Division(s): Faringdon

PLANNING & REGULATION COMMITTEE – 30 NOVEMBER 2015

COMMONS ACT 2006:
IN THE MATTER OF AN APPLICATION TO REGISTER
HUMPTY HILL, HIGHWORTH ROAD, FARINGDON
AS A TOWN OR VILLAGE GREEN

Report by the Chief Legal Officer

Introduction

1. On 19 April 2013, Mr Robert Stewart on behalf of the Friends of Humpty Hill of 14 The Pines, Faringdon applied to the County Council as Registration Authority under Section 15 of the Commons Act 2006 to register land known as Humpty Hill, Highworth Road, Faringdon in Oxfordshire ("the Application Land") as a Town or Village Green. This application, a copy of which is attached at Annex 1, was submitted formally in pursuance of the Act and has now to be determined by the County Council.

2. The Planning & Regulation Committee have delegated powers to determine such applications, provided they are 'duly made'.

3. The application was considered initially by Legal Services who provided advice as to whether the application was 'duly made'. In light of such advice the application was accepted as 'duly made' and was subsequently publicised in accordance with the statutory requirements.

4. One substantive objection was received during the statutory 6-week objection period from Gladman Developments Ltd, Charles Francis Nigel Allaway and Rosemary Ann Pollock (together the "Objector"). The objection raised several factual and legal issues in relation to the application and so an independent public inquiry was held. Dr Charles Mynors ("the Inspector"), a barrister experienced in the area of law was appointed to chair the Inquiry.

5. The Inquiry sat on 16-19 March 2015 and 24 March 2015 at the Sudbury House Hotel, Faringdon with a site visit on 23 March 2015.

6. A copy of the Inspector's initial Report is appended at Annex 2. The main points to note are summarised below.

7. This matter was originally on the agenda for the Committee's meeting on 19 October 2015. Due to additional submissions on behalf of the Objector dated 16 October 2015 being lodged, the Committee deferred the matter for further legal consideration at the request of officers.

8. A supplementary Report dated 30 October 2015 was subsequently prepared by the Inspector and is appended at Annex 5. The main points to note and conclusions are summarised below.

The Application Site: Land at Humpty Hill, Faringdon

9. The application form describes the Application Land as Humpty Hill, Highworth Road, Faringdon in Oxfordshire. The Application Land is shown edged red on the map included as part of Annex 1.

10. The Application Land is a grass meadow, roughly rectangular in shape and adjoins the western end of the built-up area of Faringdon. The land is bounded on all 4 sides by hedges and Highworth Road runs along the southern boundary. The land gently slopes from the southern boundary.

11. The hedges are generally thick and impenetrable, except for pedestrian access in the form of kissing gates at the north-eastern and south-eastern corners.

12. A public footpath (207/2, Great Faringdon Footpath No 2) runs between the two kissing gates. In addition, there is a roughly circular informal path around the field, overlapping with the public footpath on the eastern boundary. There is also a second, less well-defined path running hard up against the boundary hedges.

13. At the gate on the southern boundary there is a sign giving a revocable permission for persons to use the land for recreation.

14. The whole of the Application Land is registered at HM Land Registry under title number ON273315. The registered proprietor is Charles Francis Nigel Allaway and Rosemary Ann Pollock.

15. The locality or neighbourhood relevant to the application is described as the civil parish of (Great) Faringdon.

The Town Green Application

16. The application form was duly signed by Mr Stewart and supported by the prescribed Statutory Declaration. The Applicant submitted several additional pieces of information in support of his application, including a supporting statement and some 71 evidence questionnaires by other local residents who used the land. Further evidence and statements were also submitted by the Applicant in preparation for the public inquiry.

17. On 15 July 2013 the Applicant provided an updated version of the plan attached to his application, drawn to the correct scale and exhibited as part of his statutory declaration. This was as requested by the

registration authority. This is the map that is included as part of Annex 1 hereto.

The Determination of the Application

18. Having been received by the County Council and accepted as 'duly made', the application was duly published in accordance with Regulation 5 of the Commons Registration (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007 by publication in a local newspaper, posting notices on site, and placing copies on public deposit. A copy of the statutory notice, application and plan was also served on the landowner.

19. The statutory objection period expired on 19 March 2014. A substantial objection was received from the Objector dated 18 March 2014. An objection was also received from Scottish & Southern Electricity due to the presence of overhead power lines. Some statements in support of the application by local people were also received.

20. The principal grounds for objection were in summary as follows:-

    a. That the Applicant had not established a 'locality or … neighbourhood within a locality';
    b. That the Applicant had failed to show use of the land by 'a significant number' of local people;
    c. The use of the land was not of sufficient intensity and quality to bring home to the reasonable landowner that public rights were being asserted;
    d. The Applicant has not shown that the land was used for 'lawful sports and pastimes';
    e. The Applicant has not proved use of the whole of the land (as opposed to the footpaths and tracks);
    f. The Applicant has not shown that the uses were 'as of right', in that according to the objector the use was either by right (in so far as it related to public right of way use) or forcible (in so far as locked gates were crossed or climbed, gaps made in hedges etc)
    g. The landowners warned local people to get back onto the public footpath, therefore contesting local use of the land; and
    h. Use by local people was small scale and sporadic.

21. In a separate letter the Objector also raised the argument that, since the registration authority had needed to go back to the Applicant for further information (the plan) the application was not 'duly made' until that later date. By that time, it was argued, the provisions of s15C Commons Act 2006 had come into force and there was no right to apply due to the existence of a 'trigger event' (an application for planning permission). The registration authority considered that this application was still 'duly made' in accordance with the Church

Commissioners v Hampshire County Council [2014] EWCA Civ 634 and this point was not subsequently pursued.

22. The County Solicitor consulted Counsel on these issues. Ultimately it was considered that the issues raised were ones of fact as well as law and could not be resolved simply in writing and that a public Inquiry would need to be held.

23. It is important to note at this stage that the Council as Commons Registration Authority is essentially neutral in this matter. It is simply concerned to assess the application and register the Application Land if it qualifies properly for registration. In carrying out this assessment it must look back over the use of the land and apply the statutory test under s15 Commons Act 2006. The potential future use of the land, or its desirability in planning terms, is not relevant to the assessment that the Council as Commons Registration Authority needs to make.

The Public Inquiry

24. A public Inquiry chaired by an independent barrister was therefore held on 16-19 March 2015 and 24 March 2015 at the Sudbury House Hotel, Faringdon with a site visit on 23 March 2015.

25. The Applicant represented himself and the Objector was represented by Counsel. Both parties called witnesses to give evidence in person and further written evidence was also given to the Inquiry.

26. The Inspector subsequently submitted his initial Report and recommendation to the County Solicitor on 27 September 2015 a copy of which is attached at Annex 2.

27. This matter was originally on the agenda for the Committee's meeting on 19 October 2015. By a letter dated 16 October 2015 Walker Morris Solicitors on behalf of the Objector raised certain matters in response to the Inspector's initial Report. This letter is appended at Annex 3. At the request of officers, the Committee deferred the matter for further legal consideration.

28. The Applicant was given the opportunity to respond to the Objector's letter dated 16 October 2015 and did so by a letter dated 20 October 2015. A copy of this letter is appended at Annex 4.

29. The Inspector reviewed the additional submissions and produced a supplementary Report dated 30 October 2015. A copy of this supplementary Report is appended at Annex 5.

The Inspector's Recommendations

30. The Inspector's findings are summarised at the beginning of his initial Report and are briefly as follows:

a. that the Application Land, as a whole, has been used for twenty years by the inhabitants of Faringdon Civil Parish for lawful sports and pastimes, up to the date of the application; and

b. that such use has been “as of right”.

31. The Inspector sets out his conclusions in more detail from paragraph 160 of his initial Report. He finds as follows:-

a. The general use of the land has been as a grass meadow. There has been low-level agricultural use through the year, peaking during a two-week period in the summer when the hay crop is cut and baled. No arable crops have been planted or ploughing carried out;

b. The growing grass usually presented no obstacle to general recreation, either on or off the paths. The landowners and others had witnessed people using the paths (and occasionally elsewhere on the land). As the grass grew longer, it made off-path use more difficult;

c. The evidence generally disclosed use of the land for walking (with or without a dog), children playing, and informal football, less strenuous activities such as bird watching, nature study, enjoying the view, and generally “hanging out”, “lounging about” or “chilling”, and seasonal activities such as blackberrying, other fruit gathering, sledging and tobogganing;

d. Use of the land was predominantly but not exclusively on the formal and informal footpaths, but there was evidence that some activities took place all over the land;

e. Cattle were grazed on the field in 1996 and 1997. This would have been during the months approximately May/June to September/October. Only 10 or so cattle were grazed and the Inspector found that their presence did not materially affect the use of the land for lawful sports and pastimes;

f. The landowner was aware of the use of the land by local people and took only cursory steps to prevent it. There was only low-level conflict between the recreational and the agricultural use and neither materially impeded the other;

g. In respect of the sign put up at the southern entrance, the Inspector finds that this was installed on or after 18 April 2011 and therefore that the 20-year period required was 1991-2011 and the application was made inside the 2-year period referred to in section 15(3) of the 2006 Act; and

h. The relevant locality is the civil parish of Great Faringdon and the users of the land came predominantly from that area.

32. In conclusion, the Inspector finds that the land is a “classic case” of use for dog walking and childrens’ play. The use of the footpaths indicated use of the land as a generally circular walk for recreation (although some can be attributed to footpath use, in particular people following the north-south public footpath). The recreation and agricultural uses existed side-by-side and the landowners were aware of this and did not forbid or make use permissive until the sign was erected in 2011.

33. In particular, the co-existence of uses on the land is expressly dealt with in recent case-law and in particular by the Supreme Court in R. (on the application of Lewis) v Redcar and Cleveland BC [2010] UKSC 11, to which the Inspector refers in his initial Report.

34. In response to the letters of Walker Morris and the Applicant appended at Annexes 3 and 4, the Inspector prepared a supplementary Report in which his conclusions are as follows:-

a. As regards the permissive sign, the Inspector accepts that his supplemental Report contains a different analysis, however in his opinion the outcome is the same in any event. This is because the application was either made within 2 years of the sign being put up (s15(3) of the 2006 Act), or the use ‘as of right’ has continued from the date of the sign being put in place up to the date of the application (s15(7)(b) 2006 Act);

b. The Inspector reasserts his conclusion that the land has been used by a ‘significant number’ of the residents of the civil parish of Faringdon. In his opinion the written evidence, oral evidence at the Inquiry and the impression of use from several visits all taken together indicate that this is a ‘well-used piece of land’. He concludes therefore that the number of people using the land was sufficient to indicate that their use of the land signified to the landowner that it was in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers. He acknowledges that more users will tend to live closer to the land;

c. As regards the nature of the use of the land, the Inspector notes that the use for walking on paths was only one (albeit the primary) of the uses found by him. He confirms that he has discounted any footpath use that more appropriately refers to an actual or emerging public right of way, but affirms his view that the bulk of the walkers were using the land for general recreational use consistent with the assertion of a village green right.

d. In respect of the cattle on the land, the Inspector remains of the view that this occurred for a period of months in 1996 and again in 1997. He restates his conclusion that the presence of a few (approximately 10) cattle did not affect the recreational use since people avoided the cows and vice versa. The evidence suggested that the cows would congregate near the bushes at one of the boundaries to avoid the weather and so did not materially impact the recreational use.

35. In view of these conclusions and the more detailed discussions of the law and evidence in his Reports, the Inspector recommends that the application be approved and the Application Land be registered as a town or village green.

36. The Chief Legal Officer supports these conclusions.

RECOMMENDATION

26. **Having received the Opinion of the Inspector set out in Annexes 2 and 5 to this report, the Committee is RECOMMENDED to APPROVE the application for registration as a new Town or Village Green that plot of land known as Humpty Hill, Highworth Road, Faringdon in Oxfordshire that site being indicated clearly on the map included in the application submitted by Mr Robert Stewart on 19 April 2013.**

PETER CLARK
County Solicitor & Head of Legal Services

Background papers:
- Appendices to Form 44
- Additional Evidence Questionnaires
- Objections by Charles Francis Nigel Allaway, Rosemary Ann Pollock and Gladman Developments Ltd dated 18 March 2014
- Responses received to statutory consultation
- Procedural Directions of the Inspector dated 19 December 2014
- Skeleton Closing Submissions on Behalf of the Objector dated 24 March 2015
- Inquiry Bundles
- In Members' Resource room from 23 November 2015 until the conclusion of the meeting.

Contact Officer: Richard Goodlad, Principal Solicitor (Tel: 01865 323917)

FORM 44

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:

COMMONS ACT 1965
OXFORDSHIRE COUNTY COUNCIL
REGISTRATION AUTHORITY
19 APR 2013

Application number: NLREG34

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

To the

Note 1
Insert name of registration authority.

Oxfordshire County Council

2. Name and address of the applicant

Note 2
If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

Name: Friends of Humpty HMI

Full postal address:

14 The Pines
Farnsdon
SN7 8AA

Postcode SN7 8AA

Telephone number: (incl. national dialling code) 01961118920

Fax number: (incl. national dialling code)

E-mail address: friendsofhumptyhill@gmail.com

3. Name and address of solicitor, if any

Note 3
This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

Name:

Firm:

Full postal address:

Post code

Telephone number: (incl. national dialling code)

Fax number: (incl. national dialling code)

E-mail address:

4. Basis of application for registration and qualifying criteria

Note 4
For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**: ☐

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies: ☑

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*

Section 15(3) applies: ☐

Section 15(4) applies: ☐

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

5. Description and particulars of the area of land in respect of which application for registration is made

Note 5
The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable to it to be clearly identified.

Name by which usually known:

Humpty Hill

Location:

Highworth Road, Faringdon.
Adjacent to Orchard Hill.

** Only complete if the land is already registered as common land.*

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

Note 6
It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

The Town of Faringdon.

