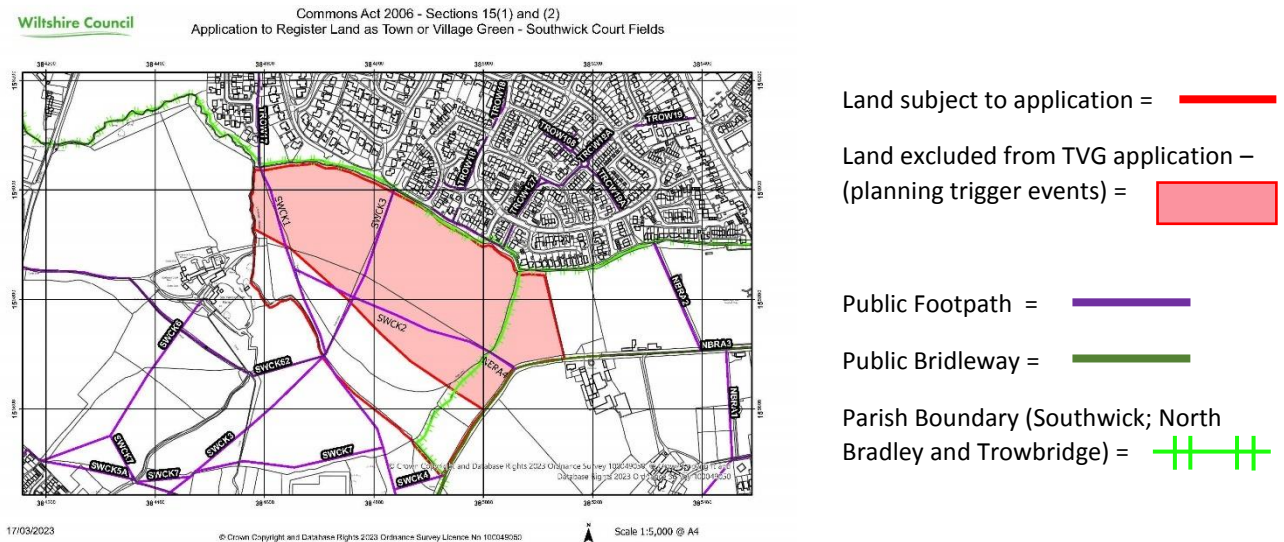


Commons Act 2006 – Sections 15(1) and (2)
Application to Register Land as Town or Village Green – Southwick Court Fields, Southwick and North Bradley – Application no.2020/02TVG

Appendix 17 – Officers’ Consideration of the Legal Tests

The Application Land



Right to Apply

1. The Growth and Infrastructure Act 2013 introduced a series of provisions to make it more difficult to register land as a TVG. This included, at Section 16, the insertion into the Commons Act 2006, of Section 15C “Registration of greens; exclusions”, i.e. the removal of the “right to apply” to register land as a TVG where specific planning “trigger” events have occurred in relation to the land, e.g:
 - Where an application for planning permission, which would be determined under Section 70 of the Town and Country Planning Act 1990 is first published in accordance with requirements imposed by a development order by virtue of Section 65(1) of that Act, or
 - A draft development plan document which identifies the land for potential development is published for consultation in accordance with regulations under Section 17(7) of the Planning and Compulsory Purchase Act 2004, or
 - A development plan document which identifies the land for potential development is adopted under Section 23(2) or (3) of the 2004 Act.

2. The right to apply is revived where a corresponding “terminating event” has taken place, e.g:
 - The withdrawal of the planning application; a decision to decline to determine the application is made under Section 70A of the 1990 Act; where planning permission is refused and all means of challenging the refusal by legal proceedings in the UK are exhausted and the decision is upheld; or where planning permission is granted and the period within which the development to which the permission relates must be started, expires without the development having begun, or
 - The draft development plan document is withdrawn under Section 22(1) of the 2004 act; the document is adopted under Section 23(2) or (3) of that Act; or the period of two years beginning with the day on which the document is published for consultation expires, or
 - In the case of a development plan, the document is revoked under Section 25 of the Planning and Compulsory Purchase Act 2004; or a policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of Section 38(5) of that Act.

(A full list of planning trigger and terminating events is included at Schedule 1A of the Commons Act 2006, as added by Section 16 of the Growth and Infrastructure Act 2013 and amended to extend the list of events).

3. This alters the way in which the CRA deals with new applications to register land as a TVG. DEFRA has issued interim guidance to Registration Authorities which recommends that upon receipt of an application the CRA should write to the local planning authorities and the Planning Inspectorate, to seek confirmation of whether or not there are planning trigger/terminating events in place in relation to all or part of the application land, (The DEFRA Guidance, see **Appendix 6**).
4. In the Southwick Court Fields case, as per the guidance, the CRA wrote to the Planning Inspectorate; Spatial Planning and Development Control at Wiltshire Council on receipt of the application, using the letter template as set out within The DEFRA Guidance (**Appendix 6**), including a map of the application land and links to the list of trigger and terminating events and amendments to the list, (please see **Appendix 11** for trigger/terminating events consultation replies from the Planning Authorities).
5. Wiltshire Council as the CRA, have accepted the application in part only, based upon replies from the relevant Planning Authorities that there are valid planning trigger events in place over part of the application land which exclude

the right to apply to register land as a TVG, over that section of the application land, i.e:

- i) Part of the land subject to the application is affected by planning application no.20/00379/OUT – Land South of Trowbridge, Wiltshire: Outline planning permission with all matters reserved except access for the erection of up to 180 residential dwellings (Use Class C3); site servicing; laying out of open space and associated planting; creation of new roads, accesses and paths; installation of services; and drainage infrastructure, valid date 15 January 2020.
- ii) Part of the land subject to the application forms a designated allocation for development within the now adopted Wiltshire Housing Site Allocations Plan (WHSAP) (adopted February 2020).

The CRA continues to determine the TVG application over the unaffected application land, please see application plan accepted area at **Appendix 3**.

6. Since the first application in January 2020, part of the land, (the northern section), has always been affected by a planning trigger event, although the type of trigger event has changed since first submission of the application, the effect is materially the same. Dispute of the CRA's interpretation of the extent of planning trigger events and their effect is not maintained by the Applicant or the Objector in this case.

Main Considerations for the Council

7. Under Section 15(1) of the Commons Act 2006, it is possible, (where the right to apply is not extinguished), for any person to apply to the Commons Registration Authority (CRA) to register land as a Town or Village Green (TVG) and under Section 15(2), where a significant number of inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of 20 years or more and they continue to do so at the time of application, (please see legislation attached at **Appendix 6**).
8. The legal test set out at Section 15(2) of the Commons Act 2006, can be broken down into a number of components, each of which must be satisfied in order for the application to succeed. It is no trivial matter for a landowner to have land registered as a green.

Significant number of inhabitants

9. The meaning of the word “significant” has never been defined but was considered at the High Court in *R v Staffordshire County Council, ex parte Alfred McAlpine Homes Ltd* [2002] EWHC 76 (Admin). It was held that this did not mean a considerable or substantial number, as a small locality or neighbourhood may only have a very small population, but that the number of people using the land must be sufficient to show that the land was in general use, by the local community, for informal recreation, rather than just occasional use by individuals as trespassers.
10. The requirement is that users should include a significant number of inhabitants of the claimed locality or neighbourhood within a locality, in order to establish a clear link between the locality or neighbourhood and the proposed green, even if these inhabitants do not comprise most of the users.
11. In this case, 49 witnesses/parties (including the Parish Council’s of Southwick and North Bradley), have provided evidence/statements in support of the application, including:
 - 7 joint responses;
 - 23 witnesses who have signed a petition accompanying the application (Petition 1);
 - 20 witnesses who have signed a second petition submitted with correspondence dated 5 April 2022, (Petition 2).

The application identifies the locality or neighbourhood within a locality as “Grove Ward, Trowbridge” as shown on the map at Exhibit B of the application form:



“Exhibit B – Boundary map of Grove Ward, Trowbridge – Locality, or neighbourhood within a locality, in respect of which this application is made.”

12. Trowbridge Grove ward population figures are as follows:

2001 – 4,351
2011 – 4,495
2020 – (estimate) 4,458

Area 1.239 km²
(Source: City Population).

13. Certainly 49 witnesses out of an area having an estimated population of 4,458 in 2020 does not, at first glance, represent a significant number of inhabitants, however, witnesses refer not only their own use of the land, but also to use by others:

H Chamulewicz – *“The land is of immense benefit to hundreds of local people...In Summer many sit on the grass and soak up the surroundings. Fly a kite, throw a ball even a swing was popular this year attached to a substantial tree.”*

J Dennis – *“...enjoyed meeting and chatting to other people from the local area...”*

P & S Elphick – *“We are two of many who walk the area and it helps keep us fit...So many others including numerous dog walkers, would also gain from Village green status that would give all residents within the boundary a sizeable area that would be protected from future development. The benefits will be immeasurable for both young and old alike.”*

A & N Swanney – “...we have observed it in use for a wide variety of activities...”

S & P Willcox – “We have also organised community walks through the fields...”

Cllr G Hill – “I can attest to the regular and constant use of the land by residents from within my Ward and by a large number of visitors who either walk or drive to Westfield Crescent, Sandringham Road or Balmoral Road and walk from there...I have observed it in use for the activities contained within this document.”

14. 11 statements make reference to use of the land with family members, including:

D Goodship - “I have lived opposite these fields for over 45 years, during this time myself & family have used them...I am pleased to report that my Grandchildren also now enjoy walking them...”

M Stevens - “My wife Lin and I have lived in this area for over 40 years and during this time we have without stay or impediment regularly walked and exercised in this area with our two children and now five grandchildren.”

C Hill - “My family have enjoyed exploring the wonderful landscape for over nineteen years...Our children and grandchildren have spent many hours picking blackberries and sloes from the hedgerows and identifying birds and habitats. Learning about the countryside and enjoying daily walks throughout the year has provided a valuable education and many family adventures.”

15. The numbers of users are supported in the responses to planning application no.20/00379/OUT – Land South of Trowbridge, Wiltshire: Outline planning permission with all matters reserved except access for the erection of up to 180 residential dwellings (Use Class C3); site servicing; laying out of open space and associated planting; creation of new roads; accesses and paths; installation of services; and drainage infrastructure, as included at **Appendix 16**, (please note planning application comments may be viewed in full on the Wiltshire Council website using the following link):

[Planning Application: 20/00379/OUT \(wiltshire.gov.uk\)](https://www.wiltshire.gov.uk/planning-application/20/00379/OUT)

In particular, Mr N Swanney (04/12/21) refers to use by over 200,000 people per year and R Williams (16/11/21) quotes use to be between 35,000 – 40,000 people visits per year based on survey results, as detailed below in his previous correspondence on this matter, dated 23/03/21:

“We have done a second survey of users over the last month (the first one was sent with our first objection to this site a couple of years ago), in weather that has not been brilliant, being the depths of February / March but even

though this may have put people off walking across the fields we have counted 3,545 people going into the fields between the hours of 08:00 – 16:00 over the period. The dates reviewed were 8th February to 8th March [2021] and included people of all ages. The first survey showed that there were an average of over 25,000 people using the fields for recreation every year, but this second survey shows that the annual figure would be nearer 42,000 people a year; and the responses certainly give the impression of a well used recreation area and for a long period of time.”

