contains answers to various questions put to respondees such as number of years used, frequency of use, how the land has been used and observed use, along with nearly two pages of further comments which I have read. The survey is clearly interesting but, in my view, the CRA should not accord a great deal of weight to it. In the first place, it is singularly lacking in the sort of detail which the CRA requires in order to be able to make an informed decision (such as where users actually walked on the land) and, in the second, it comes well after the end of the qualifying period even though I accept that a number of those who participated in the survey also claim to have used the land during the material period. However, although consistent with it, it nonetheless adds little in practice to the combined weight of the other written and oral evidence.

125. The use of those witnesses who did not give oral evidence is broadly consistent with the evidence of those who did. The evidence focuses on walking with or without dogs, children playing (including ball games, flying kites and model aeroplanes), jogging, camping and people generally enjoying the land or spending family time in less strenuous ways, including picking blackberries and playing around in the snow. This is all that one might have expected in an open space near to a moderately-sized settlement to which there is unhindered public access and a landowner living locally who seemingly lets them all get on with it, albeit coupled with periodic and mainly limited agricultural use taking place from time to time. I should mention that I have not overlooked the brief flurry of correspondence involving Sadie Pike/Andrew Pike/Ernest Clark/Andrew House in February/March 2013 about rubbish and trespass within the 'Hilperton Gap' which was not investigated in the oral evidence and is not relied on by the objector, no doubt as it is not focused on user within the application land and could apply to other land.
126. The real difficulty with the written statements is that, with some exceptions, the evidence does not deal with the precision that is required as to where these witnesses walked when they were on the land. As I say, in some instances there are indications of where qualifying witnesses walked but the question begs as to whether even this evidence is strong enough to justify registration.
- (1) Mrs Catharina Davies says, for instance, that she took her young children 'for regular walks' in the field and they 'played ball games and ran around the field enjoying the space' (A/73). In his statement (A/74) her husband, Tim Davies, speaks of 'Weekend walks around Church Field when the children were young'. Mrs Davies also says (as does her husband) that they 'also used Church Field as our route to walk into Trowbridge' (Mr Davies speaks of using the field 'for pedestrian access to Trowbridge via Middle Lane'. There was also walking, with and without a dog, but it is unclear where exactly they both routinely walked when using the field for their walks. Their son James also speaks of regular walks on the field when he was young but when he was older he used the land to walk into Trowbridge (A/76).

(2) Sally Lacey says that over the years she has walked ‘the dogs all over the field, it is so nice to be able to let the dogs off the lead and let them run free, played games such as rounders and cricket etc ..’ (A/83). For instance, did she walk around the edge of the field whilst her dogs ran off elsewhere and how often and where was rounders and cricket played (presumably by her children)?

(3) Phoebe Hart (when aged 14) said in her statement (A/86) that she took her dog ‘for walks around Church Field about 3 times a week’ (which may not assist the applicant’s case). She also said that she plays football, French cricket and with frisbees with her friends but she does not say where or how often this occurred. Mr. Hart says that ‘the entire field is in use all the time’ which is, I think, far too wide-ranging to carry sufficient weight to justify registration.

(4) K.J Waring said that he suspected that he has ‘covered every inch of Church Field chasing after dogs, recovering lost balls and trying to train our canine pals’. This evidence might very well imply that he normally sticks to the paths and from time to time will chase after and retrieve his errant dog or the ball that has not been picked up by the dog (A/88).

(5) Jacqui Clark says that (when they were small) her children ran and played with a ball ‘whilst I wandered around the footpaths’ (A/98). When they were older they used the path on their way to and from school avoiding the then busy Church Street route. When her children were older (i.e. when they were unsupervised) Mrs Clark says that they played in the field with their friends for prolonged periods. However, and in all fairness to the objector, Mrs Clark cannot sensibly be heard to say where her children played when she was not with them. Her evidence about training her dog in the field is admittedly stronger but this is unlikely to have been prolonged.

