Application to register land known as Harcourt Hill Field as a town or village green

Commons Act 2006, s.15(3)

Oxfordshire County Council

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REPORT

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INTRODUCTION

1. This report concerns an irregularly shaped field adjacent to the Harcourt Hill Estate in Oxford, bounded by Grosvenor Road and Vernon Avenue to the north, by associated residential development (in part) and open land (in part) to the east and west, and by a nature park and trail to the south (**"the Land"**). The Land is best shown on the amended application plan [111].

2. On 13 March 2013 Oxfordshire County Council (**"the Council"**) accepted an application made by Martin Hockey (**"the Applicant"**) on behalf of the Harcourt Hill Residents' Association (**"the Residents' Association"**) to register the Land as a town or village green (**"TVG"**) under s.15(3) of the Commons Act 2006 (**"the 2006 Act"**). An objection was submitted by the then landowners, Mssrs AP and TJ Gresswell. The objection was sent to the Applicant and comments in response were received.

3. The application was initially due to be considered at a public inquiry in 2014. However, the inquiry was postponed in light of negotiations of the sale of the Land to the Oxford Preservation Trust (**"the OPT"**). The sale was completed and the OPT was registered as proprietor of the Land on 18 May 2016.

4. Following the change in land ownership, the Council sought confirmation from the Applicant and the OPT as to what their respective positions were on the application. The Council also erected notices on the land. The outcome of that process was as follows. The Applicant confirmed that the Residents' Association maintained the

application but did not wish to submit any further evidence, and was content for the application to be determined without a hearing or inquiry.[1] The OPT maintained its objection and indicated that it did not wish to submit further evidence or representations but stated that it would like the application to be determined at a hearing.[2]

5. Given the substantial nature of the issues raised by the application and the outstanding objection, the Council decided that the appropriate course of action was to hold a public inquiry to ensure that the Applicant, the OPT and any interested parties have an opportunity fully to present their cases and for those cases to be properly tested.[3]

6. Accordingly, I was appointed by the Council to provide a report recommending how the application should be determined following a public inquiry. The inquiry was arranged for up to three days, commencing on 26 November 2018 at the Kings Centre, Osney Mead, Oxford. I issued directions ahead of the inquiry setting out a timetable for the production of any further evidence and submissions, whether by the main parties or any other interested persons. Pursuant to those directions, the Council publicised the inquiry in a local newspaper and placed further notices on the Land.

7. No substantive written representations were received.[4] The only person to attend the inquiry on 26 November 2018 was Gilliane Sills, Chairman of the Residents' Association, who confirmed that she was not making any additional representations. I therefore held the inquiry open until around 11:30, at which point and in the absence of attendance, or notice of attendance, from anyone else I closed the inquiry. I then carried out a short

[1] Letter of 6 October 2017
[2] Letter of 13 October 2017
[3] This is in line with the approach set out in case law; in particular in R (Whitmey) v Commons Commissioners [2004] EWCA Civ 951; [2005] QB 282 Waller LJ (with whom Arden LJ agreed) said that *"in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain proper advice before registration"* (para.66); see also R (Cheltenham Builders Ltd) v South Gloucestershire DC [2003] EWHC 2803 (Admin) per Sullivan J at paras 36 and 38
[4] I received a letter from the Residents' Association reiterating the position that the Applicant has nothing to add to the case originally made and a letter from the OPT expressing disappointment that the application is maintained

unaccompanied[5] site visit both of the Land, the area around it (including the nature park and nature trail) and the neighbourhood.

8. The application therefore falls to be considered essentially on the papers. The Council prepared a core bundle of documents, which contains all the relevant materials. Where appropriate I refer to the bundle in this report, with page references indicated in square brackets.