16. In correspondence regarding the TVG application dated 5 April 2022, the Applicant, states:

“To apply a little perspective to the figures supplied within the Application: If one takes a median daylight length of 12 hours, the number of people using the application site would have to reach the giddy heights of 25 people per hour. This would necessarily reduce during wintertime, plateau during spring and autumn, but increase exponentially in the summer months. The estimate of 300 visits per day is therefore on the lower end of reasonable and, lacking any evidence to the contrary, must stand.”

17. The Applicant includes with this correspondence a second petition:

“We the undersigned wish to register our continued support for the Village Green Application on Southwick Court fields (ref.2020/02 TVG (Southwick Court Fields, Southwick and North Bradley Parishes). We have used the land identified in the attached map without stay or let for the number of [years] indicated below. This access has not been restricted by any party. This includes not only the marked footpaths, and identified trackways. Access has been continuous including the occasional time that cattle have been present, prior to their withdrawal in 2020.”

This petition includes 20 names of residents, (not signed), including the “Number of YEARS familiar with the use of the fields”, 5 of whom have already signed the first petition included with the application and provided an additional witness statement in support of the application.

18. The Objector makes the following representations on the “significant number” point, (17 December 2021):

“7.2 The applicant claims that “a recent survey” of activity has been undertaken. The applicant goes on to state that the survey indicated “an average use of the field by 300 distinct visits/uses per day. This sum equates to approximately a third of a million separate visits each year.

7.3 This statement lacks credibility for a number of reasons.

7.4. First, from the landowner's first-hand knowledge of the site, this appears to be a significant exaggeration of the year round use of the Land.

7.5 Second, no details of the survey (for example, when it was carried out, by whom or the methodology followed) have been provided. It is reasonable to assume that the use of the footpaths on the Land would be far more frequent during the summer. Use would have also been far more frequent during recent "lock down" periods when many more people have been accessing public rights of way in the countryside. Therefore, there is insufficient detail to confirm whether the survey is broadly representative of "average" conditions as claimed.

7.6 Third, the nature of the use has not been recorded. If a person was accessing the land to walk the public footpaths, this use must be discounted when considering the use of the land for lawful sports and pastimes (as explained above).

7.7 Therefore, the evidential value of this statement is very low at best."

19. Officers agree that the evidence submitted in the form of the surveys and petitions, are lacking in detail regarding the nature of the individuals' use of the land and therefore their evidential value is low. There are four recorded public footpaths over the application land: Southwick 1, 2 and 3 and North Bradley 4, (see Application Land above), as well as numerous unrecorded tracks, including a circular route around the perimeter of the fields, (including the northern section of the land now severed from the TVG application where there is a valid planning trigger event in place), (see map provided by Applicant at paragraph 58 and aerial photographs at **Appendix 5**), however, the use of recorded public rights of way and unrecorded tracks, leads to a number of issues which are addressed later in this report, including, most importantly, how such use would have appeared to a reasonable landowner, i.e. attributable to the exercise of a right of way or to recreation over a wider area of land.

Significant number of inhabitants:

The application is supported by 49 individuals, who give differing levels of evidence:

Petition 1 = 23 witnesses;

Individual witness statements = 21 (including 7 joint statements and 2 Parish Council replies);

Petition 2 = 20 witnesses.

The population figures of the identified neighbourhood within a locality of Grove Ward, is estimated at 4,458 in 2020.

The Applicant speaks to use by a significant number of residents and surveys which demonstrate such use. Additionally a number of the witnesses refer to seeing others using the land and/or their own use with family.

However, the Objector disputes use by a "significant" number of inhabitants, given

the landowners own knowledge of the use of the land and insufficient evidence provided within the surveys/petitions regarding the nature of use. Where there is dispute of the evidence it is considered that hearing direct evidence from witnesses and the cross-examination of witnesses on this point at a public inquiry, would assist the CRA in its determination of the application, where all elements of the legal test to establish a new green, must be satisfied, on the balance of probabilities.

Of any locality or neighbourhood within a locality

20. A TVG is subject to the rights of local inhabitants to enjoy general recreational activities over it. The “locality” or “neighbourhood within a locality” is the identified area inhabited by the people on whose evidence the application relies, (although it is acknowledged that there is no requirement for most of the recreational users to inhabit the chosen “locality” or “neighbourhood within a locality”, as long as a “significant number” do, other users may come from other localities and/or neighbourhoods). However, it is the people living within the identified locality or neighbourhood who will have legal rights of recreation over the land if the application is successful.
21. The definition of “locality” and “neighbourhood within a locality” were reiterated in the case of *Paddico (267) Ltd v Kirklees Metropolitan Council & Ors* [2011] EWHC 1606 (Ch) (23 June 2011) as follows: a “locality” being an administrative district or an area with legally significant boundaries, such as a borough or parish, whilst a “neighbourhood” does not need to be an area known to law, but must be a cohesive area which is capable of meaningful description, such as a housing estate. So, for example, a housing estate can be a neighbourhood, but not just a line drawn around the addresses of the people who have used the claimed green.
22. In this application, the identified locality or neighbourhood within a locality in respect of which the application is made, is Grove Ward, Trowbridge. The Applicant has not identified whether this area is a locality or a neighbourhood within a locality, however, if the definitions set out in *Paddico* above, are followed, Grove ward is an administrative area or ward with defined boundaries and its own elected Councillor and division within Wiltshire Council. Electoral wards are set by the Local Government Boundary Commission for England (LGBCE) to ensure that each Councillor has the same number of electors, they also aim to ensure that wards reflect community ties and identify and promote effective and convenient local government (lgbce.org.uk). Officers therefore suggest that Grove Ward is a locality.
23. In correspondence dated 17 December 2021, the Objector includes population numbers for Grove Ward, (as paragraph 12 above), however, in correspondence date 5 April 2022, the Applicant suggests the following:

“Population numbers for Grove Ward are unnecessary and irrelevant. The nature of the Village Green application requires the applicant to identify a Community Area which the application will serve. The truth of this application is that many visitors to the area in question travel to the vicinity for their recreation. This is partially as a result of good permeability into the field system in question via footpaths, trackways and bridle paths and partly due to the availability of parking adjacent to those aforementioned routes.

The number of residents in the nearby Ward has been estimated and used as “evidence” that numbers are exaggerated. If they are submitted to imply usage then no consideration has been made for footfall from other Wards such as Drynham or Central, Villages such as North Bradley and Southwick, or the many who drive to the boundaries from not only the Town to reach the most accessible green infrastructure, but as far as Frome.

Grove Ward is only identified as nearest conurbation and place of residence of Applicant as required in the Village Green Application. Should the Application be successful, there will be no restrictions for access based on postcode and the current use of the land will be maintained and protected in Law.”

24. In fact the identification of a locality or neighbourhood within a locality is of much greater importance than that suggested by the Applicant. Whilst it is acknowledged that not all users will come from the identified locality, if the land is successfully registered as a TVG, it is those residents only who will have a legal right to use the land for the purposes of recreation, (although the recorded footpaths are open to the whole of the general public). The identification of a locality seeks to establish a link between the land subject to the application and the locality, so rather than being included only as the *“nearest conurbation and place of residence of the Applicant”*, it should identify where the users come from. It perhaps suggests in this case that the locality is incorrectly identified as Grove Ward when the locality should perhaps be a much wider area. In response to planning application no. 20/00379/OUT, Cllr D Vigar, Wiltshire Councillor for Trowbridge Grove Division submits a Report dated 10th June 2022, which quotes the Wiltshire Core Strategy statement: *“It is recognised that the villages surrounding Trowbridge, particularly Hilperton, Southwick, North Bradley and West Ashton, have separate and distinct identities as villages. Open countryside should be maintained to protect the character and identity of these villages as separate communities.”* It is possible for there to be more than one identified locality or neighbourhood within a locality in relation to a TVG application.
25. In additional correspondence dated 23 May, the Objector makes the following comment regarding this legal test:

“7.4. It is, therefore, clear that the applicant, when preparing the application has misunderstood the relevant statutory tests. Rather than ensuring that the evidence is drawn from the “locality” (to demonstrate use by a significant number of the inhabitants of the locality specified in the application), the applicant has assumed that the evidence should relate to use by any persons who might, in the future, wish to use the TVG should it be registered. The evidence relating to the use of the site has, therefore, been drawn on a far wider range of users of the site than should have been the case. This is an important and material error.

7.5. If, as stated by the Applicant, the locality of Grove Ward has been considered to be “irrelevant” when preparing the evidence, the relevance of the evidence to the statutory tests must be doubted.”

26. The witnesses refer to use by local residents:

S & P Willcox – “Land provided social contact with other residents enjoying the open space.”

J Dennis – “...enjoyed meeting and chatting to other people from the local area...”

As well as those who are visitors from outside the area:

H Chamulewicz – “The land is of immense benefit to hundreds of local people and that is not only those of us that live in the vicinity, and all ages young and old alike, plus those who drive to enjoy walking the fields. Some with dogs some without.”

G Hill – “Regular and constant use by residents and visitors who walk or drive to Westfield Crescent; Sandringham and Balmoral Roads and walk from there.”

N & A Swanney – “Attest to regular and constant use by local residents and a large number of visitors who either walk or drive to Westfield Crescent, Sandringham Road or Balmoral Road and enter the fields from there.”

27. It can be seen from the witness distribution map (**Appendix 15**) that the users of the land providing witness evidence are from the Grove Ward area of Trowbridge, (44 witnesses out of 49 where addresses are known), there are no witnesses from the outlying villages of Southwick and North Bradley to support additional use by inhabitants of additional localities or neighbourhoods within a locality, although the Applicant and other witnesses suggest use from a much wider area.

Locality:

The locality identified within the application is Grove Ward, as the area from which a significant number of users of the land come from. The identification of the area is important as it is the residents of this area who will have a legal right to use the land for lawful sports and pastimes. The Applicant's claim that the Grove Ward locality has been identified simply for convenience as the closest conurbation and the area where the Applicant resides, is not sufficient to form a link between the land and the locality.

The Applicant also suggests that this does not take account of use from a much wider area outside the identified locality, so is the locality in this case wrongly identified and should it relate to a much wider locality or more than one locality/neighbourhood within a locality, although witness evidence is provided only by inhabitants of Grove Ward.

The distribution of those giving evidence residing in the identified locality assists in forming a link between the land and the locality.

The Objector considers that the identification of Locality and its significance has been misinterpreted by the Applicant.

Where there is dispute of the evidence it is considered that hearing direct evidence from witnesses and the cross-examination of witnesses on this point at a public inquiry, would assist the CRA in its determination of the application, where all elements of the legal test to establish a new green, must be satisfied, on the balance of probabilities.

Have indulged as of right

28. Use "as of right" means use without force, without secrecy and without permission. In the TVG case of *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335, Lord Hoffman commented on use as of right:

"It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner...The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited time."

29. The Objector states in correspondence dated 17 December 2021: *"Given the vague nature of the evidence that has been submitted, the landowner cannot offer further comment as to whether the claimed use would be "as of right". Therefore, the landowner must reserve its position in this respect."*

Without permission

30. Witnesses provide the following evidence that use of the land has been without permission:

Petition 1 (submitted with the application) – *“Access and recreation has taken place without stay or let from the landowner and without any form of notified restriction from said landowner. It has been established over this period that such access and activity has become defined as “as of right”.*” (Signed by 23 individuals).