Tick here if map attached: ☐

7. Justification for application to register the land as a town or village green

Note 7
Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

Indulgence by a significant number of the inhabitants of Faringdon as of right in lawful sports and pastimes for a period of at least 20 years before permission was granted under section 15(2) of the Commons Act 2006 as witnessed by the 71* enclosed signed statements showing use for: Children Playing, Dog Walking, Blackberry Picking, Bird Watching, Picknicking, Kite Flying, People walking, Sledging, Rounders, Football, Scouts, Skiing, Drawing and Painting, Camping, General Exercise, Landscape Appreciation, Running / Jogging, Golf, Ball Games, Infants School Egg Rolling, Wildlife Observation, Wild-flower Study by a ~~[illegible]~~ significant number of people over a period from 1960 to 2013.

* Seventy One enclosed questionnaires

Note 8
Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

Nigel Allaway
Crabtree Farm
Lechlade Road
Faringdon
SN7 8BH

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 9
List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

10. Supporting documentation

Note 10
List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

11. Any other information relating to the application

Note 11
If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

72 Witness Questionnaires Attached.

Note 12
The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date: 18/4/2013

Signatures:

R. A. STEWART.

REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I, Robert Andrew Stewart,[1] solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if Applicable*

1.[2] I am ((the person (~~one of the persons~~) who (has) (~~have~~) signed the foregoing application)) (~~the solicitor to (the applicants) (one of the applicants)~~).

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.[4] I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

(i) a declaration of ownership of the land;
(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

Cont/

[4] *Continued*

~~been received and are exhibited with this declaration; or~~
~~(iii) where no such consents are required, a declaration to that effect.~~

FB
DS

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said)
)
)
at The Portwell Angel)
Market Place, Faringdon, Oxfordshire)
)
this 18th day of April 2013)

Signature of Declarant

Before me *

Signature:

Address: BUXTON COURT, 3 WEST WAY, OXFORD, OXFORDSHIRE, OX2 0SZ

Qualification: SOLICITOR

*** The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

Dear Lisa. 15/7/13

Please find enclosed a stat dec and map as required for the Taon Green Application at Humpty Hill, Farnydon.

Rob Stewart

RECEIVED 17 JUL 2013

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I..Robert Stewart....., solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if Applicable*

1.[2] I am ((the person (~~one of the persons~~) who (has) (~~have~~) signed the foregoing application)) ((the solicitor to (the applicant) (~~one of the applicants~~)). PB RS

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.[4] I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

(i) a declaration of ownership of the land;
(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

PB RS

Cont/

[4] *Continued* been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.

RB
RS

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said)
ROBERT STEWART)
)
at 21 FULLING CLOSE)
FARINGDON, OXFORDSHIRE)
)
this 15TH day of JULY 2013)

Signature of Declarant

Before me *

Signature:

Address: BURTON COURT, 3 WEST WAY, OXFORD OX2 0JZ

Qualification: SOLICITOR

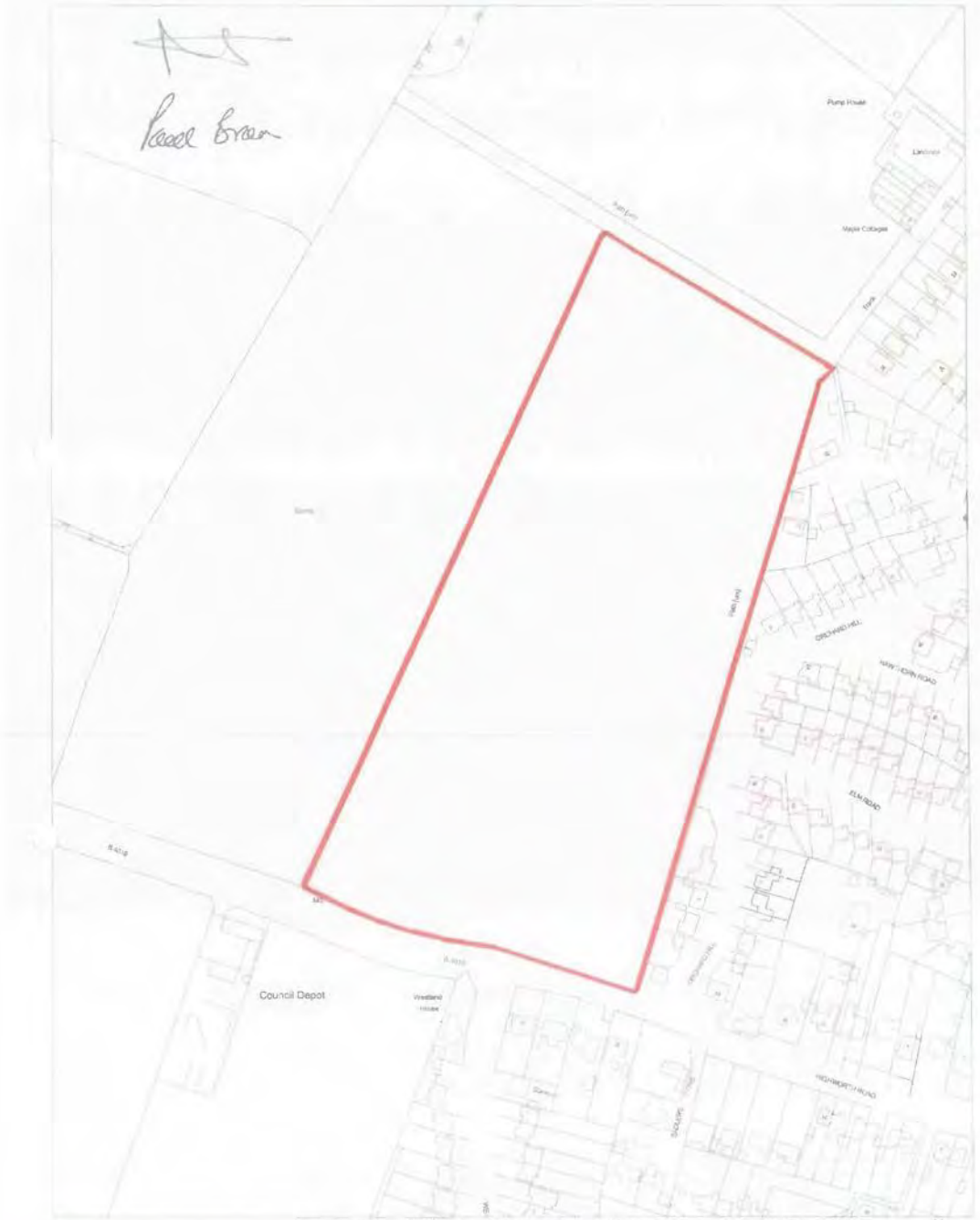
* **The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

THIS IS THE MAP REFERRED TO IN THE STATUTORY DECLARATION OF ROBERT STEWART DATED 15TH JULY 2013



OXFORDSHIRE COUNTY COUNCIL

Scale 1:2500 (Approximate) Plot Date: 26 June 2013

N

Worksheet Ref: LJGW

In the matter of the Local Government Act 1972 and the Commons Act 2006
And in the matter of land at Humpty Hill, Faringdon, Oxfordshire

Report to Oxfordshire County Council on the determination of Application NLREG 33 to register as a town or village green land at Humpty Hill, Faringdon

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Summary

I have been appointed by Oxfordshire County Council under section 111 of the Local Government Act 1972 to hold a public local inquiry into an application that has been made to it as registration authority under the Commons Act 2006 for the registration as a town or village green of land known as Humpty Hill, Faringdon, Oxfordshire ("the Application Land", or simply "the Land"), and to advise the Council as to how to determine it.

My conclusions are as follows:

(a) that the Application Land, as a whole, has been used for twenty years until at least April 2011 by the inhabitants of Faringdon Civil Parish for lawful sports and pastimes;

(b) that such use has been "as of right" throughout the relevant period.

I therefore consider that the Application Land is eligible to be registered as a town or village green, and I recommend that the register under the 2006 Act be amended accordingly.

In this report I first consider first various procedural matters, and outline briefly the relevant legal background. I then consider the non-contentious evidence – the physical condition of the Application Land and the immediate vicinity, and relevant documents produced independently of the present proceedings. Next, I outline the evidence produced by those resisting the registration of the Land, so far as relevant, and the evidence in support of the registration. In the final section I set out my conclusions and recommendation.

Procedural matters

The Application

1. I have been appointed by the County Council in its capacity as registration authority under the Commons Act 2006 ("the Registration Authority") to hold a public local inquiry under section 111 of the Local Government Act 1972 into an application that has been made to it for the registration as a town or village green of land at Faringdon,

Oxfordshire ("the Application"), and to make recommendations to the Council as to the manner in which to determine it.

2. The Application was made by Mr Robert Stewart, of 14 The Pines, Faringdon, SN7 8AU ("the Applicant") on 18 April 2013.[1] It relates to land described in the application as Humpty Hill, lying between Highworth Road and the southern end of Canada Lane.

3. The Application was made under section 15(2) of the 2006 Act (see below). It was made on the statutory form, and accompanied by a statutory declaration, maps of the Application Land and the surrounding area, and 71 completed questionnaires.

4. The Registration Authority considered that the Application had been duly made, and proceeded to advertise it, and to notify those whom the Authority considered might be expected to object.

5. Objections to the Application were made by Charles Francis Nigel Allaway and Rosemary Ann Pollock ("the Landowners") and Gladman Developments Limited ("Gladman"). The Owners jointly own the freehold interest in the Application Land; and they had entered into a contract dated 7 March 2013 with Gladman relating to the promotion of development on the Land. In this report, I refer to the Landowners and Gladman together as "the Objectors".

6. A further objection to the Application was made by Scottish and Southern Energy, on the basis that there is an overhead power line running across the Land. That objection raised no issues that are material to my recommendation or to the Council's decision, and I say no more about it in this report.

7. The Registration Authority decided to hold an inquiry at which the parties would be able to call evidence and make legal submissions.

8. I should record that, although I knew the Faringdon area reasonably well in the 1970s (my parents lived in Shellingford), I had never seen the Application Land before 2015, and knew nothing of its history, other than from the information with which I have been supplied in connection with the present proceedings. And I know none of those connected in any way with this case.

The inquiry

9. I held an inquiry at the Sudbury House Hotel in Faringdon, on 16 to 19 and 24 March 2015. I visited the Land and explored Faringdon, unaccompanied by any of the parties or the Registration Authority, on Saturday 7 March; and carried out further visits, accompanied by a representative of the Authority, during the inquiry; on my final visit I was accompanied by representatives of the parties. I regret that, due to other unexpected commitments, it has taken so long for this report to emerge.

10. I am grateful to all concerned – in particular the officers of the Registration Authority – for facilitating the smooth running of the Inquiry and the site inspection.

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[1] Mr Stewart has since moved to 15 Eagles, Faringdon, SN7 7DT.

Evidence in support of the Application

11. The Applicant represented himself at the inquiry. He gave oral evidence himself as to the use of the Application Land, and called 14 further witnesses to give such evidence: Mr Gary Bates, Mr David Butler, Mr Colin Desborough, Mr Neil Edwards, Mr Joel Francis, Mr Robert Kelly, Mr Ian Lee, Ms Eileen Mrs Metcalf, Mr Joseph Middleton, Mrs Josie Miller, Mr George Platt, Mr Tim Stewart, Mr David Tutt, and Mr Edward Williams.[2] Each of those produced a written statement; 10 had also produced a questionnaire at the time of the Application.

12. I was given a written statement from one witness (Mr Robin Ashdown) who had been expected to give oral evidence but in the event was out of the country during the inquiry, and a further 55 written statements from others in support of the application who did not give oral evidence at the inquiry. There were also some 32 questionnaires from people or couples in support of the application who neither submitted statements nor appeared at the inquiry. I have generally lumped together representations from couples or families living at one address, as they tended to give very similar evidence; but the precise numbers in each category may be slightly inaccurate, as it is not always immediately apparent who belongs to the same family group.

Evidence in support of the Objectors

13. The Objectors were represented at the inquiry by Mr Philip Petchey of counsel, instructed by Walker Morris solicitors. He called eight witnesses to give oral evidence, each of whom had produced a written statement, accompanied (in some cases) by copies of relevant documents.

14. He called, firstly, six members of the Allaway family – Mr Charles Francis Nigel Allaway ("Nigel"), and his wife Mrs Alison Allaway; their children Mr John Allaway and Mrs Catherine Allaway James; Nigel's sister Mrs Rosemary Pollock (nee Allaway); and her husband Mr Richard Pollock.

15. He also called Mr Philip Benson and Mr Ian Bowler to give oral evidence, and to produce a number of relevant documents. Mr Benson is the director of Phil Benson Contracting Limited. Mr Bowler is a partner of Strutt & Partners, Salisbury, and has been the land agent in relation to the Application Land since 2003.

16. The Objectors also relied upon written statements from a number of other witnesses who were did not appear in person at the inquiry – from Gladman, Mr Robert Black (project manager), Mr Robert Hogg (project manager), Mr James Holladay (land director), Mr Richard Horsfield (Land Director), Mr Jonathan Shepherd (director), and Mr Christopher Still (planning and development manager); for FPCR Environment and Design Ltd, Mr Martin Woolly (ecologist), Mr John Blackburn (assistant ecologist), and Ms Helen Kirk (Associate); Mr Malcolm Reeve (Director, Land Research Associates Ltd); Ms Hannah Smalley (Archaeological Consultant, CgMS Consulting); and Ms Katy Hayhoe (Associate Landscape Architect, TPM Landscaping).

[2] In this and other such lists in this report, the names in alphabetical order.

17. These witnesses were all willing to give evidence at the inquiry, but in the event were not required to do so, as the Applicant was willing to accept their written statement without the need for them to appear in person. In those circumstances, I did not require their attendance at the inquiry, but gave their written evidence the same weight as it would have had if they had attended and been subject to cross-examination.