(6) Emma Herlinger speaks (at A/99) of ‘using church field to walk our dog and exercise ourselves and the children’ but she gives no details as to where exactly she regularly walked on the field. She also says her children ‘run around the field and have even used their scooter in the dryer summer

months'. Does she mean that they ran around the perimeter and was using a scooter outside the paths even feasible when the grass was longer?

(7) Someone called Andy at A102 says he used the field as a short-cut on his regular trips to Trowbridge. Although he says that he has used the field since 1987 he does not say where he walked.

(8) Lesley House speaks of regular usage of a whole of activities across the entire field and not just the footpaths (A/103). It is also the case that Mrs House and her children used the land on their way to and from their primary school. In my view, this is precisely the sort of evidence which needed to be tested by cross-examination.

(9) Sheila Sawyer's evidence (A/107) also needed more detail. For instance, she says she came to the village in 1974 and she and her children used the field regularly. On the face of it, her children had probably ceased playing on the field before 1997 and the evidence of her own use is not sufficiently detailed.

Closing submissions

127. I hope both advocates will forgive me if I merely summarise the main points within their comprehensive submissions.

Applicant

128. Mr Waller submits as follows:

- (1) It is common ground that the qualifying period is 1997 to 2017.
- (2) Public access to the land has been enjoyed since 1952 which is when HILP1, HILP2 and HILP3 were added to the DMS.
- (3) Elizabeth Way was built in 2015 after which time the land was no longer used for grazing.
- (4) The construction of the road did not interfere with the size, boundaries or the public's use of the land.

- (5) The aerial photos after 2002 show trodden paths throughout the material period. These paths run around the field perimeter and also correspond with HILP, 1, HILP2 and HILP3.
- (6) The applicant's evidence in chief evidence suggested that these paths were renewed after the summer cut.
- (7) The perimeter path remained in roughly the same location.
- (8) There were other tracks not corresponding with the PROWs such as the curved path between Middle Lane (in fact it runs from the circular path and does not go as far as Middle Lane) and HILP3 (which can be seen on the aerial photo for 2017).
- (9) Paxcroft Mead was built out in phases in the late 1990s. Only that part of Paxcroft Mead to the north of the A361 lies within the village of Hilperton (see App/4 plan and OBJ/221 – the boundary with Trowbridge now aligns with the outer edge of the Hilperton Gap on its south-western side). The rest of Paxcroft Mead falls within the administrative area of Trowbridge.
- (10) It is accepted that some of those who used the land in the period 1997-2017 would have resided in the administrative area of Trowbridge and would have accessed such land via points 11, 12 or 13 on the App/3 plan.
- (11) It is also accepted that some of those using the land would have been using it as a place of transit from Hilperton to Trowbridge or vice versa. Such use would not be qualifying.
- (12) The use by the inhabitants of more than one locality would be qualifying use following *Leeds Group Plc v Leeds City Council* [2010] EWCA Civ 1438. The multiple localities in this instance are the civil parish of Hilperton and the administrative area of Trowbridge Town Council. It is also being alleged in the alternative that the use via the access at 11 was by the inhabitants of more than one neighbourhood. It is suggested that Paxcroft Mead could be described either as a single or (with the A361 as a potential dividing line) a multiple neighbourhood within the town of Trowbridge, perhaps corresponding with the boundary of Adcroft ward which sits on the eastern

side of the town. I found all this puzzling as the application is advanced as a 'locality' claim (see Box 6 on Form 44 with the accompanying Exhibit F being a map of the civil parish). It is too late in closing submissions to convert the claim into one which is based on a neighbourhood claim of some description.