Petition 2 (submitted with correspondence dated 5 April 2022) – *“We have used the land identified in the attached map **without stay or let** for the number of [years] indicated below. This access has not been restricted by any party. This includes not only the marked footpaths, and identified trackways.”* (List of 20 individuals).

The application itself at “7. Justification for application to register land as a town or village green” states:

“The unfettered use of the land has been unchallenged over this period and is symbolised by the footpaths and trackways formalised upon it. Divergence from these footpaths and/or trackways has not been challenged either formally or informally. Maintenance and enhancement of access points have been supported by both the landowner and Wiltshire Council as demonstrated in attached photographs and documents.”

P Allsop - *“The landowner has been fully aware of my activities and has allowed this without stay or impediment, on occasion I have spoken to him whilst out walking.”* The activities which Mr Allsop refers to are as follows: *“I lived in Summerdown Walk in the early 1980’s and currently live in Spring Meadows. Both in the 1980’s and for the last seven years I have walked our dogs nearly every day on the permitted footpaths through the fields around Boundary Walk, Southwick Court and through to Southwick...My wife and I have picked blackberries, for pies and sloes, to make sloe gin, from the hedgerows on many occasions.”*

T Allsop - *“I have on occasions had conversations with the land owner whilst out walking”.* She refers to the activities of walking her dogs daily on the *“...permitted footpath through the fields around boundary walk, southwick court and beyond...I have made pies and jam from the plentiful blackberries that grow in the hedgerows.”*

D Goodship – *“I have lived opposite the fields for over 45 years, during this time myself & family have used them for walking, running and picking blackberries, “without stay or impediment” by the landowner.*

I am pleased to report that my Grandchildren also now enjoy walking them, again “without stay or impediment” by the landowner.”

C Hill – “My family have enjoyed exploring this wonderful landscape for over nineteen years without stay or impediment.”

Cllr G Hill, Town Councillor, Grove Ward - “The historic use “as of right” has not been to my knowledge as a resident for some eighteen years, been directly challenged or restricted in that time.”

“Evidence of this presumed acceptance has been seen over the past two years. This has taken the form of sections of fencing being removed to facilitate access for the general public along the notified footpaths, and gates previously being used to retain cattle being left open, or even removed. All these changes indicate a desire to give unrestricted access to the land by the landowner and represent moves to that end.”

R Hunt – “The fields in questions [sic] have been available for walking without stay or impediment for as long as I have lived here.” (moved to Trowbridge 1999).

M Stevens – “My wife Lin and I have lived in this area for over 40 years and during this time have without stay or impediments regularly walked and exercised in this area with our two children and now five grandchildren.”

A & N Swanney – “We have lived in the area and used the fields for more than 38 years and the landowner has allowed us access to these fields without stay or impediment over all this time.”

S & P Willcox – “Throughout this time [living in Southwick 1977-1997] we have regularly walked around and across the area concerned with our children and dog without let or hindrance.”

31. The Objector states in correspondence dated 17th December 2021:

“6.1. It is an established legal principle that ‘as of right’ means not by force, nor stealth, nor the licence of the owner (as confirmed by the House of Lords in the Sunningwell case).

6.2. As noted above, a number of activities claimed to have been undertaken on the Land have been with the express consent of the landowner. Again any such use would not be “as of right” as the user has the licence of the owner.”

They observe that the scattering of ashes is claimed to have been carried out with the express consent of the landowner, the petition submitted with the application agrees that this is done with the full knowledge and permission of the landowner, and as such, it is not qualifying user “as of right”.

32. In correspondence dated 5 April 2022, the Applicant states:

“The lack of restrictions placed on any of the named activities, including berry-picking without specific permission from the landowner, but undisputed in the Objection, demonstrates one aspect of “as of right”. There has never been any form of restriction placed nor permission sought for this activity. There is no evidence for any restriction ever having been placed on this foraging which has clearly taken place with the knowledge of the landowner. In order to be valid, the Objection must eliminate all such use to be valid.”

33. In the witness evidence set out above, the activity of using the “permitted footpaths”; walking and berry picking (the latter at the edges of the field), without further detail, suggests perhaps use of the recorded public rights of way and unrecorded tracks over the fields and at the field edges. In a previous TVG application considered by Wiltshire Council: Commons Act 2006 Application to Register Land Known as ‘Church Field’ at Hilperton as a Town or Village Green (Application no.2017/01), the Inspector, Mr William Webster, 3 Paper Buildings, in his advisory report dated 19 November 2020, considers:

“...the main issue in such cases is whether the use would appear to a reasonable landowner to be 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.”

Users may have remained unchallenged by the landowner where it may have appeared to them that the public were on the land exercising an existing right in the use of recorded public rights of way “by right” rather than “as of right” and “emergent” rights of way, rather than the use being attributed to use of a wider area of land for lawful sports and pastimes. Would the landowner have been aware of such use of the land for lawful sports and pastimes, to challenge such use if they so wished?

Without Force

34. In the Planning Inspectorate publication “Wildlife and Countryside Act 1981 - Definitive Map Orders Consistency Guidelines”, (updated 16 March 2021) it is stated that: *“force would include breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate.”*

35. In correspondence dated 23 May 2022 the Objector claims:

“5.7 In very recent years, cows have not been present on the site. However, there is a good reason for this change. Around 2-3 years ago, fences and gates began being regularly damaged. Fences were cut with wire cutters and gates were broken (presumably by people wishing to access the land). The

cost of repeatedly repairing and replacing the fences outweighed the revenue that could be generated from the use of the land for cattle grazing. Therefore, the cattle were moved elsewhere. However, before this point, cattle were present on the land during the summer months.

5.8 It was due to the increasing level of vandalism and breaking of gates and fences that it was necessary to padlock a number of gates on the site (as shown in Mr Swanney's photographs).

5.9 In this respect, it is relevant to note that in order to be "as of right", the use must be without force, stealth or permission. The breaking of gates, cutting of fences and other acts of vandalism to access the site amounts to access by force. The use of the site by any person carrying out such acts or by others who are benefitting from those acts cannot be taken into account.

5.10 For the sake of completeness, we should note that cattle could be returned to the application land at any time."

36. Officers consider that there are entry points onto the land from existing public rights of way, i.e. Footpath no's 1, 2 and 3 Southwick; Footpath no.4 North Bradley and Bridleway no.3 North Bradley, (Axe and Cleaver Lane), (please see Witness Distribution Map at **Appendix 15**), the obstruction of which would be an offence under the Highways Act 1980, therefore it is not considered that force was necessary to access the land. Of course if additional access was gained via the breaking of gates and cutting of fences as claimed by the landowner, access gained in this manner would not be qualifying user "as of right". Witnesses provide little evidence about how they gained access to the land and additional evidence on this point would assist the CRA in its determination of the application.
37. Use by force does not refer just to physical force, but also where use is deemed contentious, for example by erecting prohibitory notices in relation to the use in question. In the Supreme Court Judgement R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and another (Respondents) (2010), Lord Rodger commented that:
- "The opposite of "peaceable" user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is "vi" only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant context vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner has told him not to do it. In those circumstances what he did was done vi."*
38. At Exhibit 5.1 of the Application "Land description", the Applicant states: "At no point during the past twenty years has any notice appeared restricting either access or activity to or on the land."

In correspondence dated 5 April 2022, the Applicant adds:
“As explained elsewhere the grazing of cattle was spread across at least six discrete fields in the ownership of the landowner. The small section in question of this Application was never closed to any form of access and was utilised mainly throughout the time when agriculture was in place as a source of winter fodder.

The location of the Village Green application was never out of bounds, nor restricted by any signage or activity or even practically placed out of use with the exception of the two part-days when mowing and then baling took place. Even on those days it was just a case of avoiding the progress of the tractor and not related to any formal or informal exclusion.”

39. The Objector provides no evidence that signage or other measures which would deem the use contentious, have ever been in place.

Without Secrecy

40. Mr P Allsop, (please see above), states in evidence that the landowner was fully aware of his activities and he and T Allsop have spoken to the landowner on occasion whilst out walking. The activities which Mr and Mrs Allsop refer to are walking with dogs on *“the permitted footpaths through the fields”* and blackberry/sloe picking from the hedgerows. If Mr and Mrs Allsop were using the “permitted paths”, which suggests use of the recorded public rights of way over the land, these routes carry an existing public right and the landowner would have no reason to challenge members of the public whilst using these routes. Without further details regarding the uses being undertaken when seen by the landowners, it is not possible to separate the use of linear routes (i.e. recorded/unrecorded public rights of way), which may appear to a reasonable landowner to be user “by right” (recorded rights of way), or emerging public rights of way, from use of the wider land for lawful sports and pastimes to establish TVG rights, in which case, as set out by the Inspector previously in the Hilperton case above, where the appearance of use is *“...ambiguous, then it shall be ascribed to a lesser right, i.e. a right of way.”* Would the landowner have been aware of such use of the land for lawful sports and pastimes, to enable them to challenge that use if they so wished?

41. The Objector in correspondence dated 23 May 2022, refers to one camping incident which the landowner is aware of, *“The users knew that should not have been camping on the site (as evidenced by the fact that they fled when it appeared that they would be challenged). The user was intended to be “by stealth” even if the campers failed to achieve this.”*

As of Right:

There are access routes onto the land, e.g. via existing public rights of way, the obstruction of which would be an offence under the Highways Act 1980, therefore it is not considered that users would have been required to use force to enter the land and there is no evidence of notices prohibiting access which would have

rendered user by force.

As the Objector points out, there are some activities which appear to have taken place with the landowner's permission, e.g. the scattering of ashes, but it appears that not all activities have taken place with the landowner's permission.

There is no statement from the landowner to suggest that activities were taking place with secrecy, other than the referenced camping incident, and no evidence provided regarding incidents of challenge by the landowner.

The use of existing public rights of way, as recorded on the definitive map and statement is not qualifying user for TVG registration, where a right for the public is "by right" rather than "as of right" and there would be no reason for the landowner to challenge or obstruct such user. The use of recorded rights of way/unrecorded tracks and linear routes over the land may appear to a reasonable landowner to be attributable to the use of public rights of way and not wider use of the application land for lawful sports and pastimes: i) if this use is ambiguous it should be attributed to the lesser right, i.e. public rights of way, and ii) is use of the land for lawful sports and pastimes sufficient to bring to the attention of a reasonable landowner that a right is being asserted against them, to enable them to challenge such user if they so wished.

Further information regarding use "as of right" would assist the CRA in its determination of the application, i.e. hearing direct evidence from witnesses and the cross-examination of witnesses on this point at a public inquiry, where all elements of the legal test to establish a new green, must be satisfied, on the balance of probabilities.

Lawful sports and pastimes

42. The application includes a petition which lists a number of activities taking place on the land, (Petition 1) as follows:

"We the undersigned formally attest that the land known locally as Southwick Court fields (OS reference ST84801 55856 and defined on the attached maps) has been consistently in use as an informal recreation space for a minimum of twenty years. These activities have taken place both on the network of paths and trackways illustrated in this application and between them..."