The evidence

18. As is normal in such cases, the available evidence on which I have to base my recommendation consists of the documentary material (plans, photographs, reports, and so on) produced before the start of the present dispute; the oral evidence presented by those who appeared at the Inquiry, and the written statements accompanying such evidence; the statements produced by others who did not give such evidence; and what I saw myself in my various site inspections. I have listed or referred to this above.

19. I have given special weight to documentary evidence produced prior to the start of the present dispute, as the documents themselves could not be tainted by any suspicion of possible bias. As to the selection of those documents, there is no procedure for discovery, as there is in civil litigation, so there is always the possibility that unhelpful material could have been simply omitted; but there was in this case no suggestion that that had occurred.

20. I was also particularly assisted by the aerial photographs of the Application Land produced in 1999, 2004, 2006 and 2009. The proper interpretation of such photographs is always to some extent open to question; but there was no suggestion that they were not genuine photographs.

21. As for oral and written evidence produced specifically in connection with these proceedings, it needs to be remembered that the desirability or otherwise of any proposals for development on or affecting the land in question is wholly irrelevant. Equally irrelevant is any view as to whether the land should, as a matter of principle, be retained for recreation. However, it is likely that much if not all of the evidence in this category will have been produced by those who have views – possibly strong views – on such matters; and that will be relevant to my assessment of their credibility as witnesses.

22. I am aware that in this case Gladman has sought planning permission for the construction of housing on the Application Land. Its application was rejected by the local planning authority, and the subsequent appeal against that refusal dismissed by the Secretary of State.

23. Those giving oral evidence to me at the Inquiry as to the use of the Land (and those producing written statements or questionnaires) could therefore be said to biased, in that they are or were or may have been either opposed to that proposal or in favour of it. However, I detected no particular tendency to misrepresent the truth – in either direction – and neither of the advocates (nor any of the witnesses) at the Inquiry seriously suggested that this was the case.

24. As noted above, fifteen witnesses appeared at the inquiry in support of the Application; and a further 85 or so produced only written evidence (either a statement or a questionnaire or both). I gave the greatest weight to those who appeared at the inquiry and were available to be cross-examined by the advocate appearing for the Objector; and I gave less weight to the evidence of those in the other categories listed above. However, as is normal in such cases, their evidence was generally consistent with the evidence of those who did appear in person.

The law

The statutory definition of a town or village green

25. The statutory definition of a town or village green is in section 15 of the 2006 Act, which, so far as relevant, when first enacted provided as follows:

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.
>
> (3) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
>
> (b) they ceased to do so before the time of the application but after the commencement of this section; and
>
> (c) the application is made within *the period of two years beginning with the cessation referred to in paragraph (b)*"

26. Section 15 came into force on 6 April 2007, in place of the definition previously to be found in section 22(1)(c) of the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000). That earlier definition was virtually identical.

27. With effect from 1 October 2013, the Growth and Infrastructure Act 2014 amended section 15 of the 2006 Act, to substitute for the words in italics the words "the relevant period". That phrase was defined in a new subsection (3A), also inserted by section 14 of the 2014 Act with effect from 1 October 2013, as follows:

> "(3A) In subsection (3), "the relevant period" means—
>
> (a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b); .."

28. The amendments to subsection 15(3) of the 2006 Act, and the insertion of subsection 15(3A), took effect on 1 October 2014 – see Growth and Infrastructure Act 2013 (Commencement No. 2 and Transitional and Saving Provisions) Order 2013 (SI 1488), article 6. However, by article 8(2) of that Order,

"The coming into force of section 14 of the Act so far as it applies to land in England, has no effect in relation to any cessation referred to in section 15(3)(b) of the Commons Act 2006 which occurs before 1st October 2013."

29. It should also be noted for completeness that amendments were made to the 2006 Act (amending section 15 and inserting sections 15A to 15C) by the Growth and Infrastructure Act 2013. Those amendments came into effect on various dates from 25 April 2013; they do not apply in relation to applications made before that date.

Application to the present case

30. Section 15(2) of the 2006 Act thus makes it clear that, for the Application Land to be eligible to be registered as a town or village green by virtue of that subsection, it must have been used throughout the period of 20 years ending on the date of the application for registration:
    - by a significant number of the inhabitants of a locality or of a neighbourhood within a locality, and
    - for lawful sports and pastimes,
    - as of right.

31. Where land has been used in that way for twenty years, but then ceases to be so used, for example because the landowner explicitly permits its use by local people,
    - where the cessation occurs before 1 October 2013, the land will still be eligible for registration – under subsection 15(3) of the 2006 Act as originally enacted – provided the application for registration is made within two years of the cessation;
    - where the cessation occurs after 1 October 2013, the land will still be eligible for registration – under subsection 15(3) as amended – provided the application is made within one year.

32. In this case, the Application was made on 18 April 2013. To justify registration under subsection 15(2), therefore, it must be shown that the Application Land was used in a qualifying manner for 20 years starting on 18 April 1993.

33. It is said that a sign was erected in mid-2011 at the southern end of the Application Land, at the entrance from Highworth Road, permitting the use of the Land. If the effect of that sign was that all otherwise qualifying use of the Land after that date was no longer "as of right" – a point to which I briefly return later in this report – the result is that section 15(2) would not apply. However, the Land would still be eligible for registration is it was used in the appropriate manner for 20 years until the date on which the sign was erected, and the application for registration was made within two years after that date.

34. In the light of that analysis, I have considered carefully the use of the Application Land for the period starting 20 years before the sign was erected – in practice, from the start of 1991 – until the present. I refer to that in this report simply as "the relevant period".

Use for lawful sports and pastimes

35. The use of an area of land for "lawful sports and pastimes" includes use of it for various forms of informal recreation, such as walking, with or without dogs, picnicking, flying kites, picking blackberries, and children playing. This was explained by the House of Lords in *Sunningwell* as follows:

> "Class c [in section 22(1) of the 1965] Act is concerned with the creation of town and village greens after 1965, and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J in *R v Suffolk CC, ex parte Steed*, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green.[3] It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right. In the present case, however, [the inspector] found 'abundant evidence of use of the glebe for informal recreation' which he held to be a pastime for the purposes of the Act."[4]

36. In particular, use for lawful sports and pastimes may not include walking along a specific route either around the edge of a field or across the middle, as a means to get from one point on the perimeter to another – that might in certain circumstances be appropriate to establish a claim to a public right of way, but it could not form the basis of a claim to a town or village green. This was considered by Sullivan J in *R (Laing Homes) v Buckinghamshire CC*,[5] and by Lightman J in *Oxfordshire v Oxford CC*, who summarised the position as follows:

> "[102] The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green.
>
> The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land: see Lord Hoffmann in *Sunningwell*,[6] cited by Sullivan J in *Laing Homes*.[7]
>
> Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. 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).

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[3] (1995) 70 P. & C.R. 487 , at p 503.
[4] *Sunningwell*, per Lord Hoffmann at pp 357D.
[5] [2003] 3 PLR 60.
[6] [2000] 1 AC 335 , 352h-353a and 354f-g.
[7] [2003] 3 PLR 60 , 80, paras 78-81.

> [103] Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a green or for both. ...
>
> [104] The second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way.
>
> [105] The third scenario is where there has been a longer period of user of tracks referable to the existence of a public right of way and a shorter period of user referable to the existence of a green. ..."[8]

37. When *Oxfordshire* came to the House of Lords, the observations of Lightman J at first instance, quoted above – and indeed those of Sullivan J in *Laing Homes* – were described as "sensible" by Lord Hoffmann; the other members of the House did not express an opinion on the relevance of rights of way, but did not dissent from or overrule those observations. I consider the implications of this further towards the end of this report.

Other points

38. The House of Lords in *Sunningwell* established that the use of land "as of right" means use that is not by force, by stealth or by permission.[9] Whether a use of land is "as of right" must be judged from the perspective of "how the matter would have appeared to the owner of the land"[10] – a question which must be assessed objectively.[11] Thus in *Sunningwell* itself, twenty years' use of glebe land for recreation by residents, the majority of whom came from a single locality, was treated as an effective assertion of village green rights.

39. Where part of an area of land is overgrown or inaccessible, that does not of itself preclude the registration of the whole (including that part) as a town or village green. As pointed out by in *Oxfordshire CC v Oxford CC*, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.[12]

40. Finally, where a registration authority forms the view that the case for registration as a town or village green has been made out only in respect of part of the land that forms the subject of an application, it may register just that part if it considers that can be done with no injustice to the parties – and there is no rule that the smaller area of land bear any particular relationship to the land originally claimed.[13]

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[8] *Oxfordshire CC v Oxford CC* [2004] Ch 253, at [96]-[105]. Sub-paragraphs added for clarity.
[9] *R (Sunningwell PC) v Oxfordshire CC* [2000] 1 AC 335, HL at p 356A.
[10] *Sunningwell*, per Lord Hoffmann at pp 352H-353A.
[11] *R (Barkas) v North Yorkshire CC* [2015] AC 195, per Lord Neuberger at [21], and Lord Carnwath at [62].
[12] *Oxfordshire CC v Oxford CC* [2006] 2 AC 674, HL, per Lord Hoffmann at [67].
[13] *Oxfordshire CC v Oxford CC* [2004] Ch 43, CA, at [101]-[111], upheld at [2006] 2 AC 674, HL, at [67].

Non-contentious evidence

The Application Land: the physical evidence

41. As noted above, I had the opportunity to view the Application Land and its immediate vicinity before and during the inquiry.

42. The Application Land adjoins the western edge of the built-up area of Faringdon, on the north side of the Highworth Road. It is approximately 5.6 hectares (14 acres) in area, rectangular in shape, and slopes gently down from a thick hedge along the north side of the Road.

43. The southern boundary of the Application Land is formed by the hedge along the Highworth Road, which is more or less impermeable except possibly by small dogs and adventurous children. The western boundary is formed by a thick hedge, also impenetrable, adjoining a large arable field of approximately the same size and shape as the Application Land. The northern boundary, at the bottom of the hill, is also in the form of a thick hedge, adjoining a small belt of trees.

44. The eastern boundary is also a hedge, but this adjoins various residential properties at either end, and a short stretch of residential road along the middle section. It is possible that there may be one or two gaps in this boundary, and there may have been some in the past; but none are particularly visible now, and any that do (or did) exist would probably only be used by those occupying particular properties, and not by local people more generally.

45. The Application Land is currently a grass meadow, with no particular features other than round the edge. There is a pedestrian entrance at the south-east corner, at the uphill end of the field, enabling access from the Highworth Road via a kissing gate. There is also at this point a sign containing a map of the Application Land and stating:

> "NOTICE. The public have permission to enter this land on foot for recreation.
> This permission may be withdrawn at any time"

There is no access for vehicles or horses at any point along this southern boundary.

46. At the other, downhill, end of the Land (at its north-eastern corner), there is another pedestrian kissing gate. This one is immediately adjacent to a standard metal five-bar gate, wide enough to allow vehicular access – although it would seem, from the pattern of the grass to either side, that this gateway is only occasionally used by vehicles. These gates allow access to the Land from the southern end of Canada Lane. The northern half of Canada Lane is a metalled road that runs southwards from Lechlade Road, alongside the Infant School, and then becomes the Pines. The southern half is an unmetalled track leading from the junction with the Pines down to the corner of the Application Land.

47. Between the two kissing gates, running up the eastern side of the Application Land, is a public right of way on foot. This is clearly well used; and I observed people walking up and down this route with and without dogs.

48. There is also a well-worn pedestrian route running roughly around the perimeter of the Land, but a few metres in from the edge – overlapping with the public right of way along the eastern boundary. This path is referred to in this report, as it was at the inquiry, as "the circular path" (or track), as it cuts the corner at each of the four

corners of the field – particularly at the north-western corner, which is slightly boggy. It also cuts the corner by each of the two gates – that is, it appears that those walking round the field, having initially gained access to it from one gate, go up one side and down the other, making a circular route, presumably leaving by the same entrance as they arrived. The result is that, by each of those two gates, there is a path leading to the circular path in each direction, and the circular path itself cuts the corner, so that the walk round the field can be started or finished at either gate, and enjoyed in either a clockwise or anti-clockwise direction.

49. And the circular path is indeed well used – broadly just as much used as the right of way – as is clearly visible both by looking at the Land today, in 2015, and on inspection of the 1999 and 2004 aerial photographs. In particular, I observed that, standing at the kissing gate at the uphill end of the Land, the path going to the west (parallel to the southern boundary) and the path going to the north down the hill (parallel to the eastern boundary) appear to be more or less equally used – in other words, although in law one is a public right of way and the other is not, that does not affect the way in which they are used. The same pattern is to be seen at the Canada Lane entrance.

50. Although it was not much referred to at the inquiry or in the written statements, it is clear on site that there is a further route, tight up against the hedges around the edge of the Application Land. This boundary route too seems to be well used, as evidenced by my observation of both the physical state of the route itself and people and dogs walking along it; but it would not seem to be used as much as the circular path, perhaps because it goes right into the corners, and is therefore longer. And along the eastern boundary (adjoining the houses and the road), there are some points at which the two paths merge.

51. Finally, I noted that there was generally a wire fence within the boundary hedge. There was in addition evidence of other wire fencing at the north-western corner of the Land.

52. On my various visits to the Application Land I observed that it is clearly now being used regularly for informal walking; indeed, it would be very surprising if it were not, given that it is immediately adjacent to a residential area and easily accessible at two points at either end of a public right of way. I also noted that some of those using the Land kept to the circular path; but some went into the middle; and, as noted above, it would seem that some use the path right at the edge of the Land.

53. I also observed that there is a good general view of the Application Land from the lay-by on the north side of the Highworth Road, just to the west of the south-west corner of the Land – sometimes referred to in the evidence as "the viewing point".