- (13) The written and oral evidence provides 'ample' evidence of qualifying use (including observed use) across the entirety of the application land in order to justify registration (41 written statements, the 2020 online questionnaire and 7 oral witnesses). I am not going to review Mr Waller's submissions on the applicant's evidence which I have already covered in detail along with my findings on that evidence.
- (14) Mr Waller comments upon the objectors' suggestion that there are other open spaces in the locality, including the recreation ground, the grass meadows to the west of Elizabeth Way and to the south of Hilperton Marsh, and in the amenity spaces in and around the new Paxcroft Mead development. The objectors no doubt wish the CRA to infer from this that as there was accessible walking space elsewhere the volume and frequency of use of the application land would necessarily be diminished. Mr Waller points to the heavy use of the recreation ground for football whereas the application land is of an entirely different nature, a place for instance where one could do other things such as fly kites or play rounders or, he might have added, walk dogs off their leads which would not be allowed on the recreation ground. It is also some way off from Paxcroft Mead, even allowing for the A361 road crossing. I might add that I have considered the note on alternative recreational areas in and around the Paxcroft Mead estate lodged by Denise Harvey and Ernie Clark which I thought very useful and informative. It seems obvious that the application land is of an entirely different character to the amenity spaces found within the new development.
- (15) I am invited to discount use which is accepted to be non-qualifying. In this regard, Mr Waller mentions the use of the land as a cut-through to Trowbridge and vice versa (the so-called 'transit use'). Mr Waller dealt with the use of what he called 'the trodden paths' which he analysed as either qualifying use or PROW use. He also posed the question as to whether use

in the case of the former involved qualifying use across the whole of the land. He accepted, however, that most of the witnesses mainly stuck to the 'trodden paths' although there were others who wandered over the field, including some of the witnesses.

- (16) Mr Waller raised the issue of the use of existing PROWs or of emergent rights of way neither of which, he accepts, would be qualifying use. He placed emphasis on what Lightman J said in the *Oxfordshire* case at [2004] Ch 253 at [103] where he instanced a situation where a track lead to an attractive viewpoint (which might readily be regarded as referable to user as a public highway alone) or to a case where users of the track veer off the track and play, or meander leisurely over and enjoy the land on either side which would usually be referable to use as a green. As the learned judge put it in full at [103] (and on which Mr Waller no doubt relies): '... 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'. As Mr Waller puts it at [86]: 'It is a holistic test rather than a test that engages only with the evidence of user of the circular / linear tracks taken in isolation'. This must be right and he cites from *R (Allaway) v Oxfordshire CC* [2016] EWHC 2677 (Admin). He goes on at [89]: 'Thus the question is whether, looking at the entirety of the user evidence holistically, the reasonable landowner would have interpreted the user of trodden paths as referable to a PROW or LSP'. I do not overlook either Mr Waller's reliance on the findings of fact made by the inspector in *Allaway* which he says 'is remarkably similar to the facts' of the present application although I think that Mr Waller would have to accept that TVG applications are highly fact-specific.
- (17) At [91] Mr Waller sets out in detail why, in this instance, 'a reasonable landowner would have viewed the use of the trodden paths on CF as referable to use for LSP, not a PROW'.
- (18) Mr Waller invites me to reject any suggestion that the late Mr Pike expressly or impliedly permitted recreational use. He says that there is no evidential basis for this and the permission afforded to grave-diggers and in relation to

the grass keep arrangements had no impact on the public's use of the land for recreation. Mr Waller is also right when he refers to the evidence about overflow parking for weddings and funerals which, if it happened, either predated the start of the qualifying period or else came after it had ended.

- (19) Mr Waller also submits (in effect) that the agricultural activity did not materially impact on the public's use of the whole field.

Objectors

129. Mr Marwick invites me to read his lengthy opening case outline (OBJ/32) in conjunction with his closing submissions (which was accompanied by a document headed 'Landscape & Visual Setting Analysis' dated October 2017 which was prepared for Hilperton Parish Council and contains some very helpful photos of the Hilperton Gap and plans of the general area – this document would have been helpful during the oral evidence). Looking at Mr Marwick's submissions in the round, it seems to me that the objectors' main defences to the application to register are as follows:

- (1) It is agreed that Hilperton village is a qualifying 'locality' in law. Mr Marwick submits that as this is a 'locality' case, rather than a case involving a 'neighbourhood within a locality', any user by those living outside the boundaries of the village should be discounted (citing *Leeds Group Plc* [2010] EWCA Civ 1438 at [27]).
- (2) The alignment of the four PROW has remained consistent over the years and represents the main way in which the application land has been used, namely by walkers with or without dogs. Any claimed wider use 'is imprecise and unclear both temporally and spatially'. Any walking, with or without dogs (which Mr Marwick accepts is the principal use of the land) should be discounted 'because it is objectively referable to right of way user (see OBJ/33 at para 6) (I believe Mr Marwick to be saying that this is the core issue on the application). It is claimed that any remaining user was either permissive or too trivial or sporadic to justify registration and/or would be incompatible with the use of the field for agriculture. It is also suggested that the length of the grass and the presence of cattle in the field from time to

time would, in any case, have limited the scope of other, non-dog walking, recreational use.

- (3) The CRA should be slow to assume that all the user taking place on the land is necessarily by qualifying local inhabitants. Some discounts need to be made for, if I may put it, outside of locality use during the qualifying period. Mr Marwick suggests that the very location of the land in the Hilperton Gap adjacent to Trowbridge made it more likely that user would also be by walkers/dog walkers from outside the village. He also points to alternative open spaces for recreation both within and outside the village both of which, I understand him to be saying, impact on the sufficiency of qualifying use (he also suggests incidentally that there are formal areas for more structured LSP within both the Hilperton Gap and Paxcroft Mead areas). It follows, Mr Marwick suggests, that the evidence of third party user (by which I understand him to mean 'observed use') should be treated with caution.
- (4) Mr Marwick suggests that the use of all the worn paths was such as to indicate to a reasonable landowner the assertion of emergent rights of way (in the case of the perimeter path) or the use of actual rights of way (x4) and should be discounted. He also submits that any user by those straying off the paths, including by those retrieving their dogs, and any use of the paths in excess of the width of the PROW identified in the statement accompanying the definitive map (likewise picnics and kite flying close to the trodden areas which a reasonable landowner would attribute to right of way user), was such as to indicate the exercise of emergent or existing rights of way and in both cases should be discounted. Any use off the paths should be treated as incidental to these primary uses and would not obviously be referable to LSP. Mr. Marwick cites from *Allaway* and *Oxfordshire*. He also correctly states that the starting point is how the matter would have appeared to a reasonable landowner observing the user made of his land?
- (5) The CRA should be alive to the risk that the applicant's witnesses have been motivated by a desire to protect the application land against development. The written evidence should be accorded less weight as it has not been subjected to cross examination.

- (6) Other smaller points: (i) a finding should be made that the pre-school children were expressly allowed to use the field at some stage; (ii) heavier use by families living close to the field would not indicate to the landowner that the land was in general use by the local community for informal recreation; (iii) gatherings for snowball fights or building snowmen should be regarded as brief en masse trespass rather than the assertion of recreational right of user; (iv) those with gates opening directly onto the land (and an adjacent PROW) would not indicate to a landowner that a communal right to recreate existed on the land; and (v) helicopter landing is not LSP and no one knows where the kite surfer came from.
- (7) Once non-qualifying user is discounted the applicant falls short of meeting the statutory threshold for registration. Mr Marwick suggests that the burden lies on the applicants to provide convincing evidence that the claim to register has been made out. In this case he suggests ‘that there has not been user of such a duration, nature and quality as to support registration’.

Discussion

130. The application must be tested against the criteria for registration contained in section 15(2) of the CA 2006, namely whether a significant number of the inhabitants of (in this instance) any locality had indulged as of right in LSP on the application land during the relevant 20 year period ending in April 2017.
131. In the first instance, it is plain that the civil parish of Hilperton is a qualifying locality. For reasons already explained, this is not a case where the applicants rely on one or more neighbourhoods straddling more than one locality. The case advanced is based solely on the qualifying use of those living in the civil parish of Hilperton. In the result, the applicants are unable to rely on the use of the land by others living outside the boundaries of the village. The point is academic anyway as the applicants are relying only on the written and oral evidence of those who actually live, or have lived, in the village.
132. The core issue on this application is, as it seems to me, whether, without more, the use of the land for walking, with or without dogs, children’s play and general informal recreation suffices to justify registration? This is not, however, a straight-forward application involving a small parcel of land being