Activities which have historically, and which continue to occur include:

- *Rambling*
- *Exercise and fresh air*
- *Foot traffic via notified pathways to outlying villages*
- *Berry picking*
- *Drone and model aircraft flying*
- *Children camping out*
- *Childhood games*
- *Dog walking*
- *Landing and takeoff paragliders*

- *The scattering of ashes of locals with the knowledge and blessing of the landowner*
- *Protecting property from severe flooding as a functional flood plain”*

43. The petition is signed by 23 individuals, (witness evidence forms available from the Open Spaces Society have not been completed in this case). Whilst the petition is helpful in identifying the activities taking place on the land, it does not assist in whether or not those individuals have indulged in those activities themselves and which of these activities they have observed taking place on the land, a point which is considered by the Objector (correspondence 17 December 2021):

“4.2. Document 7.1. appended to the application is a form signed by 23 people giving their names and addresses. The front page of the form makes a number of vague statements regarding the use of the Land for recreational purposes. However, the form provides no details as to the duration, location or frequency of the claimed activities.

4.3. No information is given as to how long the signatories have lived at the listed address or how the relevant person claim to know of the alleged use of the Land (e.g. it is unclear whether the signatories would assert that they have carried out the uses claimed, seen the uses taking place by others or have simply heard third hand that some people claim to use the Land for the uses claimed).

4.4. Therefore, the evidential value of the signed form is very low.”

44. Officers agree with this statement that on its own the petition is of very low evidential value, however, 9 of the individuals who have signed the petition, have also submitted statements at the formal consultation stage. These individuals provide evidence of their own / observed use of the land for:

Witness	Use / Use Observed
P & S Elphick	Recreational purposes - walking
S & P Willcox	Regularly walked around and across the area with children and dog. Also exercise and recreational purposes. Social contact with other residents. Forage for wild food. Observe wildlife.
H Chamulewicz	Residents enjoy walks around the field with/without dogs. In summer many sit on the grass and soak up surroundings. Fly a kite. Throw a ball. Swing attached to substantial tree popular this year.

	I pick a large quantity of blackberries each year since childhood (surrounding hedges). Sloes in hedgerows.
M Dennis	Many walks – dog walking and walking for fitness. Observing and listening to nature.
J Dennis	Used to walk the dog. After dog walking just walking and enjoying fresh air. Picked elderflowers to make cordial and blackberries for puddings and pies. Meeting and chatting with other locals.
G Hill	Regular and constant use by residents and visitors – walking. Both my children and grandchildren played in the field. Observed use for activities contained within this document (i.e. application and petition).
C Hill	My family have enjoyed exploring this wonderful landscape. Children and grandchildren – picking blackberries and sloes from hedgerows. Identifying birds and habitats. Daily walks throughout year. Watching and documenting changing seasons has been inspiration for hours spent drawing, painting and crafting. Extended periods of time in the fresh air.
G & M Whiffen	Exercising dogs. Use for recreational and health purposes. Utilising area for the benefit of 4 grandchildren for last 10 years. Utilise fruits such as blackberries and sloes from hedgerows and damsons from Axe and Cleaver Lane.
N Swanney	Attest to regular use by local residents and visitors. Children and grandchildren have played in the fields. Observed: walking, jogging, dog walking, blackberry picking, bird watching, model plane flying, drone flying, hot air balloon landing.

45. Others who have not signed the petition, but have submitted statements in the consultation period, include the following activities:

Witness	Use / Use Observed
A Swanney	As N Swanney above (joint statement).
P Allsop	In 1980's and for last 7 years walked dogs nearly every day on permitted footpaths through fields to Southwick. Wife and I picked blackberries for pies and sloes for gin from hedgerows.

T Allsop	Walk dogs daily on permitted footpaths through fields and beyond. Made pies and jam from blackberries in hedgerows.
D Goodship	Walking. Running. Picking blackberries. Grandchildren now enjoy walking fields.
R Hunt	I and my family have used fields daily for last 22 years for exercise. Annually foraged for blackberries and elderflowers to make cordials, crumbles and jams.
B Jones	Dog walking. General exercise for well being. Picking wild fruit – blackberries etc. Observe wildlife.
J & B Keltie	Daily – walking, dog walking. General exercise and enjoyment. Picked blackberries, sloes and damsons when in season from hedgerows.
M Nutch	Recreation.
M & J Oliver	Brought up 4 children here and made use of many rights of way for: Walking. Jogging. Playing. Picking blackberries. Watching wildlife.
M & L Stevens	Regularly with 2 children and now 5 grandchildren: Walked. Exercised. Annual family blackberry picking session.

Activities undertaken/observed	No. of witnesses <i>(those providing written statement only – petitions not included)</i>
Walking (with/without dogs)	19
Exercise (not qualified)	6
Recreation (not qualified)	4
Blackberry / sloe / elder flower / elder berry picking	16
Social contact	3
Observing Wildlife	8
Sit on grass	1
Fly kite	1
Throw ball	1
Swing	1
Playing	4

Running / jogging	4
Model plane flying	2
Drone flying	2
Hot air balloon landing	2

46. The majority of these activities qualify as lawful sports and pastimes, (with the exception of model plane/drone flying and hot air balloon landing, which may or may not be lawful, as discussed later). The main activities undertaken and observed are dog walking, walking and picking wild fruit and produce such as blackberries, sloes, elderberries, elder flowers and damsons.

Camping:

47. The Objector disputes camping by Local Children, (correspondence dated 17 December 2021), based on no detail of the frequency or location of this use or how it was practically or safely achieved, being provided:

“The site owner rejects the suggestion that there has, at any time, been a camping use of the Land. If any such use has been carried out it has either been on a covert basis (thus failing the “as of right” test) or has been so trivial or infrequent as to have been undiscoverable by the land owner (thus failing the “quality of user” test).

5.9 ...It is presumed that the Applicant would only seek to claim that the camping took place during the summer. This is when the Land is actively used for cattle grazing. It is implausible to suggest that parent would allow their children to camp on Land when cattle are present. Such a use would have risked the children being trampled in addition to risking harm to the cattle.”

48. The Objector considers that this use is likely to have taken place on the northern section of the application land, closest to the settlement and within sight of parents, i.e. the land excluded from the Application where a planning trigger event is in place, however, this is disputed by the Applicant in correspondence dated 5th April 2022, stating that camping does take place and assumes that children would want to be *“...as far away from adult censure as possible as evidenced by the bottles and cans which are cleared by users of the field and that the Southern portion of the field, as applied for, is the preferred location. If cattle were present this activity could not take place...”*

49. In the Objector’s correspondence dated 23 May 2022 (supplementary):

“5.12 The landowner is aware of one camping incident occurring. The “campers” were on site for one night and then fled the scene leaving their tents, some clothes and various other items which were then disposed of. 5.13. The use was clearly not “as of right”. The users knew that should not have been camping on the site (as evidenced by the fact that they fled when it

appeared that they would be challenged). The user was intended to be “by stealth” even if the campers failed to achieve this.”

50. Whilst “*Children camping out*” is listed as an activity taking place on the land in Petition 1, the more detailed written statements of witnesses do not refer to camping taking place. Petition 1 does not give sufficient detail regarding the location, frequency and by whom camping was being undertaken.

Paragliders and Hot Air Balloons:

51. In correspondence dated 17 December 2021, the Objector considers the landing and taking off of para-wings (believed by the Objector to be reference to paragliders) and hot air balloons “...*it is difficult to see how any such thing could take off from the Land. The Land is flat.*” They consider the landing of hot air balloons to be covered by aviation law and therefore not user “as of right”, even if it were this use is “...*so trivial and sporadic as not to carry the outward appearance of user as of right’ and should, therefore, be ignored for the purposes of the application.*”
52. The Applicant claims that “*Landings and take-offs occurred regularly pre-Covid.*”, however, the Landowner has no recollection of this use ever taking place and the use is not accepted by them. Officers agree that reference to the landing of hot air balloons is limited to the joint written statement from Mr and Mrs Swanney only, as an observed activity, and other than the petition submitted with the application, there are no references to paragliders landing and taking off in witness evidence.

Trail bikes:

53. In correspondence dated 17 December 2021, the Objector states that there is only one reference to use of the land by trail bikes in the Land Description, (Exhibit 5.1 submitted with the application), where it is listed as an activity taking place on the land, therefore no evidence has been provided to support this claim. Officers would agree that this activity is not supported by inclusion in Petition 1 accompanying the application, or written testimony from witnesses.

Scattering of ashes:

54. The Objector, in correspondence dated 17 December 2021, observes that the scattering of ashes is claimed to have been carried out with the express consent of the landowner and as such, it is not qualifying user “as of right”, as it is with permission. Officers agree that Petition 1 states that the scattering of ashes of locals has taken place “...*with the knowledge and blessing of the landowner.*” which suggests that any such use cannot be considered as qualifying user “as of right” where it was undertaken with the permission of the landowner.

Children playing:

55. With regard to children playing on the land, the Objector considers that no evidence regarding frequency; duration or areas of claimed use, are provided to support this claimed use.
56. References to playing on the land are low in number amongst witnesses who have provided written statements, i.e. fly kite (1); throw ball (1); swing (1); playing (4); recreation – not qualified (4). Certainly additional information on this point, as suggested by the Objector regarding the location, duration and frequency of play on the land, would assist the CRA in its determination of the application, for example the Objector suggests in correspondence dated 23 May 2022, that the swing referred to by H Chamulewicz “...a swing was popular this year attached to a substantial tree...”, was attached to an oak tree located on the boundary closest to the housing on that part of the land now excluded from the TVG application where there is a planning trigger event in place.

Walking/Dog Walking:

57. Dog walking and walking appear to have taken place on a daily basis and very regularly. Certainly when Officers from the CRA visited the site in 2021, there were a number of walkers/dog walkers using the field. However, the use of linear routes may not be sufficient evidence to establish TVG rights, as the Objector comments in correspondence dated 17 December 2021:

“5.20. Evidence of the use of the Land for walking should be discounted.

5.21. The Courts have been clear that the use of footpaths must be distinguished from use for sports or pastimes.

5.22. In Oxfordshire County Council v Oxford City Council Lightman J held that where the claimed use relates to defined tracks over land, this will generally only establish public rights of way, unless the user is wider in scope or the tracks are of such character that users of them cannot give rise to a presumption at common law as a public highway.