54. From the Lechlade Road, and from the track leading to Crabtree Farm, on the other hand, there is only a fairly distant view of the Application Land. I imagine that it might be possible on a sunny day in the winter to see sledging on the Land – not least because of the movement of the sledges. But I should be surprised if anyone walking on the Land would be visible from the Lechlade Road.

55. I am obviously very conscious that I have only personally seen the Land and the immediate area in spring 2015, and that it may not have always been in the same physical condition, or used in the same way, throughout the relevant period.

The use of the Land: documentary evidence

56. Clearly the production of any written or oral evidence specifically in the context of the present Application is open to the charge that it has been fabricated, or at least exaggerated, to provide support for the case of the person producing it. Before considering such evidence, therefore, it is helpful to consider what evidence exists that altogether predates the present proceedings, and so is not open to any such doubts – even though it may be open to more than one interpretation.

57. The first items of evidence are the aerial photographs, referred to above, which indicate that the Application Land was in the period from 1999 to 2009 in more less the same condition and use as it is today.

58. Secondly, inventory and valuation reports were produced by Dreweatt Neate, indicating that the land (under the name Liddiard's Field) was "permanent pasture" at the start of June in the years 1991 to 1996; that no dung was applied in any of those years; that fertiliser was applied in (only) 1995 and 1996; that the Land was chain harrowed in 1992 to 1996; and that it was rolled only in 1995.[14] The reports for the years after 1996 were not produced. The identity of the land to which the various processes were applied is not directly stated in the reports, but there was no dispute as to the conclusions to be drawn.

59. Thirdly, handwritten stocktaking books produced by Mr Bowler, again by reference to "Liddiards Field", from 1990 to 2013[15] indicates that fertiliser was applied in 1990, 1995 and 1996; chain harrowing was carried out in 1990 and from 1992 to 1999; rolling in 1990 and 1995; and no works from 2000.

60. Fourthly, invoices from various contractors indicate that hay baling was carried out on the Application Land in the years from 1993 to 2012, with the exception of 1996, 1997, 2001 and 2002.[16] Again, the identity of the land involved is not stated in the reports, but there was no dispute as to the conclusions to be drawn.

61. A letter from the County Council indicates that the kissing gates were installed in 2003.[17]

Evidence in support of the objections to registration

The use of the Land: the evidence at the inquiry from the Owners

62. It is customary in inspectors' reports on village green inquiries to consider first the evidence produced of the Applicant. However, on reflection, in view of the oft-repeated advice from the courts that the key in such cases is always to consider first how the matter would have appeared from the perspective of the landowner, I am

[14] Exhibits CFNA 2 to CFNA 7.
[15] Exhibit IB 2, helpfully summarised at exhibit IB 3.
[16] Exhibits CFNA 8 to CFNA 12.
[17] Letter of 25 April 2003, exhibited (unnumbered) by Nigel Allaway.

starting with the evidence of the owners of the Application Land, and those advising them or working with them.

63. In this case, as noted above, oral and written evidence was to be produced at the inquiry by the Owners, Nigel Allaway and Rosemary Pollock, their spouses, and Nigel Allaway's children. Nigel Allaway was unfortunately unable to be present at the inquiry. I deal with each in turn.

64. Nigel Allaway and Rosemary Pollock have owned the Application Land since they inherited it from their mother on her death in 1990. Since they were born, in the early 1950s, they lived with their parents at Crabtree Farm, Lechlade Road – a mile or so outside Faringdon. In 1983, Mrs Pollock moved to Highworth, where she still lives.

65. Nigel Allaway explained in his written statement that the Application Land – known to him as Liddiard's Field or Cooper's Field, not as Humpty Hill – had always been permanent pasture, and in support of that produced the inventory reports, referred to above. He said that the Land had been chain harrowed each year until 2013, by him or a family member or friend, involving the use of chain harrow towed by a tractor for 1 to 2 hours, before or after the hay crop was taken. The rolling would similarly have taken 3 to 4 hours. The fertiliser would have taken 1½ hours each spring; and dung would have been spread each year, taking 45 minutes each February or March. Ragwort would have been pulled up each year before the Land was cut for hay. In addition, Mr Allaway would have visited the Land monthly while the crop was growing, and weekly towards the end of the grass growing season (around July). He mowed the Land until 2001, taking a full day; after that the mowing was done by P J Benson. And he carted the hay bales back to the Farm until 2009, taking slightly over a day. The hedges were cut every year, until c.2009.

66. Mr Allaway also stated that he had put cattle – about 10 cows – on the Land in 1996 (from June) and 1997 (from May). There was a water trough on the Land, around half way down the western boundary. There was a pen in the north-west corner of the Land, into which the cattle would be herded in September/October in order for them to be loaded on a trailer and taken back to the Farm (in 1996) or driven on foot (in 1997). There was only one isolated incident of the cattle escaping. There were no cattle after 1997.

67. When he was on the Land, engaged in harrowing, rolling, spreading fertiliser and dung, Mr Allaway mostly saw people on the path; if he saw them walking round the boundary of the Land, he would tell them to get back to the path. When mowing or carting, he only saw people on the footpath. Similarly, when he was on the Land checking the cattle, he did not see a lot of people using the footpath; and if he saw people on the circular path, he would tell them to get back onto the public footpath. Usually, if people had seen him, they would stick to the public path. But he had not seen people using the middle of the Land – he would have remembered, as it would have interfered with the crop.

68. He accepted that there had occasionally been sledging on the Land, to which he had never objected; and he had seen blackberry picking on one occasion. He also noted that children had interfered with the hay bales – cutting open the small square ones or, more recently, rolling the larger round ones down the hill – but usually they had run away before being intercepted. .

69. Mr Allaway explained that there had been another entrance to the Land, approximately half way along the southern boundary, but this had been blocked up in around 2005.

70. Mrs Pollock – who had also never heard the Land referred to as Humpty Hill until recently – explained that until 2011 she had occasionally stopped on her way past the Land, to view it from the lay-by on the Highworth Road; and since then she had visited the Land every month, and more frequently at haymaking time. She confirmed that there had been a hay / silage crop on the Land each year, except in the two years when there had been cattle.

71. Over the years, she had seen people walking, with or without dogs, on the public path and round the edge of the Application Land – on some visits, one or two, and on some visits none – but she had not seen any tracks elsewhere on the Land. The grass would grow to around 60 cm (2 feet) tall, which would make it difficult to walk elsewhere. She particularly looked for dogs off the lead when there were cattle on the Land.

72. At the inquiry, she explained that she had considered trying to stop people on the land – including by the erection of fencing – but that it was difficult. The gate at the Canada Lane entrance had been locked, but the lock was vandalised. The permissive notice had been erected in 2011; the wording had been suggested by Swindon Council. She had seen a childminder on the land with some children, but she would not have asked them to leave; it was good for them to get out.

73. In re-examination, she explained that she was certain about the cattle on the Land in 1997, as that had been the year of Princess Diana's death, and her daughter Catherine had told her about herding the cows on horseback, which had linked in her mind with her recent visit to the USA.

74. Generally, the evidence of Mrs Pollock supported that of her brother Nigel.

The use of the Land: evidence from the Owners' family

75. Mrs Alison Allaway is the wife of Mr Nigel Allaway, one of the Owners of the Application Land. She has lived at Crabtree Farm since 1992, where she has been involved in the running of the farm. She corroborated the evidence of her husband as to the farming activities on the Land – including chain harrowing, rolling, spreading dung and fertiliser, pulling up the ragwort, mowing, baling and carting. In oral evidence, she explained that the dung had only been applied as a very thin coating. She had been on the Land every 2-3 months.

76. She explained orally that the use of the Land had been for "low level" agriculture – producing a consistent hay crop, but not intensive farming with lots and lots of artificial fertiliser.

77. She also confirmed the presence of cattle on the land in 1996 and 1997. Water for the cattle came from a neighbouring field, and a trough and a holding tank on the Land. Her husband had visited the Land every day, for 15-20 minutes, while the cattle were on the Land, entering from Canada Lane and driving around in a 4x4. She explained that cattle were very good at hiding, especially if they were not welcome; they could get under the trees at the bottom of the hill.

78. She noted that she had sometimes seen people walking on the public path. She had also seen people walking, or dog walking, around the perimeter of the Land – usually solitary walkers rather than groups. And she was aware that children used the Land for sledging in the winter. Due to problems with children playing on hay bales, since the 1990s the hay crop has been baled and carted as soon as possible, to avoid damage. She stated in written evidence that otherwise she was not aware of anyone using the Land; although she noted in her oral evidence that Mr Benson had reported evidence of use, including dog balls. She also stated that she had seen people walking on the footpath throwing balls and frisbees; and small children on bikes.

79. Signs had been put up at the Canada Lane entrance before 2011, but they had been removed within months. She could not be specific as to whether the signs had been before or after 1991; nor could she produce any record of those signs.

80. Mr John Allaway is the son of Nigel and Alison Allaway. He was born in 1974, and lived at Crabtree Farm from 1992 to 1998, since when he has lived in Swindon. He had assisted his father with the haymaking on the Application Land in July and August from 1990 until 2004. He stated that the mowing would take around 4 hours, and turning another 4 hours two days later; the whole harvesting process would take between one and two weeks, depending on the weather. Initially he and his father had done the work themselves, and latterly they had employed contractors.

81. As to cattle, he confirmed that they were on the Land in 1996 and 1997; he suggested that there had been around 10-15 animals – dry cattle – on the Land. They were generally all over the Land, but tended to be at the edge to benefit from the shade and to keep out of the wind. His sister had helped, on horseback.

82. He noted that there had been occasional dog walkers on the Land; but the dogs had been on a lead when the cattle were present. In preparation for introducing the cattle, he and his father had secured the perimeter of the Land, and had noted that unauthorised pedestrian entrance points had been created. In written evidence, he said that he had seen people walking alone or with dogs, usually on the public path but occasionally elsewhere; "the vast majority of people I saw off the public footpath would put their dog back on its lead and return to the path if they saw me on the [Land]". In oral evidence he said simply that he had seen some people one the footpath and others on the perimeter path. And he had seen teenagers hanging around the hay bales. He had occasionally seen sledging. But he thought that the presence of the electric cable across the Land would deter kite flying.

83. Mrs Catherine Allaway James is the daughter of Nigel and Alison Allaway, and sister of Mr John Allaway. She was born in 1982, and has lived at Crabtree Farm since 1992. She broadly corroborated the evidence of her parents, although she only left sixth form college in 2000. She had visited the Application Land around once a fortnight during the months from May to August in the years from 1990 to 2000, accompanying her father to check the crop growth. Since 2000, she had visited three or four times a week during harvesting – for two or three weeks – and otherwise every six to eight weeks.

84. She considered that there would have been roughly ten cattle on the Land in 1996 and 1997; and she described vividly her memories of driving the cattle into a pen in the north-west corner of the Land – a rectangular enclosure, made of wire fencing, just

enough for 10 cows tightly contained – riding her horse Emily, which she acquired in around March 1996 (aged 14).

85. She remembered from the period before 2000 seeing a couple of people walking their dogs on the public path. She had also seen people on the perimeter path, and asked them to get back onto the public path. She had once seen someone walking down the middle of the field; and on one occasion children playing in the hedge on the western boundary. She had often visited the Land in her car, and people had seen the car and kept to the footpath. And she said that her parents would drive over the Land in their 4x4, to check the crops – and had sometimes driven through them.

86. Mrs Allaway James had not seen other activities on the Land; nor had she heard her friends at school in Faringdon mentioning any visits to it. She said that she could also see the Land when driving into Faringdon from the Farm; and she had sometimes seen people walking their dogs down Canada Lane in the direction of the Land. And she had seen from the top of the track to Crabtree Farm people sledging on the Application Land.

87. She was fully aware that the perimeter track had been made by people walking; that it was act of trespass; and that the use of any paths in the middle of the Land would amount to an act of damage. However, although they tried to stop unauthorised access over years and years, and had discussed fencing the footpath, they had not taken any action; as there had not been enough damage to make it worthwhile.

88. She also drew attention to a number of other open spaces which local people could use for dog walking and playing with children.

89. Mr Richard Pollock is the husband of Mrs Rosemary Pollock, one of the Owners of the Application Land. He has lived at Highworth since around 1983-1984. He corroborated their evidence as to the agricultural activities taking place there. They had visited Crabtree Farm weekly, until c. 2012, to visit her brother Nigel; and had occasionally stopped at the lay-by on the Highworth Road, to look at the Application Land from the viewing point there.

90. Mr Pollock had seen people walking, with or without dogs, along the public path or in a circle around the perimeter of the Land. He remembered discussing with his wife "on a number of occasions" the fact that they could see someone on the "wrong" side of the Land. But there were often times when they did not see anyone on the Land – and there was never anyone on the Land when he was helping his brother-in-law Nigel with the baling. He had been occasions over the years when he had seen children playing with the bales. They had usually run off down the hill before he could tell them to desist. He too had seen no other activities.

91. Several of the Allaway family had heard of the egg rolling said to have taken on the Application Land, but none had seen it.

The use of the Land: evidence from others at the inquiry on behalf of the Objectors

92. Mr Philip Benson is the director of a contracting business, and his firm has carried out various activities on the Land since the early 2000s – he could not recall the exact year

when it started. Those activities included mowing, tedding, baling, and (since c.2011) carting.

93. His employees did the work in the period from June to August each year, depending on the weather. Between one and three of his employees would have been on the Land for between four and five days each year, from 9,00 a.m. until 9.00 p.m., with an extra day (and possibly an extra employee) in the years they were also doing the carting. He also regularly drove along the Highworth Road to get to other clients; and once the grass on the Land had been cut, he would "quite often" visit the land to see if it was ready to be turned and baled.

94. Mr Benson explained that he had seen people walking on the Land, usually on the northern perimeter – although he did not know where the footpaths were on the Land. His employees had also seen people walk round the Land in a circuit. They had found lost balls and sticks from dog walkers. If they saw a dog off the lead, they would ask the owner to put it on a lead, for safety reasons. They had also had altercations with children interfering with the hay bales; and he himself had seen children trying to roll bales down the hill. Otherwise, they had not told people to leave; although the had reported the incidents to Mr Allaway.