used for qualifying purposes. On the contrary, it is a very large grass meadow subject to low-level agricultural uses which happens to be criss-crossed by four PROW (with gated access points and directional signs) and a circular path running around the outside of the field which, in my view, in the case of the latter, is likely to fall within the category of an emergent right of way. I cannot see how it would have appeared other than this from the perspective of the landowner in a case where walkers mainly use the path to walk around the field and only incidentally walk outside it, perhaps to stand around chatting with other dog walkers or to follow their dog or else cut a corner if they are pressed for time or even to bypass other walkers ahead of them.

133. It seems to me that the main issues which need to be addressed by the CRA on this application are these:
- (a) Where do people mainly walk when they use the land?
 - (b) Was that main use sufficient to justify registration – for instance was it non-qualifying as a matter of law because it was not enough to suggest to a reasonable landowner that the whole of the land was being used for informal recreation during the relevant period?
 - (c) Were other incidental uses outside the trodden paths, when looked at in the round, sufficient to justify registration?
134. I shall start by dealing with the general pattern of use of the land and its context.
135. The land is a grass meadow of long-standing within the Hilperton Gap. The agricultural use within the relevant period has been limited to an annual hay or silage crop although prior to the coming of Elizabeth Way in 2015 it had also been used for the occasional grazing of a small number of cattle (the evidence is too vague to put a number on it but the grazing herd would have been small and non-threatening to walkers) none of which activities in practice, as I find, would have been inconsistent with the use of the land for TVG purposes. It was not as if the land was ploughed or used extensively for grazing. In general, the whole of the land was available for informal recreation during the relevant period although it is important to note that before the grass

was cut in June/July each year there would have been a number of weeks when the grass was longer and more difficult to walk upon.

136. The alignment of the PROW and the main circular path have remained more or less consistent over the years. The *Google earth* images after 2002 demonstrate that this has been the case. The landscape changed in around 2015 with the construction of Elizabeth Way which ran through Hilperton Gap and cut off the land from the two fields which used to adjoin it on its south-west side. One can, for instance, see how cattle would have been moved between these fields with ease and how HILP3 ran across these fields right into the outskirts of Trowbridge. It is also apparent from the rights of way plan at App/2 that before the new road was built walkers could have traversed Hilperton Gap unhindered via a network of paths whereas the new road places limits on the practicalities of this (compare the plans on App/1 and App/2) despite the new Middle Lane crossing.
137. I think Mr Marwick is right when he says that the trodden paths crossing and running around the land represent the principal way in which it has been used by walkers, with or without dogs, during the relevant period. A number of oral witnesses on both sides gave evidence to this effect. It seems to me that whereas, before 2015, there is certain to have been greater use of the land as a place of transit into the adjoining fields, the position after the advent of the new road is that most people now stick to the field as a destination in its own right and use it, as one might expect, by walking mainly on the worn paths or at least as close to these paths as makes no difference. I also consider that any use outside the paths should be treated as being incidental to the primary use of the paths and not referable to LSP.
138. I think Mr Marwick is right when he says that the use of the trodden paths would have indicated to a reasonable landowner the assertion of an emergent right of way, in the case of the main circular path and its offshoots, or the use of actual rights of way when it comes to the use of the four PROW and that, as a matter of law, such use should be discounted for TVG purposes. I also accept his submission (i) that any use by those straying off the paths (including by those retrieving their dogs), and (ii) that any use in excess of the

width of the paths identified in the DMS would also have been such as to indicate the exercise of emergent or actual rights of way.