5.23. As Lightman J stated:

“If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).” [102]

“The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both.” [103]

5.24. *The Application refers to the use of the Land for general walking, (for example, to access the outlying villages) and dog walking. The Applicant appends an aerial photograph (Exhibit C) showing the walking routes around the site. Therefore, the Applicant's claim regarding walking use is limited to the routes shown on that plan.*

5.25. *The Land is crossed by a number of public rights of way. Any use of those public rights of way will be use "by right" rather than "as of right". Therefore this use must be discounted. There is also a circular route around the field which is marked on OS maps as a path.*

5.26. *The use of these routes for walking with or without dogs would not suggest any use to a reasonable owner other than use of paths as a public right of way. This use would in no way suggest to a landowner that the users believe that there were exercising a right to indulge in lawful sports and pastimes across the whole of the field.*

5.27. *Accordingly, in the circumstances, where people have walked paths that traverse the Land, it would not be reasonable to expect the landowner to object to a dog owner's use of the footpaths due to the fact that their dog may be trespassing off lead on the rest of the Land.*

5.28. *Therefore, the use of these routes for walking (with dogs or otherwise) is insufficient to amount to use of the Land for lawful sports and pastimes and should be discounted."*

58. In correspondence dated 5 April 2022, the Applicant states:

"As evidenced by the trackways map and photo in appendix c), the designated footpaths are supplemented by a series of trackways and meander lines which cover the entirety of both the application site and the allocated portion of the land." The Applicant provides Appendix C, which records established pathways, recorded and unrecorded over the land:

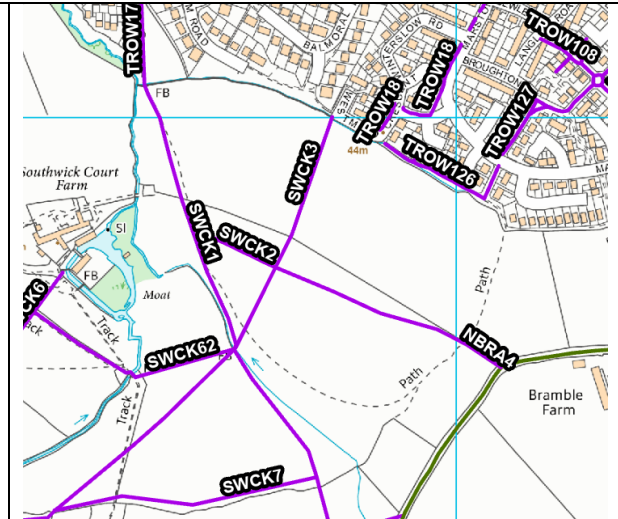
Current footpaths and trackways

Whilst photographs exist taken from ground level, this is the clearest representation of the numerous paths and trackways in us at the current time.



Current footpath/trackways key:

Black	Principal circular path
Yellow	Secondary "internal" paths running either side of the remains of the fencing and the Southern perimeter.
Blue	Right is the path from the kissing gate, Left follows the high water line of the flood zone.
Orange	The principal North-South footpath.
Red	Blocked off pathway
Purple	Right access to bridleway, left access onwards to Southwick, North Bradley and Hoggington.
White	Dog walker route



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Extract from working copy of definitive map of public rights of way:
 Purple line = Footpath
 Green line = Bridleway

59. Witnesses provide evidence of the use of recorded footpaths/tracks over the land:

P Allsop – “...walked our dogs nearly every day on the permitted footpaths, through the fields around Boundary Walk, Southwick Court and through to Southwick.”

T Allsop – “I walk my dogs daily on the permitted footpaths through the fields around boundary walk, southwick court and beyond.”

M & J Oliver – “...made use of many of the rights of way for walking, jogging and playing...”

S & P Willcox – “We have also organised community walks through those fields...”

60. There is some evidence that the land itself is a destination for undertaking lawful sports and pastimes, i.e. walking and dog walking as Cllr G Hill; H Chamulewicz and A & N Swanney provide testimony of the fields being a destination for others from outside the area who walk or drive and park in neighbouring streets, to walk in the fields. The TVG Application states in the “Land Description” at Exhibit 5.1 of the Application – “There are three formal access points on the Northern edge and one each on the southern and Western fringes...The disparity between the number of access points from the

Northern edge and those on the Western and Southern boundaries argue strongly for the land functioning as a destination in and of itself and not simply for access to points beyond...Within the confines of the field further footpaths and trackways link the paths defined by stiles and gates. This further argues for the site being a destination in and of itself...

61. The Objector in correspondence dated 23rd May 2022, states:

“5.2. Further we note that a number of the statements and representations submitted in December relate to uses of the land which should be discounted when considering use as of right in the context of the TVG application. For example, express reference is made to ‘walking permissive pathways’ and use of the ‘rights of way’. The majority of the claimed uses are walking (with or without dogs) or running. It is reasonable to assume that such uses would have taken place on the pathways and should, therefore, be discounted.”

62. There are four recorded public footpaths over the application land Southwick 1, 2 and 3 and North Bradley 4, as well as numerous unrecorded tracks, as set out above at paragraph 58. The aerial photographs at **Appendix 5**, show that since 2001, (aerial photographs dated 2001; 2005/06; 2014 and 2020/21), the trackways across the land have remained consistent. In the Wiltshire Council Hilperton TVG application (2017/01), the Inspector, in his advisory report dated 19 November 2020, considers the difficulties which 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 potential acquisition of new, public rights of way rather than rights sufficient to support a TVG registration.”* He then points to the cases which address this matter, i.e. *“... 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 at [102]-[110]. The guidance in these cases was approved by Lord Hoffmann in the Oxfordshire case at [2006] 2 AC 674 at [68] [Oxfordshire County Council v Oxford City Council [2006] UKHL 25] and was also followed more recently in R (Allaway) v Oxfordshire County Council [2016] EWHC 2677 (Admin).”* and the helpful overview provided in the report of Vivian Chapman QC at Radley Lakes (13/10/2007) at [304]-[305] *“...who said 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...”*

63. Certainly additional evidence on this point would assist the CRA in its determination of this application and address the main points here. i.e:

- i) how use would have appeared to a reasonable landowner;
- ii) is use of the land for walking/dog walking user “as of right”, i.e. the use of recorded public rights of way “by right”;

- iii) was use of the land for lawful sports and pastimes sufficient to bring such use to the attention of the landowner to challenge that use if they so wished;
- iv) if the use of recorded/unrecorded public rights of way is removed as qualifying user, is the remainder of the use for lawful sports and pastimes too trivial/sporadic to lead to support registration.

Berry Picking:

64. The Objector states:

“Berry Picking

5.18 Again, no evidence is given regarding the frequency or duration of this use. It can be assumed that this use was limited to the periphery of the Land as there are no berry-bearing plants elsewhere on the Land. However, whether this claimed use is limited to the northern part of the Land nearest the settlement (which is subject to the trigger event) is wholly unclear.

5.19. In any event, such use does not demonstrate a general use of the entire Land for lawful sports and pastimes. The use would be confined to the extreme margins of the periphery of the Land.”

- 65. 16 witnesses refer to picking wild produce on the land. The picking of fruit and wild produce is seasonal in nature, however, in this case there appear to be a number of types of produce taken, i.e. blackberries (very approximately late August – early September); Sloes (late October – early November); Elderflowers (late May – Mid June); Elderberries (mid August – mid September) and damsons (August to October), an activity which covers a large part of the year from late May to early November, (excluding July), depending on weather conditions etc.
- 66. Certainly Mr and Mrs Whiffen, in their joint statement, suggest that they collected damsons from Axe and Cleaver Lane, which could be a reference to the northern section of the land not subject to the live TVG application where the entrance to the fields from Axe and Cleaver Lane is located. Where the fruits etc, are located at the edges of the land, as confirmed by the Objector, it may be that use of the unrecorded perimeter route may not have appeared to a reasonable landowner to be attributable to the wider use of the land for lawful sports and pastimes, thereby bringing such use to the attention of the landowner for them to be aware that TVG rights were being asserted against them and to enable them to challenge such use if they so wished.

Drone / Model Aircraft Flying:

- 67. The personal use of drones and model aircraft in the UK is governed by the Civilian Aviation Authority Air Navigation Order 2016 and there are certain rules, including for example: staying below 400ft; keeping the drone in sight and not flying a drone within 50m of a person, vehicle or building not under

your control, however, a licence is not required for operating a drone weighing less than 250g. Without further details of the drone/aircraft and the manner in which it was being flown, it is not possible to consider the drone/model aircraft flying as a lawful sport or pastime here and this use must be excluded.

68. The Objector states that *“No evidence is given as to the duration or frequency of this claimed use, the location where it is claimed to have occurred or the people who are claimed to have undertaken this use. Again, we assume that the use is likely to have occurred nearer the dwellings in the northern part of the Land (which is subject to a trigger event).”*
69. Further, in addition to reference in the petition submitted with the application, the evidence of incidents of drone/model aircraft flying is low, confined only to the joint written statement of Mr and Mrs Swanney as an “observed” activity.

General:

70. The Objector states in correspondence dated 17 December 2021:

“Lawful Sports and Pastimes

5.1. It is not sufficient simply to assert that the land has been used for various lawful sports and pastimes. The nature and quality of the use must be such that it can be taken into account in support of the Application.

5.2. A number of principles have been established by the Courts in this respect including:

5.2.1. “the user must be shown to have been of such character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed” (White v Taylor (No.2) (1969) 1 Ch 160 at 192)

5.2.2. The use must be to a sufficient extent. Use which is ‘so trivial and sporadic as not to carry an outward appearance of user as of right’ is to be ignored (R v Oxfordshire County Council, ex parte Sunningwell Parish Council [2000] 1 A.C. 335, 375D-E)

5.2.3. The decision maker should be concerned with ‘how the matter would have appeared to the owner of the land’ (R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70)

5.2.4. The onus is on the applicant to prove that the whole, and not merely a part or parts of the Land, have been used for lawful sports and pastimes (Cheltenham Builders v South Gloucestershire Council [2003] EWHC 2803 (Admin) at [29])

5.3. *The submitted evidence does not address any of the requirements above. The evidence submitted in support of the application does not contain any details regarding the extent of the Land used or the frequency or duration of each claimed use...*

71. In this case there is a lack of evidence regarding regular/organised/community events taking place on the land which might further support general use of the land by the local community for general recreation. In the Inspector's Advisory Report on "Applications to Register Land Adjoining Seagry Road at Lower Stanton St Quintin, Nr Chippenham as a New Town or Village Green", dated 9th January 2023, the Inspector Mr William Webster considers limited community events taking place on the land, but places only limited weight on these, (paragraph 35): "...events were somewhat infrequent anyway and would have been of only limited duration on the day. It is not as if, for instance, the application land was the location for the annual village fete or was a place where the annual Remembrance Day service took place each year..." In the Southwick case there is no evidence of "events" taking place on the application land.

Lawful Sports and Pastimes:

The main use of the land has been for the purposes of walking/dog walking and fruit picking. The lawful sports and pastimes claimed lead to a number of questions, including how such use would have appeared to a reasonable landowner; user "as of right" and sufficiency of user to support registration of the land as a TVG.

There is no evidence of regular/organised/community events taking place on the land.

It is considered that hearing direct evidence from the parties and the cross-examination of witnesses on this point at a public inquiry, would assist the CRA in its determination of the application, where all elements of the legal test to establish a new green, must be satisfied on the balance of probabilities.

On the Land

72. The Application, at Exhibit 5.1. "Land description (in respect of which this application is made)", gives the following description of the land:

"The proposed Village Green is on the immediate southern boundary of Trowbridge..."

The land is bordered on its Northern edge by hedgerow defined as "Important" by the 1997 hedgerows act. This designation is confirmed on a number of levels and documented fully.

The Eastern and Southern boundaries of the site are defined by Lambrok Stream. This watercourse contributes to the Environment Agency determination of those boundaries of level 1, 2 & 3 flood plain. The site is

also subject to surface water ingress from the Northern and Southern boundaries as demonstrated on Wiltshire Council flow analyses.