95. Neither Mr Benson nor his employees had seen other activities on the Land. Nor had there been track worn through the tall grass on the Land.

96. Mr Bowler had worked from 2003 for Dreweatt Neate, which merged in 2009 with Carter Jonas. In 2011 he moved to Strutt & Parker in Salisbury. He has been the land agent for Mr Nigel Allaway in relation to all of the land at Crabtree Farm, including the Application Land. He had also seen the stocktaking valuation notes dating back to 1996. He produced the documents referred to earlier in this report. And he explained that, following his attendance at a seminar on town or village greens in 2011, he had given the Owners advice (on 10 March 2011) that had led them to place a sign on the Land shortly afterwards.

97. He had seen walkers and dog walkers on the public path and on the circular path.

The use of the land: the evidence for the Objectors from those not appearing at the inquiry

98. As noted above, a number of statements were produced by employees of Gladman and by other professionals employed by Gladman, detailing visits that they had made to the Application Land on various dates between August 2012 and August 2013, in connection with the development of the housing proposal.

99. Of those who visited briefly, Mr Horsfield saw one dog walker on the circular path during a 10-minute visit in August 2012, and saw no one on a 10/15-minutes visit to the lay-by on the Highworth Road on a very cold day in December 2012. Mr Still, on a visit in March 2013, observed the Land from the lay-by for 10 minutes and from the Canada Lane gate for 5 minutes, and saw no one. Mr Hogg and Mr Black visited the Land, viewing it from the lay-by for 15 minutes, in March 2013, and saw no one. Mr Holladay and Mr Shepherd visited the Land with their colleague Mr Gregory, for a brief visit (of between 10 and 20 minutes) in October 2012. They saw one person walking a dog on the public footpath.

100. Ms Smalley made a visit of 30 minutes on 20 December 2012, a wet and miserable day. She noted that the track had been muddy, suggesting regular use; and she saw four dog walkers, on the circular track. Ms Hayhoe visited the Land for approximately 45 minutes, on 13 January 2013, and saw a gentleman walking along the western side. Mr Hogg visited for about an hour on 4 December 2012; from the lay-by, he saw one dog walker on the circular track and one on the footpath, but he did not see anyone whilst he was actually on the Land.

101. The two ecologists were each on site for around two hours, carrying out surveys: Mr Woolly on 13 December 2012, and Mr Blackburn in the early morning on 27 August 2013. The former saw two or three walkers, either on the public footpath or the circular track; the latter saw three or four dog walkers. In one case, the dog was allowed to run into the centre of the site, while its owner remained on the path. Mr Blackburn returned to the site in the evening, to conduct a bat survey for 2½ hours, and saw two dog walkers on the circular path.

102. Ms Kirk visited the land on 18 December 2012, a pleasant but cold day, to carry out a tree survey around the edge of the Land. She saw no one on her visit. Mr Reeve was on the Land for 5 hours on 12 December 2012, a very cold day, carrying out a soil survey. He saw one dog walker on the public footpath, and possibly another on the circular track.

103. None of those giving written evidence saw any other activity on the Application Land.

104. It was made plain by Mr Petchey that those who had made the written statements summarised above could be made available at the inquiry if either the Applicant or I had wished to ask them any questions. In the event, none of the statements was challenged at the inquiry by the Applicant; and I therefore accord them the same weight as I would have done if those making them had attended in person.

Evidence in support of the Application

The case for the Applicant

105. On the original application form, in answer to the question 7 (headed "Justification for application to register the land as a town or village green"), the Applicant replied:

> "Indulgence by a significant number of the inhabitants of Faringdon as of right in lawful sports and pastimes for a period of at least 20 years before permission was granted under section 15(2) of the Commons Act 2006 as witnessed by the 71 enclosed signed statements (questionnaires) showing use for: children playing, dog walking, blackberry picking, bird watching, picnicking, kite flying, people walking, sledging, rounders, football, scouts, skiing, drawing and painting, camping, general exercise, landscape appreciation, running / jogging, golf, ball games, infants school egg rolling, wildlife observation, wildflower study by a significant number of people over a period from 1960 to 2013.

106. As noted above, some 15 witnesses (including the Applicant himself) gave evidence at the inquiry in support of the Application. They were all courteously but thoroughly cross-examined by Mr Petchey, in particular as to their use of the Land in 2014. Some were extremely helpful, and had a clear and apparently accurate memory of what had occurred on the Land over the years; others were less certain, and had a more general

impression of what they had done or seen. But I did not detect any deliberate falsification.

107. Generally, those who gave oral evidence had been familiar with the Land for many years – some since the 1950s (Mrs Metcalf), the 1960s (Mr Kelly, Mr Desborough) or the 1970s (Edwards, Mr T Stewart); most since the 1980s (the Applicant, Mr Butler, Mr Middleton, Mr Tutt, Mr Platt, Edwards, Mr Lee); and two since the early 1990s (Mr Bates, Mr Francis). Only one (Mrs Miller) had not known the Land for the whole of the relevant period; she had first arrived in 2010, but had been very familiar with the Land since then through her work as a childminder.

108. A number of the witnesses commented on the name of the Application Land. The Stewarts noted that it had been known as either Humpty Hill or Humpty Dumpty Hill; Edwards thought of it as Humpty Dumpty Field; Mr Kelly thought that the next field was Humpty Dumpty Hill. Mrs Metcalf thought that the Land itself was Humpty Dumpty Hill; in answer to questions, he observed that Cooper and Liddiard were both Faringdon names, but he had not heard them attached to this particular field. Mr Williams indicated that he had always known the Land as Humpty Hill and had never heard of either Cooper's Field or Liddiard's Field; Mr Lee said that he hade never heard of any of those three names, although a neighbour of his (who had lived in Faringdon since the war) referred to it as Humpty Hill.

109. Not surprisingly, the evidence of many who appeared at the inquiry overlapped to a significant extent. I have therefore not attempted to record in full the evidence of each of the 15 witnesses, but to highlight the common themes that occurred. I do so principally by reference to the use of the Application Land – the activities actually indulged in by those giving oral evidence at the inquiry and their families; those in which they have themselves seen others taking part; and those described in the witness statements and questionnaires. I then consider the specific issue of the use of the Land for the grazing of cattle, as perceived by those using the Land for recreation. And finally I touch upon the identity of those using the Land. I have generally not referred to evidence that related solely to use of the Application Land prior to the 1990s.

110. I have recorded the principal activities in which the witnesses said that they had taken part, or seen others doing so; but not those they had not seen.

The use of the Land by those supporting the Application at the inquiry

111. Almost all of those giving oral evidence stated that they or members of their family had used the Application Land for dog walking (Mr Edwards, Mr Kelly, Mr Lee, Mrs Metcalf, Mr Middleton, Mrs Miller, Mr Platt, Mr T Stewart, Mr Tutt, Mr Williams) or for walking without a dog (the Applicant, Mr Butler, Mr Francis, Mr Middleton).

112. Another common use of the Land was by children playing, football (Mr Kelly, Mrs Metcalf, Mrs Miller, Mr Platt). Sometimes this took the form of informal kickabout; in one case erecting a tent; and in one case an unsuccessful attempt to use a tricycle. And sometimes the adults sat and watched while the children played (Mr Butler).

113. Several referred to picnics (Mr Butler (although he was uncertain), Mr Desborough, Mr Francis, Mr Lee, Mrs Metcalf, Mrs Miller) – this may have taken the form of a formal picnic, but it was more likely to be sandwiches and crisps – several referred to using the top end of the field for this, because of the view. Enjoying the view generally, again particularly at the top of the field, or "relaxing" or teenagers "hanging out", was also a repeated theme (Mr Butler, Mr Francis, Mr Lee, Mrs Miller, the Applicant, Mr T Stewart) – in some cases on specific types occasions, such as late summer evenings, bonfire night, or to watch the air displays at Brize Norton or Fairford.

114. A significant use of the Land, albeit seasonal, was blackberrying (Mr Butler, Mr Desbrough, Mr Francis, Mr Kelly, Mr Lee, Mrs Metcalf, Mr Middleton, Mrs Miller, Mr Platt, Mr T Stewart, Mr Tutt, Mr Williams). A few also referred to gathering sloes and crab apples. The main focus of this activity appeared to be the western and northern boundary hedges. Bird watching, and nature study generally, was mentioned by a few (Mr Francis, Mr Lee, Mr Middleton, Mrs Miller); along with wild flower collection (Mr Tutt).

115. More active pursuits on the Land included jogging or keep fit (the Applicant, Mr Francis, Mr Middleton, Mrs Miller). This was sometimes up and down the public path, sometimes round the circular path, and in some cases zig-zagging up the hill. A similar group took part in flying kites, planes, and frisbees – generally at the top, to avoid the pylon (Mr Francis, Mrs Metcalf, Mr Middleton, Mrs Miller, Mr T Stewart, Mr Williams). Almost everyone said that they had taken part in sledging whenever there was snow, and everyone had seen it taking place.

116. As for other activities, there was much discussion of egg rolling. This appeared to have been organised on annual basis, at least for a while, by Faringdon Infant School (in nearby Canada Lane). Evidence was given by Mr Bates that a competition had occurred in 1993 and 1996; and I was shown photographs of the 1996 event. And other events linked to the School had taken place on the Land (Mr Edwards)

117. It appeared that the geographical pattern of the use of the Land was very varied. Butler had "enjoyed the whole field", not just the perimeter; the children had used the centre, and he and his wife the perimeter. He had enjoyed the good sunset from the high point in the middle of the field. Mr Desborough had varied his route, whereas Mr Edwards had kept to the paths. Before children, Mr Francis too had kept to the path, doing a full circle; but he occasionally cut across the middle, especially with a small child; and the children went all over the Land.

118. Mr Kelly said that, when walking the dog, he would sometimes keep to path, sometimes not; he usually used the circular path, but sometimes walked across to talk to other people. He would walk across the middle of the field to get to the blackberries, but sometimes failed to cross due to the long grass. Mr Lee would walk all over the Land, sometimes off the path, and sometimes into the longer grass. Mrs Metcalf would walk around or up and down the Land, varying her walk, and sometimes zig-zagging; her dog got bored always walking round path – most people would stay on the path, but she didn't; but she did respect the growing crop. Sometimes she would stand at the top, throwing a Frisbee. Mr Middleton too had used the whole of the field; he too varied his walk each day – 50/50 round the track or across the middle. It also depended on the weather, as the worn track would get messy. Mrs Miller used

the whole of the Land with no fixed route; the children with her (she was a childminder) went all over it, using the paths for racing; the older children looked at the view from the top.

119. Mr Platt had used the entire field; Labradors would go all over the field, sometimes on the path, and sometimes down the middle. He occasionally walked after dark, and would then stick to the path. He explained that the apparent track shown on the aerial photographs is due to a spring – hence the boggy patches. The Applicant tended to use the top of the hill, throwing a ball to his dog in the middle, and typically doing a few laps of the field. Mr Tutt also used the whole field; he generally stuck to the track, with his dog, doing a circuit to maximise the length of a walk; but he would go to the edge to get blackberries. Mr Williams walked around the perimeter path, but also often walked into the centre – to get sufficient exercise without climbing hill, and to minimise dog straying onto neighbouring fields.

120. Mrs Metcalf, Mr Middleton and Mr Tutt – each of whom lived in the area of housing alongside the eastern boundary of the Land – used both entrances to the Land. Others consistently used one entrance or the other, depending on which was nearest to their house.

121. As for the frequency of use, this too varied. Mr Lee, Mr Middleton (while he had a dog), Mrs Miller and Mr Platt visited 2-3 times a day. Mrs Metcalf visited most days; and Mr Middleton (without his dog) 2-3 days per week. Mr Butler and Mrs Miller used the Land weekly. Mr Francis, and Mr T Stewart use it around twice a month, as did Mr Desborough, although he now uses it only very occasionally. Mr Kelly used it 3 to 4 times a year, walking a dog; and the Applicant "several times a year". Mr T Stewart said that he had visited the Land more as a child and a teenager.

122. Finally, a few had sometimes crossed the Land en route from one point to another. Thus Mr Bates used the Highworth Road entrance in the course of walks to the open country beyond; Mr Desborough had walked from that entrance across the field and on into the town; Mr Kelly had walked across it on his way to the infant school; and Mrs Miller had crossed it as part of a longer jogging circuit to Coxwell.

Use of the Land by others, seen by those supporting the Application at the inquiry

123. In addition to their account of how they and their families had used the Application Land, those giving oral evidence at the inquiry also described what they had seen of the Land being used by others.

124. All the witnesses stated that they had seen the Land being used by others for dog walking. Some said they had seen people walking on the Land without dogs (the Applicant, Mr Butler, Mr Desborough, Mr Lee, Mrs Metcalf, Mr Platt). As noted above, some walked round the edge of the field, but not all (Mr Middleton, Mrs Miller). Mrs Miller noted that dogs don't always keep to path; half do, but half run in the middle – it depends on the breed. Mr Desborough had seen walkers going all over the field; but Mr Butler observed that visitors to Faringdon just used the footpath, whereas the locals used the whole field.

125. A number noted that they had seen children playing (the Applicant, Mr Desborough, Mr Edwards, Mr Lee, Mrs Metcalf, Mr Tutt) – sometimes on bicycles (Mr Platt). Mr Tutt noted that mums and toddlers sometimes stopped on their way home across the field, and played for a little. Many had seen picnics (Mr Butler, Mr Francis, Mr Kelly, Mr Lee, Mrs Miller, Mr Tutt); Mr Tutt particularly noted children having picnics, mainly at the top of the hill.

126. Many had seen other people jogging across the Land or taking other forms of exercise (the Applicant, Mr Butler, Mr Francis, Mr Kelly, Mr Lee, Mr Middleton, Mrs Miller, Mr Platt, Mr Tutt). Some joggers used the footpath; some used the circuit; and some cut across the middle (Mr Platt, Mr Tutt).