139. While I accept that, from time to time, people used the field for other recreational activities such as ball games, flying kites and model aeroplanes, jogging, camping and generally enjoying the land, I do not accept that these uses were, either by themselves or collectively, substantial enough or occurred with sufficient frequency to justify registration. I find that these other non-dog walking uses were very probably trivial uses and, as Mr Marwick rightly says, did not involve user of such a duration, nature or quality as would support registration. In my view, such uses are likely to have occurred mainly in the summer months after the grass had been cut when, for a while, the land is bound to have been much easier to walk on.
140. The CRA needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the application land had been used for informal recreation always bearing in mind that qualifying use will be heavier in some areas than in others. I have already indicated that, in my view, the land is mainly used by people walking on the trodden paths which, as I find and as I saw for myself on my inspection in August, soon reappear after the grass has been cut. However, this still leaves the rest of the field which, as I find, is largely unused apart from only trivial or occasional uses when the length of the grass and the condition of the weather is such as to accommodate with far greater ease other non-dog walking uses.
141. It is not an uncommon difficulty in what I might call a 'big field' case for a CRA to have to decide whether the whole or part of the land is still registerable even though large parts of it are unused. In such a case, even if the CRA were (a) required to discount the use of the trodden paths, yet (b) considered that other uses taking place outside these paths were still sufficient to justify registration, an applicant would, in these circumstances, (c) still need to identify with precision where these other qualifying uses took place on the land in order that the CRA might then consider whether to exercise its power to sever from the application those parts of the land where qualifying use may not have taken place. As Mr Marwick succinctly puts it at OBJ/33 at para 6, the claimed use in this instance (outside the trodden paths) 'is imprecise and

unclear both temporally and spatially'. I agree. This is not a severance case even if it was arguable that other uses outside the use of the trodden paths would have supported registration which, I hasten to add, is not the case on the basis of evidence laid before the CRA. The applicants' case might have been a good deal more arguable when it came to uses outside the paths if it had showed with much greater precision what was happening on the land, where it was taking place and when but their case under this head had not been properly or strictly proved.

142. I am not going to reiterate my findings on the oral evidence (where, it will be recalled, I expressed concerns about the quality of the evidence of Ms Katevska, Ernest Clark and Mrs Hart) but there is another matter which I should address and it concerns the Paxcroft Mead development.
143. Whilst I accept that this estate resulted in some people who lived outside the village boundary using the land (and so may have numbered amongst others observed to be using the land by qualifying local residents), it is, as I find, unlikely to have been a major component in the overall use of the land although I accept that some discounting would be necessary to allow for the use of those living outside the village. However, it still needs to be recognised that crossing the A361 is likely to have been a major hindrance to those living outside the village boundary who wished to recreate on the field, especially in the case of adults with young children in tow. The field was very probably also too away for unsupervised play in the case of younger children. I am also told that there are suitable amenity spaces within the new estate although I doubt whether they are likely to be as desirable for dog walking as the application land. This issue arose late in the day and in the absence of a proper audit as to how many people accessed the land for recreation via points 11-13 on App/3 one can only but speculate on the number of people using the land who lived outside the village boundary, whether they came from the Paxcroft Mead estate or elsewhere. At the end of the day, however, there were, in my view, enough qualifying witnesses who gave oral and written evidence to signify that the land was likely to have been in general use by the local community for informal recreation. It is just that the user relied on was, for the reasons explained, not qualifying use for the purposes of section 15 of the CA 2006.

Recommendation

144. In light of the above discussion, I recommend that the application to register the application land (proceeding under application number 2017/01) should be **rejected** on the ground that the criteria for registration laid down in section 15(2) of the CA 2006 have not been satisfied.
145. Put shortly, the predominant use of the application land during the relevant period was for walking, with or without dogs, on four PROW and a circular path (and its offshoots) running around the outside of the application land which would not have justified registration as a matter of law as it would not have suggested to a reasonable landowner the exercise of a right to indulge in LSP across the whole of the application land. Other claimed uses taking place outside these paths were either incidental to the primary use of the paths or else were too trivial or occurred only sporadically and, either alone or collectively, would not have been sufficient in terms of duration, nature or quality to support registration.
146. 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 19 November 2020”.

William Webster

3 Paper Buildings

Temple

London EC4Y 7EU

Inspector