The current use of the land is for a sustained blend of cattle grazing and informal recreation and is defined as such by Wiltshire Council. There is a network of footpaths which appear on a series of maps. There are three formal access points on the Northern edge and one each on the southern and Western fringes. These access points have been formalised with the knowledge and support of the landowner. The most recent improvement has been the replacement of a stile with a kissing gate. This work was completed with the knowledge of and blessing of the landowner. The disparity between the number of access points from the Northern edge and those on the Western and Southern boundaries argue strongly for the land functioning as a destination in and of itself and not simply for access to points beyond.

All access points to the site consist of formalised stiles except for the aforementioned kissing gate. A wire fence which subdivides the Northern and Southern portions of the land for grazing confinement purposes contains a further stile and additional gate. Within the confines of the field further footpaths and trackways link the paths defined by stiles and gates. This further argues for the site being a destination in and of itself...”

73. The southern, eastern and western sides of the application area are enclosed by mature hedging and trees, whilst the northern side of the land is partly fenced and partly open to the adjoining land, (which originally formed part of the TVG application, but which was excluded where there were planning trigger events). The land subject to this application has access via a footbridge with stile from the point at which Footpaths 62; 1 and 3 Southwick converge on the southern perimeter and Footpaths 1 and 3 enter the application land. On the northern boundary, Footpath no.1 leaves the TVG application area via a stile, (please see photographs below). Other access points on recorded public rights of way are located outside the TVG application area, i.e. within the excluded area - Southwick Footpath 3 and North Bradley Footpath 4 (which links to Bridleway no.3 North Bradley (Axe and Cleaver Lane):

1



Footbridge with stile at entrance of Footpath no.1 and no.3 Southwick into application area on southern perimeter.

2



Stile at entrance of Footpath no.1 Southwick into TVG application area on north side.

3



Stile at entrance of Footpath no.3 Southwick, (outside application area), to north of application land.

4



Entrance of Footpath no.4 North Bradley via open gate off Axe and Cleaver Lane (Bridleway no.3 North Bradley), outside application area to the north-east.

74. The Objector states in correspondence dated 17th December 2021:

“5.5 The application states that the “current use of the land is for a sustained blend of cattle grazing and informal recreation”. This is not the case. The field is currently solely used for agriculture. During the summer months (usually April to September), the field is used for grazing cows. During the winter months the field is allowed to recover from grazing. It does not have “recreational” use.

5.6 As explained below, much of the claimed use of the Land is inconsistent with the current use of the land. Indeed the carrying out of various activities would be impossible in light of the presence of cattle during the summer months.”

Additionally, in correspondence dated 23 May 2022, the Objector confirms that *“In very recent years, cows have not been present on the site...”*

75. The condition of the field from the aerial photograph dated 2001 suggests some kind of agricultural practice taking place on the land (**Appendix 4**), and the land appears to be laid to grass in aerial photographs dated 2005/06; 2014 and 2020/21, (on a site visit in 2021 Officers’ found the fields to be laid to grass). The action of low-level agricultural activities was considered in the case of *R (Laing Homes Ltd) v Buckinghamshire County Council [2004]* where it was held in the High Court that the annual gathering of a hay crop was incompatible with use of the land as a village green and as a result the decision to register the green was quashed. However, in *Oxfordshire County Council v Oxford City Council [2006] UKHL 25*, Lord Hoffman commented on that earlier decision saying: *“I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes...if in practice they were not.”* Therefore, where there has been use of the land for agricultural purposes throughout or at some time during the relevant user period, each case must be determined on an individual basis on the degree of interruption to user and the extent to which the agricultural activity is consistent with that use. In the *Southwick Court Fields* case there are no references to interruption to user caused by the production and gathering of the silage crop, spraying or the keeping of cattle on the land. The agricultural activities appear to have had little impact upon user and the two activities have co-existed, as Mr Swanney suggests, when mowing and baling took place on two-part days, it did not prevent use, users simply avoided the progress of the tractor.
76. Section 12 of the Inclosure Act 1857 *“Protecting from nuisances town and village greens and allotments for exercise and recreation”*, makes it an offence to carry out any act to the injury of the green or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, and under Section 29 of the Commons Act 1876, *“Amendment of law as to town and village greens”*, any encroachment on or inclosure of a green and also any erection thereon or disturbance or interference with, or occupation of the soil thereof, which is made otherwise than with a view to the better enjoyment of the green, is deemed a public nuisance, (the Victorian Statutes). Following the *TW Logistics Ltd v Essex County Council [2021] 1050* case, it is now established that after registration of land as a TVG, a landowner is entitled to continue to undertake activities of the same general quality and level as it did during the qualifying period and also to undertake new activities which do not interfere with the public’s recreational right, whilst members of the public must exercise their rights reasonably and with respect to a landowner’s use, i.e. the landowners activities are not criminalised by the Victorian statutes in respect of their continuation of those activities after the registration of the land.
77. The Applicant suggests in correspondence dated 5 April 2022 that *“No change to the use of the land is desired or suggested. Should the cattle return*

*at some point in the future on the same basis as when the land **was** partly in agricultural use there shall be no impediment to that occurring. Historically, the multiple streams of use on the land have coexisted harmoniously.” This is echoed by Cllr Graham Hill who agrees, in correspondence dated 5 April 2022, that “...NO change to current free use, access, and possible future cattle grazing (if a return to mixed use happens) is proposed, and that the Application serves only to meet the requirements of policy whilst retaining unfettered use of the application site for residents and local population as a whole. The landowner stands to lose nothing.”*

78. There is a question over whether the whole of the application land has been used for lawful sports and pastimes where the main user of the field has been for walking and dog walking – perhaps the use of linear routes and picking produce at the boundaries of the field, rather than use of the whole of the application land. With regards to berry picking, the Objector states:

“...It can be assumed that this use was limited to the periphery of the Land as there are no berry-bearing plants elsewhere on the Land. However, whether this claimed use is limited to the northern part of the Land nearest the settlement (which is subject to the trigger event) is wholly unclear.

5.19. In any event, such a use does not demonstrate a general use of the entire Land for lawful sports and pastimes. The use would be confined to the extreme margins of the periphery of the Land.”

Mr and Mrs Whiffen, in their joint statement, suggest that they collected damsons from Axe and Cleaver Lane, which could be a reference to the northern section of the land not subject to the current TVG application where the entrance to the fields from Axe and Cleaver Lane is located.

79. On dog walking and general dog walking, it is noted that there are several recorded rights of way over the land and aerial photographs suggest a series of unrecorded routes, (see **Appendix 5**). The Applicant provides a map of the recorded and unrecorded paths as included at paragraph 58. In evidence several of the witnesses refer to using paths on and around the land and some refer to routes leading over the land and beyond, for example, to Southwick. The application itself at “7. Justification for application to register land as a town or village green” states:

“The unfettered use of the land has been unchallenged over this period and is symbolised by the footpaths and trackways formalised upon it.

Divergence from these footpaths and/or trackways has not been challenged either formally or informally.

Maintenance and enhancement of access points have been supported by both the landowner and Wiltshire Council as demonstrated in attached photographs and documents.” (Officer’s emphasis added).

P Allsop – “I have walked our dogs nearly every day on the permitted footpaths through the fields around Boundary walk, Southwick Court and through to Southwick.” (Officer’s emphasis added).

T Allsop – “I walk my dog daily on the permitted footpaths through the fields around boundary walk, southwick court and beyond.” (Officer’s emphasis added).

M & J Oliver – “We have brought up four of our children here and made use of many of the rights of way for walking, jogging and playing, as well as enjoying the countryside pleasures of green fields, trees and shrubs, picking blackberries and watching wildlife.” (Officer’s emphasis added).

S & P Willcox – “We have also organised community walks through those fields...”

80. Officers agree that the use of recorded public rights of way over the land to traverse the land is not qualifying user, where use is “by right” rather than “as of right”, such use would not have appeared unreasonable to the landowner, as the Inspector Mr W Webster sets out in his advisory report regarding the Hilperton TVG application:

“18. ...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’.”

81. The Objector also makes the point at 5.29 of their correspondence dated 17 December 2021 that where the application refers to the improvement of points of access to the land, including the replacement of stiles with a kissing gate, *“It would be a criminal offence for the Owner to stop up the access points to the public rights of way. Therefore, the presence of the access points, (including the carrying out of works to make access points safe or more widely accessible) should be discounted.”* Officers agree that where there are rights of way recorded on the definitive map of public rights of way, improvements to the access points may be in relation to those rights of way and not necessarily in relation to wider access to the whole of the land. It may have appeared to

the landowner that the public were exercising their right to use the legal rights of way which cross the land. In correspondence dated 5 April 2022 the Applicant refers to photographs in evidence (please see **Appendix 9**) which *“...appear to show the stopping up of access points. This would appear to be run contrary to the point made within the Objection.”*

82. Witnesses do not include a map of the area of land upon which they have carried out and/or observed activities taking place and in this case the northern section of the land is excluded from the application where there is a current trigger event in place, without a corresponding terminating event, there is no representation or evidence presented to dispute the CRA's findings on the trigger event point. Mr and Mrs Elphick state:

“We use the fields where the development is proposed, and beyond that, for recreational purposes.”

However, the Objector makes the following point (correspondence dated 17 December 2021):

“3.2 It should be noted that the trigger event applies to the vast majority of the Land covered by the Application. The trigger event applies to the land closest to the housing and the locality which is alleged to have used the land for lawful sports and pastimes.

3.3. As the Application was made with reference to the whole site, the evidence submitted does not differentiate between the use made of the northern part of the site which is now subject to a trigger event or the southern part of the site which is much further away from the settlement. Therefore, it is wholly unclear what use is claimed to have been made of the southern part of the Land.

3.4. The weight to be attached to the representations must therefore necessarily be reduced. It is reasonable to assume that, if the claimed activities did occur, they would have been focussed on the northern part of the land nearest the settlement.”

83. On this point, the Applicant states, in correspondence dated 5th April 2022:

“3.4. All representations made during the consideration of the application were submitted specifically in reference to the Southern part of the land currently standing as an active Town or Village green Application. Earlier submissions only reinforce the access to the entire site which has been, and continues to be, fully open for public use. The assumption that the responses relate to the Northern part of the land is made without any evidence or justification. Clearly long-time users of the land have been aware of where they were in relation to the cardinal points of the compass.”

84. It is true that the evidence submitted with the application is likely to refer to the whole of the application land which was subject to the original application, however, following the discovery of planning trigger events which excluded part of the land from registration as a TVG, the acceptance of the application only in part, (i.e. the southern part of the land), was advertised and comments submitted at the consultation stage are likely to be in reference to the southern section as set out in the notice of application.

The Objector's correspondence dated 23rd May, states:

"3.1. The application had been submitted in respect of the whole site. However, following the Council pointing out that the northern part of the site (i.e. closest to the housing) had been subject of a trigger event, the application has been amended and further evidence has been submitted.

3.2. Nonetheless, it remains the case that it is wholly unclear whether the majority of the supporting evidence still relates to the whole site (which was subject to the original application) or just the southern part (which is now the subject of the application).