127. Some had seen informal football being played (Mr Kelly, Mr Lee, Mr Middleton, Mrs Miller, Mr Platt, the Applicant, Mr T Stewart) – one noted that such games meant that it was necessary to keep a dog under control. Mr Kelly said that the long grass made no difference. People had been observed the Land being used for occasional golf practice (Mr Butler, Mr Middleton, Mr T Stewart, Mr Williams). Mr Kelly had seen people with cricket bats and tennis rackets, and heard noise, but no-one had seen actually cricket.

128. Many had seen people flying kites or model aircraft (the Applicant, Mr Butler, Mr Francis, Mr Kelly, Mr Lee, Metcalf, Mr Middleton, Mrs Miller, Mr Tutt, Mr Williams), although several said that this was rare (Mrs Miller, Mr Williams), or not regular (Mr Kelly); and several referred to an elderly gentleman flying plane a few years ago.

129. Everyone said that they had seen the land being used for sledging in the winter. And the Applicant and Mr Tutt had also seen skiing and snowboarding.

130. Many people had observed others blackberrying, which was said to be very popular (Mr Butler, Mr Francis, Mr Kelly, Mr Lee, Mrs Metcalf, Mr Middleton, Mrs Miller, Mr Platt, Mr T Stewart, Mr Tutt, Mr Williams). One also mentioned the picking of crab apples. And school children had been seen on nature walks (Mr Middleton).

131. As to less energetic pursuits, teenagers had used the Land for "hanging out", usually at the top of the hill, in the evenings and the school holidays (the Applicant, Mr Platt); one witness had observed courting couples. Others had been seen drawing, painting, photographing flowers (Mr Lee, Mr Tutt), or bird watching (Mr Butler, Mrs Metcalf, Mr Middleton, Mr T Stewart, Mr Williams). Mr Francis and the Applicant said that people simply visited the Land to enjoy the view.

132. Mr Edwards said that there had been a battle re-enactment, once or twice

133. Mrs Metcalf's house (at 13 Orchard Hill) looks over the Land; she can see diagonally across it from her bedroom windows. She said that, more often than not, she could see someone walking over the field, especially on the western side. And very often she had seen someone parked in the lay-by on Highworth Road, especially in the evening. Even after dark, she had seen people on the Land, with torches.

134. Mr Middleton also looks over the Application Land; from his house at 17 Beech Close it was possible to see the bottom 5/8 of the Land. He had seen lots of dog walkers in the middle of the field, and lots of people using the middle of the field. There was quite a lot of football, mainly by the bottom stile and 100m into the field, with a ball occasionally coming into his garden; the grass was not too long, even just before it was

cut, and it was still possible to play – largely kickabout. He had also seen aeroplanes, remote control helicopters, generally at the bottom end of the field; and they too had ended up in his garden on two or three occasions.

135. Mr Tutt lives near the Land, at 22 Orchard Hill, but said he was not a gazer. He noted that there had been a hole in the hedge opposite the end of Elm Road; he had maintained the hedge there with the permission of the landowner.

Use of the Land for agriculture, as perceived by those using it for recreation

136. All of the witnesses appearing on behalf of the Applicant were asked about agricultural activity on the Application Land, and whether it had ever interfered with their use of it.

137. Mrs Metcalf noted that the grass was long for about two months; as she put it, it was not special grass, you think it won't be cut, but it is. Dogs and children run through the long grass, and tend to flatten it (Mr Williams, Mrs Metcalf, Mrs Miller). Mr Platt and Mr Tutt both stated that they respected the farmer's crop, and try to avoid treading down, but dogs go all over; they go through the hay, and owners often followed (also Mr Middleton). Mr Francis said that the long grass had not affected the use of the Land a lot, especially at the top end (where the grass was not as long); in any event, long grass was exciting for small boy. The comments at paragraph 111 above are also relevant in this context.

138. A number of the witnesses had seen the hay crop being taken. Mr Lee noted that when the tractor was working, they just walked up and down the footpath. Mr Platt had seen workers (contractors, he presumed), and observed that it was nice to see the grass being cut for hay; kids loved to see tractors. Mrs Metcalf admitted that children had played with the bales. Mrs Millar had seen such activity in at least three years out of the five years she had known it. Those working on the Land had been happy for her to be there, and she (and the children with her) had kept out of their way.

139. More generally, a number of witnesses stated that the agricultural operations had not interfered with their recreational activities (the Applicant, Mr Desborough, Mr Edwards, Mr Francis). Mr Butler had seen farmworkers clearing drains – but, again, that had been no interruption to his use of the Land.

140. Mr Bates and Mr Butler said that they had not seen any crops.

141. All the witnesses were asked if they had seen dung being spread; none had. But Mr Platt had once seen the Land sprayed with compost granules.

142. There was much evidence as to cattle that may have been on the Application Land. Mr Butler had seen cattle on one or two occasions, half way down west side. A number of others had seen cattle, although they differed in their recollection of when they had been present. Mr Tutt recalled that they had been there for one or two years in the early to mid 1980s; the Applicant thought that they had been there in the late 1980s; and Mr Platt recalled six male heifers in around 1989. Mr Desborough thought they had been there before 1991; they could not have been in 1996/97, as he took his grandchildren on the Land then, and would have remembered. Mr Edwards said they had been there two or three times in his lifetime, definitely before 1996. Mr Williams also thought they had been present earlier. Mr Platt agreed; the cows had not been

there in 1996/97, as he would have recalled the manure. Mr Tutt thought it would have been 1991 at the latest, as he had a skittish dog in later years, which would have chased them. Mr Lee thought they were in the early 1990s.

143. As to the effect of the cattle being present, Mr Williams noted that his dog and the cows had co-existed, except when the cows congregated at a particular point, when the dog would simply avoid them; the cattle were not interested in the dogs, or vice versa. He also recalled the cows being in the north-west corner, and elsewhere. Mr Butler agreed that the cattle had never stopped them; Mr Lee said that they had had no impact on his use of the Land, as his dog was used to cows. Mr Platt admitted that his dog had once herded the cows up the hill, and then walked round the herd; after that, the cows had left them alone. Mr Tutt noted that the cattle had not restricted the use of the Land, although their presence had meant that his dog got less exercise.

144. Others did not recall having seen any cattle (Mr Bates, Mr Francis, Mr Kelly, Mrs Metcalf, Mr Middleton). Mr Kelly accepted that one explanation for that could have been that he was using the Land less; another witness noted that there had been cattle in another field, further along the hillside.

145. Mr T Stewart did not recall any cattle, but had been working in Oxford in 1996/97; Mrs Miller too did not recall any cattle, but had only lived in the area since 2010.

Encounters with owners

146. The witnesses were all asked whether they had encountered the owners of the Land or their employees or agents. Mr Butler had seen operatives on farm vehicles, but not been challenged.

147. Mr Lee said that the farmer had stopped children playing with the bales; but that that had not been a general prohibition. He had also been told by the owner of the lower field (on horseback) to keep to footpath, but not by the owner of the Application Land, which was much more used. Mr T Stewart had met the farmer on a number of occasions; he had never been asked to leave or to stop his activities; sometimes he had simply swapped sides to get out of way. Mr Tutt and Mr Williams had seen the landowner, but not directly encountered him.

148. Some said that they had never been denied access to the Land or challenged whilst on it (Mr Francis, Mr Kelly, Mr Platt). Others simply stated that they had never seen the landowner (the Applicant, Mr Bates, Mr Butler, Mr Edwards, Mrs Metcalf, Mr Middleton, Mrs Miller).

Change over the years

149. The witnesses were all asked whether the way in which the Land had been used had changed over the last two decades. Mr Butler, Mr Francis, Mrs Metcalf, Mr Platt, the Applicant, and Mr T Stewart all said that it had not. As Mr Edwards put it, it was simply a vacant field. Mr Desborough, Mr Lee, Mrs Miller, and Mr Williams considered that the use of the Land had not changed, but had increased over the years. Mr Middleton too thought that there had been no change, but noted that the owners had cut back the hedge hard – there were less blackberries than there had been.

The identity of the users of the Application Land for recreation

150. On the original application form, in answer to the question 6 (headed "Locality or neighbourhood within a locality in respect of which the application is made"), the Applicant simply indicated "The Town of Faringdon".

151. There seems to be no disagreement that the Civil Parish of Great Faringdon[18] was and is a locality for the purposes of the 2006 Act, and that its boundaries had not changed at any material time.

152. A map was subsequently produced showing a red line drawn tightly round the present built-up area of Faringdon.[19]

Uses of the Land: evidence in the form of statements or questionnaires

153. As noted above, there were around 85 people providing either witness statements, questionnaires or both. They were not able to be questioned at the inquiry, but I note that there was no suggestion by the Objectors that such evidence should be simply ignored. And in any event it accorded entirely with the oral evidence that I have examined with some care in the preceding sections of this report.

154. As to the questionnaires, the Applicant explained in answer to my questions that they had been handed out by him, and by Mr Williams and two others. They had selected the respondents on the basis that they were known to them. Mr Williams said that he had been given the area from Highworth Road to Beech Close; he knocked on doors, and gave a questionnaire to anyone who had lived in the area for 10 years or more (not all were accepted) – he did not return if there was no answer at the first attempt.

155. This does not prove that all of those in the area close to the Application Land had used it, or that none of those outside that are had done so.

156. I have not undertaken a complete analysis of all of the activities recorded in the statements and the questionnaires. In both cases, they relate to:

- activities actually indulged in by those providing the evidence;
- activities indulged in by members of their families; and
- activities they had seen others indulging in.

157. The activities thus recorded, in one or more of those three headings, included the following principal ones:

- walking with a dog;
- walking for general recreation;
- children playing;
- bird watching, nature study, enjoying the view;
- blackberrying; and

[18] So called to distinguish it from Little Faringdon, a small hamlet just north of Lechlade.
[19] Including also Jespers Hill and some of the parkland to the north of the Church.

- sledging and tobogganing.

158. Some provided more detail – for example, walking with particular dogs, or after dark; playing particular kinds of games; watching flying at the air shows. And some mentioned other activities, such as kite flying. And many gave details of the frequency of taking part in or observing particular activities, or the period over which such observations had been made.

159. By and large, however, as already noted, the pattern of activities recorded in the written evidence reflected both the pattern recorded in the oral evidence at the inquiry and the pattern I observed on my visits.

Summary and conclusions

The general pattern of use of the Land

160. There can be no doubt that, throughout the relevant period, since 1991, the general use of the Application Land has been as a grass meadow. That is, the grass has grown, getting gradually longer, and was cut each year, baled, and taken away as a hay crop. The relevant agricultural processes would have each taken several hours on several days over the course of a week or two, during the summer.[20] There has been almost no other use of the Land for other forms of agriculture – such as the growing of wheat, vegetables, or other crops – and in particular no use that would have required the Land to be ploughed.[21] It was, in laymen's terms, simply a grass meadow.

161. Most of the time, the growing grass presented no obstacle to the use of the Land for general recreation – including, in particular, walking round the various paths (that is, the public footpath between the two gates, and the circular path, and the less well-used outer path hard up against the edge of the field). The Owners, members of their family, and those working for them, had therefore not surprisingly seen people using the paths.[22] Those visiting the Land in connection with the housing proposal had also seen people using the paths.[23] One or two had occasionally seen people not on the paths.[24] As the grass became longer, it became more difficult to walk elsewhere.[25]

162. While the harvesting were taking place, the Owners and their families and agents generally saw people just on the public footpath; people elsewhere were sometimes told to get back to the path.[26] And children had sometimes played with the hay bales.[27]

163. The Owners and those supporting them were also well aware that the Land was used for sledging.[28] It did not appear that any serious attempt had been made to prevent or

[20] See paras 58-60, 65, 80, 93 above.
[21] See para 76.
[22] See paras 67, 71, 78, 82, 85, 90, 94, 97.
[23] See paras 99-102.
[24] See paras 71, 82, 85.
[25] See para 71.
[26] See paras 67.
[27] See paras 68, 78, 82, 90, 94.
[28] See paras 68, 78, 82.

restrict this. They made little mention of blackberry picking[29] – although the blackberry season would have occurred after the hay crop had been gathered in, so that there would have been less cause for visits to the Land for farming purposes. They had heard of the egg rolling, but not seen it.[30]

164. This pattern of use, as perceived by the Objectors, generally fits with the pattern of uses noted by those giving evidence, oral or in writing, in support of the Application. This largely focussed on

- walking (with or without a dog);[31]
- children playing, and informal football; [32]
- less strenuous activities, such as bird watching, nature study, enjoying the view, and generally "hanging out", "lounging about" or "chilling";[33] and
- seasonal activities – blackberrying, other fruit gathering, sledging and tobogganing.[34]

165. It appears that the egg-rolling, although much talked about, probably occurred only on one or two occasions (in 1993 and 1996) during the relevant period.[35] And there may have been a battle re-enactment on one occasion.[36]

166. Those supporting the Application indicated that these activities took place all over the Land; the walking was predominantly on the public footpath and the circular path, but by no means exclusively so.[37] And the agricultural activities had not significantly interfered with the recreation – as the grass became taller, it would be more difficult to go through, but children and dogs did, and sometimes adults.[38] While the harvesting was taking place, those indulging in recreation on the Land simply kept out of the way; and they had not been told to desist.[39]

167. I consider, on the balance of probability, that walking took place predominantly but not exclusively on the circular path; to a lesser extent on the outer path – which must have been made by someone – and to some extent also elsewhere on the Land. I myself saw some people using the centre of the field, and I should be very surprised if some people did not from time to time cut across the middle, if only for variety. And of course children and dogs tend to go all over a field; and adults will sometimes follow them.

168. Other activities – such as relaxing, enjoying the view, children playing, sledging – clearly took place all over the Land.