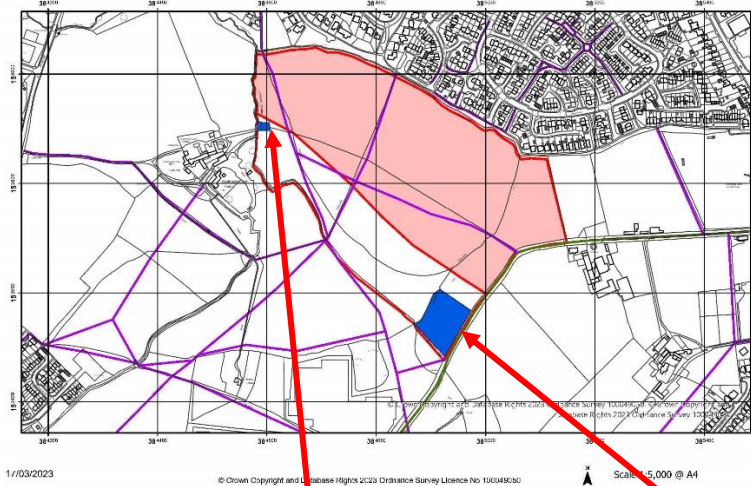
3.3. By way of example, reference is made in one of the supporting representations to a swing ("even a swing was popular this year attached to a substantial tree.") [H Chamulewicz e-mail dated 12/12/2022] The substantial tree in question is a boundary oak tree located on the boundary closest to the housing. This is outside the area which is now the subject of the TVG application.

3.4. Therefore, there is evidence that at least some of the respondents have misunderstood the extent and nature of the revised application.

3.5. It remains the case that the vast majority of evidence is ambiguous as to where uses are claimed to have taken place. Accordingly, as before, the weight of such evidence must necessarily be reduced."

85. As the Inspector points out in the Hilperton TVG application case, *"The real difficulty with the written statements is that...the evidence does not deal with the precision that is required as to where these witnesses walked when they were on the land..."* There is insufficient detail given in the user evidence provided, to establish which activities were taking place on which parts of the land and hearing from the witnesses at a public inquiry would provide additional information. However, even if the northern section of the land is excluded from the application land, there are recorded rights of way over the northern section over which the southern area and the identified locality are linked and accessible. There is also access to the southern section of the application land the from Axe and Cleaver Lane to the south, and from existing rights of way and highways in order that the locality and the southern section of the land, remain linked.

86. The separate field identified in the map below, appears to have no available access point, being surrounded by mature hedges on all sides to the land around it forming the main part of the application land and a ditch to the western side, other than a gate on Axe and Cleaver Lane, which was locked when Officers from the CRA carried out a site inspection in November 2021. Climbing over the gate would result in use by force, which is not user as of right and must be discounted for the purposes of the town/village green application land. No evidence has been provided regarding the gate and it is not clear how long it has been present/locked, there is no further evidence of how long this section of the land has been inaccessible. Certainly aerial photographs date 2001; 2005/06; 2014 and 2020/21, (see **Appendix 5**), show this as a separate field. Additionally at the north-west side of the land there is an area of pens, which appear to be inaccessible to the public in November 2021 at least, again there is no evidence of how long the area has been made up of pens and how this may have affected use by local inhabitants, (climbing over the gates/fences would be attributable to user by force and not qualifying user “as of right”). This feature does appear on aerial photographs 2001 – 2020/21, (see **Appendix 5**):



Inaccessible areas of land – proposed to be excluded from TVG application =



Pens area which appears to be inaccessible for use by local inhabitants in the exercise of lawful sports and pastimes.



Padlocked gate into separate field (part of TVG application land), off Axe and Cleaver Lane (Bridleway no.3 North Bradley).

- 87. Therefore, Officers suggest that the area capable of being registered as a TVG is reduced and the separate field and penned areas of the land, as shown in blue on the plan above, should be excluded from the area of application land, if it is successfully registered as a TVG, where the application and the evidence is silent on access and activities taking place on these sections of the application land.
- 88. It is clear from the planning application no.20/00379/OUT replies (**Appendix 16**), that the land, forming part of the ancient water meadows system around Southwick Court Fields and adjacent to the Lambrok, is subject to flooding as identified by numerous respondents. As B Johnson, Flood Warden for Southwick sets out (16 November 2021), *“These two streams [Lambrok and tributary] combine to become what the Environment Agency has classed as a main river, causing an extensive Flood plain (flood zone 2/3) after heavy*

rainfall. Fields and neighbouring gardens in Blind Lane and fields and roads in Brookmead have severely flooded at least 5 times since the year 2000 and probably many years before then. In 2014 flooding was experienced in both January and July...To utilise this floodplain in the past, medieval farmers sited ridge and furrow field workings here...‘Groundwater flooding’ has been mentioned but I understand that this is found where the underlying ground formation is of chalk. In this area the soil is of heavy clay construction. When the surface becomes saturated, the underlying clay prevents subsequent rain fall or flooding from being absorbed and it lays on the surface as fluvial flooding or surface water flooding, this is what is experienced here, not groundwater flooding...a number of photos from local residents have shown substantial fluvial and surface water flooding here, often twice a year and in subsequent years...It seems probable, as local residents have suggested that flooding has occurred here far more frequently than records suggest...On the evening of 9th August 2021 Southwick Village suffered surface water flooding in what all agencies agreed was an extreme weather event, when homes, numerous gardens, roads , (including the A361 Frome Road,) and sewers flooded and the Chantry Gardens pumping station was at 97% capacity.”

B Johnson 26 March 2021 – “...the effects of climate change have been increasingly apparent in Southwick. This is an area known as the ‘clay vale’ that has always suffered from fluvial and surface water flooding hence the present [sic] of numerous medieval and post medieval water meadows. In recent years prolonged periods of heavy rainfall have resulted in numerous instances of flooding in connection with the Lambrok waterway. No longer just ‘more than once in 30 years’ but now several times every year and the areas of flooding have also increased.”

North Bradley Parish Council 7 December 2021 – “The fields south of Trowbridge are ancient water meadows and are regularly flooded by the Lambrok stream from both the horizontal watercourses that skirts to ground of Southwick Court house and the vertical watercourse that joins that stream from the direction of North Bradley.”

Cllr G Hill - Report sent 1 November 2021 - “The photos are genuine and give visual evidence that flood events not only occur, but do so on a regular basis...the combination of fluvial and surface water flooding events generally occur a handful of times each year.”

89. The comments reflect the area as a recognised floodplain, subject to regular and increasing flood events. It is not clear from the evidence provided in the TVG application, how the flooding of the land may affect use by local inhabitants, there is no mention of flooding, only the planning application replies reveal any evidence that this flooding might prevent use, e.g:

S Wain – “I know these fields fairly well as I walk around them nearly everyday in the summer. I tend to avoid them in winter as they are so

waterlogged, for days after heavy rain there are large puddles all over the place.”

S Pisarewicz – “The fields south of Trowbridge are ancient water meadows and are regularly flooded by the Lambrok stream, I know this because I walk them regularly in the Summer when they are firm. I avoid them as they are marshy and water logged throughout the Autumn and Winter especially at the end of Spring Meadows...”

90. However, the survey of users of the fields as set out in the planning application replies from Mr R Williams, (please see paragraph 15 above), suggests heavy use of the land in February/March, i.e. 3,545 recorded visits in one month. Although the planning replies are made in relation to development of the excluded area of the application land, photos reveal the flood area extending into the active TVG application land.

On the Land –

The northern section of the land is excluded from the application by the presence of planning trigger events, which is not in dispute. However, the Objector disputes the existence of and validity of any evidence relating to use of the southern part of the land still capable of registration, given the exclusion of the northern section.

The smaller field, which is not accessible from the remaining land or Axe and Cleaver Lane, appears incapable of registration, although it is not clear how long the current gate has been in place and locked and further evidence on this point would assist the CRA in its determination of the application.

The question of whether or not the whole of the application land has been used for lawful sports and pastimes remains, where the main user is walking; dog walking and picking wild produce, perhaps utilising only linear routes, recorded/unrecorded footpath across the fields and the field edges.

The land appears to be liable to flooding, it is not clear to what extent this has prevented/interrupted user of the land for lawful sports and pastimes.

It is considered that hearing evidence from witnesses and the cross-examination of witnesses on these points, in relation to the land, at a public inquiry, would assist the CRA in its determination of this application, where all elements to establish a new green must be satisfied, on the balance of probabilities.

For a period of at least 20 years

91. To satisfy the 20 year user test, with use continuing at the time of application, the user period in question is November 2000 – November 2020. Please see user evidence chart at **Appendix 14**.
92. There is no requirement for all of the witnesses to have used the land for a full period of 20 years, rather the evidence may have a cumulative effect to demonstrate public user for a period of 20 years. In this case 19 witnesses have used the land within the identified user period 2000-2020 and 14

witnesses have used the land for the full 20 year user period. There is also use prior to the relevant 20 year user period, the earliest being from 1973.

93. Mr Swanney mentions cattle being present and agricultural activities taking place on the land, which appear to have had little impact upon use and the two activities have co-existed, i.e. there is no evidence provided within the TVG evidence of a significant interruption/s to the period of user which would stop the clock ticking on the acquiring TVG rights over the land. The ploughing of the land would not be consistent with user for the purposes of lawful sports and pastimes. However, there is evidence of flooding events taking place on the land in the planning application responses, it is not clear what effect these events have had on use of the land for lawful sports and pastimes and any interruption they may have caused, further information on this point is required.

94. The Objector states (17 December 2021):

“4.1. None of the evidence submitted claims to cover the necessary 20 year period.

4.2. Document 7.1 appended to the application is a form signed by 23 people giving their names and addresses...the form provides no details as to the duration, location or frequency of the claimed activities.

4.3. No information is given as to how long the signatories have lived at the address...

4.5. The only piece of evidence which provides details as to how long the person making the statement has lived in the locality is the letter from Graham Hill (Document 7.2). Mr Hill states that he has been resident in the locality for 18 years. This is insufficient for the purposes of meeting the criteria of the Commons Act.”

95. In order to try to address this point, the Objector writes on 5 April 2022:

“In reply to Clarke Willmott’s dismissive comments over the ‘20 year’ issue...I have asked a selection of neighbours to state exactly how many years they have used the fields and have been familiar with the lack of restrictions on access...

*It must be noted at this point that the application for the land as marked on the submission validated by Wiltshire Council Officers need only be submitted by **one** individual. The presentation of additional sworn statements only serves to add validity to the applicant and illustrate the quantity and use of the identified site. Any comment seeking to undermine the presented Application by a criticism of these additional voices is irrelevant to the consideration of the application.*

The comments within this section of the objection are ill-founded and without any basis of fact. The Objection should therefore be summarily rejected in this particular.

4.1. Submissions from residents sworn and countersigned by a solicitor are contained within the original application. These specify “over 20 years”. This objection is groundless.

4.2. This is the document referred to in 4.1. [Petition 1] and meets the criteria for evidence as published. It leaves no room for doubt about the minimum period of 20 years.”

96. Petition 2 submitted with the Applicant’s comments on the objections (5 April 2022), states:

*“We the undersigned wish to register our continued support for the **Village Green Application** on Southwick Court fields (ref. 2020/02TVG (Southwick Court Fields, Southwick and North Bradley Parishes). We have used the land identified in the attached map **without stay or let** for the number of [years] indicated below. This access has not been restricted by any party. This includes not only the marked footpaths, and identified trackways. Access has been continuous including the occasional time that cattle have been present, prior to their withdrawal in 2020.”*

The petition is then completed (not signed) by 20 individuals, giving address (all residents of the identified locality, Grove Ward), and “*Number of YEARS familiar with the use of the fields*”, ranging between 21 and 51 years. However, the individuals do not sign the document and they are asked only to clarify the length of time familiar with the use of the field, it is not clear from the petition for what years they have known the land, whether they have used the land themselves during that period or observed use of the land by others and for what purposes have they used/observed use of the land. The timescales listed in Petition 2 are not included in the user evidence chart at **Appendix 14**, as there are no dates referred to for the time periods quoted. 10 of the individuals have, however, submitted additional written statements of their knowledge of the land and in the case of those individuals this petition is certainly supportive of those evidence statements, i.e. S Willcox; P Willcox; G Whiffen; M Whiffen; N Swanney; A Swanney; D Goodship; R Hunt; M Stevens and L Stevens. This petition has only limited value in the case of the remaining individuals who have not submitted other evidence of their knowledge of the land. It is noted that in correspondence dated 5 April 2022, Cllr Graham Hill states “*...should this process continue beyond May of 2022 I can declare that I have enjoyed unrestricted use of the Application site for 20 years.*”

97. In correspondence dated 23 May 2022, the Objector responds as follows:

“4.3. Mr Swanney’s April statement contains a table containing 20 names. The final column of the table is headed “Number of YEARS familiar with the use of the fields”. “Familiarity” with the fields is not sufficient to demonstrate use for the purposes of a TVG application. Evidence needs to be provided to demonstrate use for lawful sports and pastimes (with a sufficient quality of user) as of right by a significant number of the inhabitants of the locality. The table does nothing to assist with proving such use.

4.4. Of those 20 names, many appear to be from the same household (although the names have been split up to reduce this impression). 6 out of 20 people listed have provided separate written representations. It is important that they are not counted twice.

4.5. During the pandemic, many people began accessing their local countryside more frequently (due to lockdown restrictions). This phenomenon was seen in edge-of-town countryside locations around the country. Therefore caution should be exercised in taking the evidence relating to the use of the site since March 2000 as being representative of the use of the site over the preceding period. The landowner has noticed a very significant increase in both the use of the site and the instances of damage being caused to fences and gates during this period.

4.6. This makes it even more important to have regard to evidence of the frequency and nature of the claimed uses in the earlier part of the 20 year period. The evidence relating to that period is insufficient to meet the statutory requirements.”

For a period of at least 20 years:

The user period in question in this case is 2000-2020, with application to register the land as a TVG being made in November 2020 and use claimed to be continuing at the time of application.

There is evidence of use/knowledge of use of the land during the relevant period, as shown on the user evidence chart **at Appendix 14**.

However, the landowner, as the Objector, disputes the level of evidence for 20 years use, particularly in relation to the early part of the 20 year user period, given increased use, seen nationally at countryside locations, during the covid lockdowns.

Where the evidence is disputed, it is considered that hearing direct evidence from all parties and the testing of the evidence through the process of cross-examination at public inquiry, would assist the CRA in its determination of the application, where all elements to establish a new green, must be satisfied, on the balance of probabilities.

Use continuing

98. The application is made under Sections 15(1) and (2) of the Commons Act 2006, with use continuing at the time of application. On a site visit in 2021, after the submission of the application, Officers of the CRA observed the field to be well used, by walkers/dog walkers, although it is not known if these individuals were local inhabitants. The Objector in fact points out that use of the fields has increased since covid lockdowns, (please see comments at paragraph 97 (4.5) above), and some users point towards their children and grandchildren now using the fields, i.e. generations of families, (please see paragraph 14 above). The user evidence chart attached at **Appendix 14**, shows that 19 witnesses were continuing to use the land at the time of application. There appears to be no event or interruption which has prevented use of the land, however, more detail regarding flooding events and their impact on use of the land are required.

Use continuing –

There is no dispute in the evidence that use is continuing at the time of application in November 2020, however, additional information regarding flooding events taking place on the land would assist the CRA in its determination of the application.

Comments / Objections on other matters

Planning and Policy:

99. At 5.2 of the TVG application the Applicant lists “*Wiltshire Council official description of land*” including the Wiltshire Housing Site Allocations Plan (WHSAP) Sustainability Appraisal Report, Annex 1 A.9 Trowbridge Principal Settlement (May 2018), which makes several references to the land as open space/informal recreation space, as follows:
To the east/north-east of the site are a series of open fields used as pasture and informal recreation...
The site comprises two large agricultural fields used for livestock grazing and informal recreation...
The site comprises greenfield, agricultural land/informal open space...
The site functions as a green infrastructure corridor...
The land is currently greenfield and trafficked by walkers/dog walkers using the footpaths and fields for recreation...
100. Cllr G Hill sets out in correspondence dated 15 December 2021 that “...all of the documents were included in the Examination library for the 2019 WHSAP Inspection. The documents were therefore open to scrutiny and challenge by the proposed developer of the adjacent site H2.6 and the landowner and his agents/advisors.”

Cllr Hill considers that where the WHSAP Sustainability Appraisal Report *“repeatedly classifies the area as “informal recreation land”*, there is no challenge to this description, in his view the only reasonable explanation for this being that the Landowner and their advisors saw no fault in this description. This acceptance is demonstrated by the removal of sections of fencing to facilitate access to the public along the notified footpaths and gates, previously used to retain cattle being left open or removed: *“All these changes indicate a desire to give unrestricted access to the land by the landowner...”*

101. Part of the proposed TVG application land is identified as site H2.6 in the WHSAP and is removed from the TVG application land where it is subject to a planning trigger event, therefore the land descriptions above, as set out within the WHSAP are not directly applicable to the remaining land, although given the similar nature of the land, access points and presence of public rights of way on the land, the use is likely to be similar. As Cllr G Hill states in correspondence dated 5 April 2022, *“The Application in no way interferes or hinders the allocation site of H2.6.”* and the Applicant states, in correspondence dated 5 April 2022 – *“3.2 None of the land included in the Application impinges in any way shape or form on the WHSAP allocation. There is no element of the application which has anything but a positive impact on the allocation, supporting as it does declarations made in the Outline Planning Application, the amended DAS and existing Wiltshire Council Policy.”*

102. The Objector claims in correspondence dated 17 December 2021 that *“1.3 It is clear that the application to register the land has been made in an attempt to frustrate the development of the Land. Much of the submitted “evidence” is simply an attempt to re-open the planning merits of the development. Such representations are irrelevant to an application to register the land as a TVG.”*

And in correspondence dated 23 May 2022 *“...where material is irrelevant to the TVG application (such as continued references to the planning process or erroneous allegations the land should be considered to be “public realm”), we have refrained from commenting on such material. We are content to rely on the decision maker to disregard such content.”*

103. Cllr G Hill sets out that *“...the Strategic Plan, albeit in the final stages of consultation, has from its inception rejected any further development on the Southern fringes of the Trowbridge Community Area. By designating this portion of the buffer between Trowbridge and the villages of North Bradley and Southwick as a Village Green greater protection will exist in Law to support this Policy.”*

104. Cllr D Vigar sets out in correspondence dated December 2021 that *“The draft Planning for Trowbridge document presented as part of Wiltshire Council’s current draft Local Plan reiterates (para 35) the objective of retaining undeveloped land on the edge of the town to act as a green infrastructure*

corridor and preserve the separate identities of villages such as Southwick. This supports Wiltshire Council's Core Policy 29 which requires the maintenance of a buffer zone between Trowbridge and the villages of North Bradley and Southwick."

105. Cllr G Hill in correspondence dated 5 April 2022 expands on Policy CP29 *"The Application supports Wiltshire Council Policy with direct reference to CP29 (CP29 is a policy in the CS which protects the character and identity of Southwick and North Bradley as separate communities. Integral to this is the preservation of the undeveloped countryside that lies between them.), and also CP51 (detail below). The replacement of any land with unrestricted access being replaced by a higher quality and quantity of land. The Westernmost part of the allocation alone fits neither of these criteria."*
106. The TVG application at 7.4 also refers to County Policy in the Wiltshire Council Leisure and Recreation Development Plan Document, the Applicant states: *"It is believed that this application enhances to policies and aims within the document."* Officers believe this to be a reference to the West Wiltshire District Council Leisure and Recreation Development Plan Document, adopted February 2009, to provide a spatial planning framework for the immediate future provision of leisure and recreation open space in the district including the allocation of additional sites. Although not specific to the TVG application land, the provision of additional public open space by TVG registration, would meet the identified need set out within the document, to promote healthy lifestyles and greater physical activity and to improve opportunities for people to access recreation including parks, open and water spaces.
107. Whilst the registration of the land as a TVG could assist Wiltshire Council in meeting certain planning and leisure policies, these are not considerations permitted in the determination of an application made under Section 15(2) of the Commons Act 2006. It is only possible to consider the evidence of use of the land by local inhabitants for lawful sports and pastimes, as of right for a period of 20 years or more.

Wildlife and Heritage Protection

108. There is support for the application for the purposes of:
 - i) Wildlife protection, including The Trowbridge Bat Mitigation Strategy (TMBS), as identified by Cllr G Hill *"The TBMS is a Policy adopted by Wiltshire Council subsequent to the adoption of the WHSAP. The establishment of a Village Green along the East-West arm of the Lambrok ensures that that element of the acknowledged Bat Corridors will remain inviolate and secured."* The site lies in a yellow zone and is particularly important for its population of Bechsteins bat.

- ii) Heritage protection, i.e. Southwick Court as a grade II* listed building with gatehouse and bridge over the moat, and the ancient water meadows.

However, these are not considerations permitted in the determination of an application made under Section 15(2) of the Commons Act 2006 to register land as a TVG. It is only possible to consider the evidence of use of the land by local inhabitants for lawful sports and pastimes, as of right for a period of 20 years or more.

Conclusion

109. In the Southwick Court Fields case, the evidence of whether a significant number of inhabitants of any locality, or 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, with use continuing at the time of application, is in dispute. Matters of particular conflict within the evidence include the main use of the land identified as walking, with or without dogs, and fruit/produce picking at the perimeter of the application land, taking place on recorded public footpaths over the land and unrecorded tracks and pathways, which raises a number of issues:
 - i) Whether the use would appear to a reasonable landowner to be attributable to the exercise of a right of way along a defined route, or wider use of the land for lawful sports and pastimes.
 - ii) Qualifying user “as of right”:
 - the use of recorded public rights of way “by right” rather than “as of right”;
 - was use of the land for lawful sports and pastimes sufficient to bring such use to the attention of the landowner to challenge that use if they so wished.
 - iii) If the use of recorded/unrecorded public rights of way is removed as qualifying user, is the remainder of the use for lawful sports and pastimes sufficient to support registration.
110. As there is a significant dispute regarding the facts of the case, which are likely to be resolved by hearing from the witnesses, it is proposed that an independent Inspector be appointed on behalf of the CRA to preside over a non-statutory public inquiry at which the evidence of all parties will be heard and tested through cross-examination, and to provide a report and recommendation to assist the CRA in its determination of the application to register land known as Southwick Court Fields, Southwick and North Bradley, as a TVG, as soon as is reasonably practicable.