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[29] See para 68.
[30] See para 91.
[31] See paras 111, 124, 133, 134, 157.
[32] See paras 112, 125-128, 134, 157.
[33] See paras 113, 131, 157.
[34] See paras 114, 115, 129, 130, 157.
[35] See paras 116.
[36] See para 132.
[37] See pars 117-120, 131.
[38] See paras 137, 138.
[39] See paras 138, 147, 148.

Occasional use by cattle

169. I said earlier that there had been "almost" no use for other forms of agriculture because there was much discussion of the use of the Application Land for the grazing of cattle. It seems that there can be no doubt that the Land was used for cattle, almost certainly on two occasions.[40] And there was little dispute that they would have been present from May/June through to September/October.

170. However, there was at the inquiry a significant disagreement between the parties as to which years they were there. The Owners and their family are clear that the cows were on the Land in 1996 and 1997.[41] Those giving evidence in support of the Application, however, tended to suggest that the cattle had been present at various days between "early to mid 1980s" and "early 1990s". The two accounts are impossible to reconcile. However, on the balance of probabilities, I am inclined to agree with the 1996/97 date. I do so because of the circumstantial evidence provided by the Owners – in particular as to the rounding up of the animals by Mrs Allaway James on her horse.[42] That also tends to fit with the documentary evidence – for example, the lack of invoices for baling in those years[43] – although that is not conclusive.

171. However, it seems probable that the presence of the cattle made no great impact on the recreational use of the Land in those two years. Ten or so cows would not take up a great deal of the Land; walkers and those using the Land for other purposes would simply avoid them. And one witness suggested that they tended to congregate at the edge of the field, to benefit from the shade and keep out of the wind.[44]

172. Obviously, if I am wrong in my deductions as to the timing of the cattle, they would have been on the Land before the start of the relevant period, in which case their presence would be irrelevant for present purposes.

Conclusion

173. I thus conclude that there was low level agriculture on the Application Land throughout the period from 1991 to 2013. This took the form of:

- probably, the grazing of ten or so dry cattle for a few months in 1996 and 1997; and
- the taking of an annual hay crop in other years.

174. I also conclude that there was abundant use of the Land throughout the period for informal recreation, taking the form of

- walking (with or without a dog);
- children playing, and informal football;

---

[40] See paras 66, 71, 73, 77, 81, 84, 142.
[41] See paras 66, 77, 81, 84.
[42] See paras 83, 81, 84.
[43] See para 60.
[44] See para 81.

- less strenuous activities, such as bird watching, nature study, and enjoying the view; and
- seasonal activities (notably blackberrying and other fruit gathering, and sledging and tobogganing).

175. The principal activity, walking, took place primarily on the paths, but not exclusively so.

176. I also consider that the owners of the land must have been aware – insofar as they turned their minds to it – that such recreational activities were taking place, and took only cursory steps to prevent or restrict it. Further, insofar as there was any conflict between the agriculture and the recreation, it was very low level, and neither significantly impeded the other.

The sign

177. I conclude that there was a sign, at least at the southern end of the footpath, from some unknown date in or after April 2011, permitting use of the Land. No precise date seems to have been agreed; but I note that the application for registration was submitted on 18 April 2013, and that everyone before and at the inquiry proceeded on the basis that the relevant 20-year period was from 1991 to 2011. I therefore conclude, on the balance of probabilities, that the sign was erected on or after 18 April 2011, less than two years before the application for registration – so that it was at least possible that section 15(3) off the 2006 Act could apply.

The consequences in law

178. Firstly, this is a classic case of land being used for "dog walking and playing with children" which may be, in modern life, the main function of a village green.[45]

179. Second, the use of the paths on the Application Land, without or without dogs, may be partly attributable to an actual or emerging right of way – actual, in the case of the public footpath up the east side of the Land, and possibly emerging in the case of the circular path around the other sides. However, that applies only in the case of those entering at one gate and leaving at the other, in the course of a longer walk (or jog) from A to B.

180. It seems to me likely that many of those living broadly to the south of the Land will have entered it from the Highworth Road, taken a circular walk, down one side and back up the other, and back home again. Many of those living to the north will have similarly taken a circular walk entering and leaving by the Canada Lane entrance. This is borne out not only by observation of how people use open space generally, but also by the presence of the paths cutting the corners by the two entrances – which must have been created and used by some one.

181. Thirdly, I conclude that this pattern of use is a classic example of recreation and low-level agriculture existing happily side-by-side. There is no doubt that the Owners knew, both by direct observation and from the reports of those working with and for them, that the Land was being used by people who were in effect trespassers.

[45] See Carnwath J in *Stead*, quoted in *Sunningwell* (see para 35 above).

182. This reflects the pattern of land use described in the 18th century case of *Fitch v Fitch*:

> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together."[46]

This was supported by Lord Hoffmann in *Oxfordshire*, in the context of the rights of the parties that might co-exist after registration of land as a town or village green:

> "I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with sports and pastimes for the purposes of section 22 [of the 1965 act] if in practice they were not."[47]

183. That conclusion, and the dictum in *Fitch v Fitch*, were in turn adopted by Lord Walker in *Redcar*:

> "I see great force in the ... passage quoted. Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring."[48]

And it may be noted that that tends to suggest that the recreation might be interrupted by the hay crop, whereas the evidence in this case is that the interruption was minimal.

184. Nor was the interruption to recreation by the grazing of cattle any more substantial. The grazing occurred on the Land, if at all, for around four months in two years. And those using it for other purposes simply avoided the cows – no doubt putting their dog on a lead where appropriate.

185. Fourthly, whilst the owners occasionally intervened to restrict the use of the land other than the footpath, and to prevent damage to the bales, I do think that the recreational use of the Application Land was either permitted or forbidden, until the sign was erected in 2011. Until that date, therefore, such use of the Land was "as of right"; after that date, it was by permission – at least in respect of those entering from the southern end of the path, and quite possibly others.

186. Fifthly, I consider that those using the Application Land are likely to have come largely from the Civil Parish of [Great] Faringdon. No doubt the Land was predominantly from the parts of Faringdon nearest to the Land, but that will always be true in the case of any open space at the edge of a built-up area. I think it unlikely that more than a handful will have come from outside Faringdon.

Overall conclusion and recommendation

187. I consider that there is ample evidence showing on the balance of probability:

    (a) that the Application Land, as a whole, has been used for twenty years by the inhabitants of Great Faringdon Civil Parish for lawful sports and pastimes, up to the date of the erection of the sign in 2011; and

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[46] (1792) 2 Esp 543, per Heath J at p 54.
[47] *Oxfordshire CC v Oxford CC* [2006] 2 AC 674, HL, at [51].
[48] *R (Lewis) v Redcar and Cleveland BC* [201] 2 ACC 70, SC, at [28].

(b) that such use has been "as of right".

188. I therefore consider that the Application Land is eligible to be registered as a town or village green, and I recommend that the register under the 2006 Act be amended accordingly.

CHARLES MYNORS

PhD, FRTPI, FRICS, IHBC, Barrister

25 September 2015

In the matter of the Local Government Act 1972 and the Commons Act 2006
And in the matter of land at Humpty Hill, Faringdon, Oxfordshire

Report to Oxfordshire County Council on the determination of Application NLREG 33 to register as a town or village green land at Humpty Hill, Faringdon

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25 September 2015

Chambers ref: 6990/I – Report 1a

WALKER MORRIS

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Our ref ERK/CJD/GLA.276-3

Your ref NL Reg 33/Humpty

16 October 2015

By email only
Richard.Goodlad@Oxfordshire.gov.uk
Katherine.Skinner@Oxfordshire.gov.uk

Dear Mr Clark

In the matter of an application to register Humpty Hill, Faringdon as a town green

We are instructed to act on behalf of Gladman Development Limited, Charles Frances Nigel Allaway and Rosemary Pollock (the "Objectors").

We ask that this letter be put for the attention of the members at the Planning & Regulation Committee meeting on Monday 19 October 2015.

This is another case where an application has been made to register farm land as a town or village green. Rather than reject the claim as misconceived Dr Mynors, the Inspector, has recommended registration. As demonstrated below he was wrong to do so.

Unfortunately, Dr Mynors has not engaged with the Objectors' submissions made to the inquiry and his Report is flawed. The decision of course is for the Planning and Regulation Committee and is not for the Inspector. However so far from it being open, in the light of the Inspector's Report, for the Committee to decide to **register** the land as a town or village green, what it should do is to decide to **reject** the application.

The first error that Dr Mynors made is as to legal basis of the application. As explained at paragraph 26g of the Report by the County Solicitor & Head of Law & Culture, the Inspector concluded that the application fell to be considered under section 15 (3) on the basis that the relevant 20 years use was down to 2011. In fact (in accordance with what Lewison LJ said in *R (Newhaven Port and Properties Limited v East Sussex County Council* [2014] QB 282 at paragraph 29), the application fell to be considered under section 15 (2), on the basis that the permissive use between 2011 and 2013 fell to be disregarded. This was explained to the Inspector at the inquiry and set out in Appendix 2 to the Objectors' closing submissions. In this case what is a clear error can be argued not to make any difference, but it does go strongly to support the suggestion made above that in writing his Report the Inspector did not engage with what the Objectors were saying.

The second error is this. *R (Barkas) v North Yorkshire Council* [2015] AC 195 is a new case in which the Supreme Court had to consider what the requirements were for registration of a new town or village green.

Lord Carnwath said (see paragraph 65 of his speech)

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... in cases of possible ambiguity, the conduct must bring home to the owner not merely that "a right" is being asserted, but that it is a village green right.

What makes the assertion of a "village green right" (or a "town green right" in the case of a town) different from an ordinary right is that it is exercised in connection with a village (or, in the case of a town), a town.

Sometimes, as Dr Mynors will have appreciated, a smaller area can be taken but in the present case the relevant area put forward by the Applicant was Faringdon and Dr Mynors proceeded on this basis. Faringdon is quite a small town but it still has a population at the last census of 7,121. There was oral evidence on behalf of the Applicant from 15 people; and there were, additionally, 73 evidence questionnaires (some of the makers of which had also made written statements) and 38 written statements. 111 (i.e 73 +38) is 1.56%. Moreover the great majority of those who have produced questionnaires or statements live within 200 yards of the site.

The Objectors' point was clearly put to Dr Mynors as members will see if they look at the Objectors' closing submissions available in the Members' Resource Room (it is only necessary to look at paragraphs 28 and 29 of the closing submissions).

Accordingly in the required sense the use was not by the inhabitants of Faringdon; and use was not by a significant number of these inhabitants.

However Dr Mynors does not address the submission. What he does is to consider the question of where those who have used the land at paragraph 186 and says:

... I consider that those using the application land are likely to have come largely from the civil parish of [Great] Faringdon. No doubt the [use] was predominantly from the parts of Faringdon nearest the land, but that will always be true in the case of any open space at the edge of a built up area.

Thus we don't know the reason for why he disagrees with the Objectors. This would not matter if he is right and they (and apparently Lord Carnwath) were wrong: this is a matter the Committee will have to decide. In that context it would be helpful for members to have in mind the case of *Steed* (1995) 75 P & CR 487, an earlier case decided by Carnwath J (as he was then) decided that use by those who lived near to the claimed town green could not say that their use was refereable to the town of Sudbury in which they lived. It is only necessary for members to look at the headnote to get the point:

***Held**, dismissing the application ... Use of the land is not enough. It must be accompanied by an assertion of right and be linked to a right claimed by the inhabitants of a particular locality ... the evidence presented [did not] link the use to a right claimed by reference to any particular locality.*

Just to be clear, there was no doubt in *Steed* that the use was by the inhabitants lived in Sudbury in the *nearby streets* (p505) to the application site.

This is a sufficient for the Committee to reject Dr Mynors's Report. However there is a third error into which he fell.

If members go to the land they will see "on the ground" that it is used by local people to carry out a circular walk. This is because their feet have worn down the grass. This circular path is described by

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Yours sincerely

Walker Morris LLP

1999

2004

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Help
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14 The Pines
Faringdon
Oxon
SN7 8AU

Rob Stewart

20th October 2015

Richard Goodlad, Principle Solicitor
For the attention of Nick Graham
Chief Legal Officer and Monitoring Officer
Corporate Services
Oxfordshire County Council
County Hall, New Road
Oxford, OX1 1ND

RE: In the matter of the Humpty Hill Town Green, Faringdon. On behalf of The Friends of Humpty Hill

Dear Mr Clark,

I received from your office today a copy of a representation made to Oxfordshire County Council by Walker Morris LLP of behalf of Gladman Developments and the Allaways (the Objectors).

My comments on the representations and on the action of Walker Morris LLP are as follows:

1. Walker Morris have suggested that Dr Mynors *"did not engage with the Objector's submissions"*. Dr Mynors is an extremely experienced Inspector and Barrister who I understand has reported on several Town and Village Green applications. He held a 5 day public enquiry and took 6 months to produce his report. As such I believe that this suggestion by Walker Morris is beyond ridiculous.

2. Walker Morris have suggested that Dr Mynors has made a mistake in his judgement of the legal basis of the application. For the sake of completeness perhaps this point could be clarified. It is, however, irrelevant to the outcome of Dr Mynor's report. Humpty Hill remains eligible to be registered as a Town Green.

3. Walker Morris have suggested that the usage of Humpty Hill was not by the inhabitants of Faringdon (in the required sense) and that the usage was not by a significant number of these inhabitants. They have justified this, as they did during the enquiry, with a mathematical representation. That being that only 1.56% of the population gave evidence of some sort to the enquiry. Neither the legislation nor the any of the case law require a numerical demonstration of usage. It is only Walker Morris who have suggested this. In fact the case law makes clear (*McAlpine Homes*) that usage needs only to be by a significant number of people, not a considerable or substantial number. It was Dr Mynors himself, acting for Staffordshire in the *McAlpine Homes* case who submitted 'what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.' This was held by Sullivan J and has become case law. As such, the question of whether or not the usage was by "a significant number" of inhabitants falls to the Inspector's judgement. Surely Dr Mynors, more than anybody, is suitable to make this judgement. Based on the witnesses evidence of both their own usage, and the usage they saw by others, Dr Mynors has correctly concluded that the usage is both significant and by the inhabitants of Faringdon. It should also be noted that the enquiry was made aware of the existance of an online petition against Gladman's planning application on the site. The petition was signed by over 1000 people. Over 300 people also left online comments. These comment were submitted to the enquiry.

4. Walker Morris have suggested that Dr Mynors has made a mistake in his judgement of the usage of the paths around Humpty Hill. They quote the *Laing Homes* case. Dr Mynors specifically references this case and the *Oxfordshire (Trap Grounds)* and *Sunningwell* cases at paragraph 36 of his report. These are the authorities on the matter of path usage in relation to town and village greens. Dr Mynors then goes on to describe and discuss the paths of Humpty Hill, referring to them some 83 times throughout his report, before drawing his conclusion. Again it falls to the Inspector's judgement as to how the usage of paths can and does contribute to usage of a town or village green. Dr Mynors clearly gave the matter a great deal of consideration and correctly concluded that much of the usage did contribute to that of a village green. Walker Morris also suggest that Dr Mynors failed to assess the usage which took place off the paths. One can only assume they have not fully read his report. Dr Mynors clearly make this assessment in his description and discussion throughout his report and draws his conclusions.

5. Walker Morris have attached poor quality photographs to their representation email. They have suggested that better quality photographs are available in the Objectors bundle. This is not correct. In fact, the attached photographs and those in the Objectors bundle have been produced in a low resolution. A lower resolution than Google naturally prints out at! The resolution chosen by Walker Morris shows the informal path around Humpty Hill, but fails to show all the other man made paths across the site. In my opinion this was a deliberate action in an attempt to mislead the Inspector. If the council wish to view high-resolution images they can be found in the Applicant's bundle. Along with an additional photograph from 1996.

6. The last point Walker Morris raise is with regard to cattle. They criticise Dr Mynors judgement with regard to this matter. They incorrectly state that Dr Mynors concluded that there were cattle on the field during 1996/7. In fact Dr Mynors stated that he thought this most probable. This is not a conclusion, and there is no need for one, because, as Dr Mynors found, any cattle that may have been present probably did not interfere with the usage by the inhabitants.

This application was made some two and a half years ago. Throughout that period Walker Morris have used bluff, bluster and bullying to attempt to defeat it. They raised a ridiculous objection to the updating of a map of the site. Their formal objection was inaccurate and misleading. During the public enquiry there was smoke, mirrors, red herrings and blind allies. On two occasions evidence which should have been submitted 3 weeks prior to the enquiry was *"found in the bottom of a filing cabinet"* and their Barrister's summing up was what soap operas are made of.

Outside of this process the site has been subject to a planning application which failed and is allocated as Local Green Space in the Faringdon Neighbourhood Plan. Walker Morris and Gladman have been their usual selves during these processes, attempting to bully the Neighbourhood Plan Steering Committee, the Town Council and the Vale of the White Horse District Council.

And now they appear to have established a route of appeal to an Inspector's report by submitted a last minute veiled threat of legal action. And a poorly written submission at that. Just another act of bullying. Frankly if they want a QC's opinion.....why have they not commissioned one?

I welcome the County's suggestion that this matter be referred back to Dr Mynors for his opinion and I request that my submission be forwarded to Dr Mynors for his consideration as well.

Sincerely,

Rob Stewart

In the matter of the Local Government Act 1972 and the Commons Act 2006
And in the matter of land at Humpty Hill, Faringdon, Oxfordshire

Application NLREG 33 to register as a town or village green land at Humpty Hill, Faringdon: supplementary report to Oxfordshire County Council

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1. I was appointed by Oxfordshire County Council under section 111 of the Local Government Act 1972 to hold a public local inquiry into an application that has been made to it as registration authority under the Commons Act 2006 for the registration as a town or village green of land known as Humpty Hill, Faringdon, Oxfordshire ("the Application Land", or simply "the Land"), and to advise the Council as to how to determine it.

2. In my main report, I concluded as follows:

   (a) that the Application Land, as a whole, had been used for twenty years until at least April 2011 by the inhabitants of Faringdon Civil Parish for lawful sports and pastimes;

   (b) that such use had been "as of right" throughout the relevant period.

3. I therefore considered that the Application Land was eligible to be registered as a town or village green, and I recommended that the register under the 2006 Act be amended accordingly.

4. In this supplementary report I consider briefly various points that have been made in representations by the Objectors, and responses to those points from the Applicant.

A. Legal basis for the application

5. The statutory definition of a town or village green is in section 15 of the 2006 Act, which, so far as relevant, when first enacted provided as follows:

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where–
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.

(3) This subsection applies where–

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

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

(c) the application is made within *the period of two years beginning with the cessation referred to in paragraph (b).*

...

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied–

...

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right"."

6. Section 15 came into force on 6 April 2007. With effect from 1 October 2013, the Growth and Infrastructure Act 2014 amended section 15 of the 2006 Act, to substitute for the words in italics the words "the relevant period", but that amendment (and the insertion of subsection (3A)) did not apply where the cessation in question occurred before 1 October 2013.

7. Section 15(2) of the 2006 Act thus makes it clear that, for the Application Land to be eligible to be registered as a town or village green by virtue of that subsection, it must have been used throughout a period of 20 years:

- by a significant number of the inhabitants of a locality or of a neighbourhood within a locality, and
- for lawful sports and pastimes,
- as of right.

8. Normally, that 20-year period will continue up to the date of the submission of an application for registration.

9. However, in some cases qualifying use may have taken place for 20 years but subsequently be permitted – so that it becomes no longer "as of right". In that case, by virtue of subsection (7), land may still be registered at any time, provided that the relevant use is as a fact continuing at the date of the application, and is otherwise qualifying; the permission is simply disregarded.

10. Alternatively, land may have been used in a qualifying manner for twenty years, but then cease to be so used, for example because the landowner explicitly permits, forbids or physically prevents its use by local people. in that case, provided the cessation occurred before 1 October 2013, the land will still be eligible for registration – under subsection 15(3) of the 2006 Act as originally enacted – provided the application for registration is made within two years of the cessation.

11. In this case, the Application was made on 18 April 2013.

12. It is said that a sign was erected in mid-2011 at the southern end of the Application Land, at the entrance from Highworth Road, permitting the use of the Land. If the

effect of that sign was that all otherwise qualifying use of the Land after that date was no longer "as of right", qualifying use could not have continued up to the date of the application for registration.

13. However, because the reason why the use of the land would not have been "as of right" would have been merely that it would have been "permitted" from the date of the sign being erected, the Land would now still be eligible for registration – by virtue of section 15(7)(b) – provided that it could be shown that

    - it had been used in the appropriate manner for 20 years until the date on which the sign was erected, and
    - such use continued (disregarding the permission) from that date until the date of the application.

14. Alternatively, an application for registration could succeed – by virtue of section 15(3) – if made within two years after the date on which the use ceased to be as of right, because of the permissive sign.

15. I accept that the analysis in my main report differs from the analysis above, in that the former omitted any reference to section 15(7). However, the result is in practice identical; and the omission is of no significance in this particular case – save that it means that it is of less importance to determine the precise date on which the sign was erected.

B. The nature of the right being asserted

16. I concluded at paragraph 186 of my main report that those using the Application Land are likely to have come largely from the Civil Parish of [Great] Faringdon, and that it was unlikely that more than a handful will have come from outside Faringdon.

17. It is pointed out by the Objectors that the population of Faringdon is around 7,121, and that the total number of those producing written evidence in one form or another was only 111; and it is said that this is not use by a significant number of the inhabitants of Faringdon. On that basis, the conduct of those using the land was not such as to bring home to the landowners that a town or village green right was being asserted.

18. The first point to make in this connection is that the 111 people who provided written evidence will in many case have represented couples or families. In a few cases forms were completed by both husband and wife; but not in many others. And very few children completed them as well as their parents. Secondly, as in all such cases, no one suggested that those filling in the forms or questionnaires were all those use the land – there will have been others, who could not be bothered to fill in the form, or who were out when the applicant's representatives called. The number of those actually using the land at one time or another is thus likely to have been significantly in excess of 111 – by what factor is entirely a matter of conjecture.

19. Thirdly, as a matter of impression, this is a well-used piece of land. I have seen the land on several occasions; I have read the written evidence. And I have been involved, in one way or another, in around 40 cases where land has been claimed to be a town or village green. This is one of the more convincing I have come across – purely in

terms of factual evidence as to use by local people. And the landowners were hardly taken by surprise; they were well aware that the land was being used; it would have been remarkable if it had not been.

20. It is true that, as I observed in my main report, no doubt the predominant use of the Land will have been by those from the parts of Faringdon nearest to the Land, but that will always be true in the case of any open space at the edge of a built-up area. But the law has always recognised that there can be greens linked to towns as well as villages; and this seems to me to be a good example. And it cannot be the case that land has to be used equally by people from all parts of the town or village in question.

21. I also observe that arguments very similar to those now being deployed in this case were raised by the objectors in *R v Staffordshire County Council (ex parte McAlpine Homes)*; they failed.

C. The nature of the recreational use of the Land

22. I concluded in my main report that there had been abundant use of the Application Land throughout the relevant period for informal recreation, taking the form of

- walking (with or without a dog);
- children playing, and informal football;
- less strenuous activities, such as bird watching, nature study, and enjoying the view; and
- seasonal activities (notably blackberrying and other fruit gathering, and sledging and tobogganing).

23. I noted that the principal activity, walking, took place primarily on the paths, but not exclusively so. The Objectors urged at the inquiry, and still urge, that use of the paths should be excluded altogether.

24. I expressed my view that, firstly, this was a classic case of land being used for "dog walking and playing with children" which may be, in modern life, the main function of a village green, as notd in *Sunningwell*.

25. Secondly, however, I noted that the use of the paths on the Application Land, without or without dogs, may have been partly attributable to an actual or emerging right of way – actual, in the case of the public footpath up the east side of the Land, and possibly emerging in the case of the circular path around the other sides. However, that applied only in the case of those entering at one gate and leaving at the other, in the course of a longer walk (or jog) from A to B.

26. I thus considered that it was likely that many of those living broadly to the south of the Land would have entered it from the Highworth Road, taken a circular walk, down one side and back up the other, and back home again. Many of those living to the north would have similarly taken a circular walk entering and leaving by the Canada Lane entrance. This was borne out not only by observation of how people use open space generally, but also by the presence of the paths cutting the corners by the two entrances – which must have been created and used by some one.

27. I noted in my main report that, as a matter of law, "use for lawful sports and pastimes" does not include walking along a specific route either around the edge of a field or across the middle, as a means to get from one point on the perimeter to another – that might in certain circumstances be appropriate to establish a claim to a public right of way, but it could not form the basis of a claim to a town or village green. And I am well aware that Sullivan J in *Laing Homes* criticised the inspector in that case for not excluding use of the perimeter paths from his analysis of recreational use.

28. However, a moment's observation of the way on which people use any large area of open space – particularly for walking, with or without dogs – is that they generally make their way round the perimeter of the land, often a little way in from the extreme edge. Each user will live somewhere outside the land, and will go to the chosen entry point, walk "round" the land, possibly more than once, and then leave by the original entry point before returning home. Over time, such general recreational use for walking will lead to the creation of one or more worn paths.

29. Of course there may be some using a path along the edge of an open space, or possibly across the middle, simply as part of a route from one point outside the land to another. And that occurred in this case – and I have discounted such use. But that still left the bulk of walkers who were using the Land for what, to adopt the analysis of Lord Carnwath in *Barkas*, was the assertion of a village green right – although they would probably not have thought of it in that way.

30. I am therefore in no doubt that, although there were some people using the land to assert a public right of way, the great majority were using it for general recreation, albeit in the form of walking round one or other of the paths, whilst their dogs went all over the land. And of course others walked and indulged in other forms of recreation elsewhere on the Land.

D. The presence of the cattle on the Land

31. Finally, I concluded in my main report the Land had been used for cattle, almost certainly on two occasions, from May/June through to September/October. I concluded , on the balance of probabilities, that such use occurred in 1996 and 1997.

32. Assuming that conclusion to be factually accurate, one possible deduction was that the local people were unaware of the cattle because they had not been on the Land as often as they said they had been. Secondly, they could have all been minimising the extent to which the presence of the cattle had actually interfered with the recreational use. Or, thirdly, it could be that they kept out of the way of the cattle and the cattle kept of their way – a classic example of the "live and let live" principle enunciated in *Redcar*.

33. I considered in my main report that the most likely answer was that the presence of the cattle had in fact made no great impact on the recreational use of the Land in those two years. Ten or so cows would not take up a great deal of the Land; walkers and those using the Land for other purposes would have simply avoided them. And one witness had suggested that they tended to congregate at the edge of the field, to benefit from the shade and keep out of the wind.

34. I see no reason to revise that conclusion.

Overall conclusion and recommendation

35. I thus remain of the view that there was ample evidence showing on the balance of probability that the Application Land, as a whole, had been used for twenty years by the inhabitants of Great Faringdon Civil Parish for lawful sports and pastimes, up to the date of the erection of the sign in 2011; and that such use was "as of right".

36. I therefore still consider that the Application Land is eligible to be registered as a town or village green, under either section 15(2) or section 15(3), and I recommend that the register under the 2006 Act be amended accordingly.

CHARLES MYNORS

PhD, FRTPI, FRICS, IHBC, Barrister

30 October 2015

In the matter of the Local Government Act 1972 and the Commons Act 2006
And in the matter of land at Humpty Hill, Faringdon, Oxfordshire

Application NLREG 33 to register as a town or village green land at Humpty Hill, Faringdon: Supplementary report to Oxfordshire County Council

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30 October 2015

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