SUMMARY OF RECOMMENDATION

9. I recommend that the Council refuses the application. In my view, inhabitants of a qualifying neighbourhood (Harcourt Hill) within a locality (North Hinksey Parish) have indulged in lawful sports and pastimes on the land over the relevant 20 year period (15 September 1990 to 15 September 2010). However, I am unable to conclude that such use was by a sufficiently significant number of people and over a sufficiently wide area to bring home to a reasonable landowner that village green rights, as opposed to public rights of way, were being asserted over the Land. The majority of the use relied upon is of walking, with or without dogs, and appears to have been over defined tracks predominantly used to access the adjacent nature trail. I am not satisfied that the other types of use relied upon were more than trivial or sporadic. Further, the previous landowners communicated to local residents that the Land was part of a nature park to which public access was by licence, so precarious and not *"as of right"*. The landowners have not been entirely consistent in how they have presented such a licence in various iterations of a planning obligation, management plan and community leaflets. However, the landowners in my view intended to communicate permission to access the Land and, in my view, a reasonable local inhabitant would have understood the message. Indeed, the Applicant all but concedes this point in the way that he puts his case.

FACTUAL BACKGROUND

10. The wider site, of which the Land forms part, has a somewhat chequered history. In 1982 the former landowners proposed a new golf course, including the Land. That

[5] With the Council's Senior Rights of Way Officer

proposal was rejected. The landowners therefore amended their proposals, and on 3 February 1994 planning permission was granted by the Vale of White Horse District Council (**"the District Council"**) for the change of use of land at Hinksey Hill Farm from agriculture to a golf course and a nature park (**"the 1994 Planning Permission"**)[6]. Condition 12 of the 1994 Planning Permission stated that:

> *"Prior to the commencement of the development hereby approved, a Management Plan for the proposed nature park shall be submitted to, and approved in writing by, the District Planning Authority"*.[7]

11. Condition 8 separately required the submission of a scheme for the adoption of a new public right of way – or nature trail – linking Chiswell Valley to the Harcourt Hill area.[8] The first management plan was produced in 1994 by Kemp & Kemp[9] and sets out the vision *"to create a nature park which will encourage access to the countryside and be an asset to the area"*.[10]

12. This led to a series of formulations of a management plan, tied to associated planning obligations (s.106 agreements). While the position is not entirely clear, it appears that initially the landowners sought to exclude the Land from the nature park, and at no point have they proposed that the nature trail cross the land[11]. Following some communication with the District Council, a further management plan was drawn up by Cobham Resource Consultants; this was discussed at a meeting on 26 October 1995 where it apparently impressed local planning officers.[12] However, it was not approved until 2002, most likely due to the need to update the obligations in the s.106 agreement. The final s.106 agreement is dated 4 March 2002 and appends the Cobham Resource Consultants plan.[13]

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[6] Reference SHI/8759/4
[7] [73]
[8] [79]
[9] [71-83]
[10] Para.2.2 [75]
[11] As I understand the position, the nature trail runs adjacent to the land between point A and B as shown on Plan E to the 2002 s.106 agreement [751]; see also para.14.1 of the Second Schedule [673]
[12] See the minute at [563]
[13] [685-731]

13. The 1995 management plan itself refers to *"[t]he fields to the east of Hinksey Hill Farm"* as *"currently set aside"*.[14] However, the maps associated with the management plan only show part of the Land covered by the nature park, the part furthest from Grosvenor Road.[15] At the meeting on 26 October 1995, it is recorded that *"the fields adjacent to Grosvenor Road had been omitted by mistake and Mr Gresswell had agreed to reinstate them in an amended application …"*.[16] The 2002 s.106 agreement appears to make good that omission. The second schedule to the agreement provides that *"[t]he Applicants shall provide on the Green Land a Nature Park …"* where *"the Green Land"*, as shown on Plan E, includes all of the Land in question here.[17]

14. However, it seems that limited, if any, management has actually taken place on the Land, whereas substantial works were carried out on the rest of the nature park to the south and east (creating ponds and wetland etc.). Similarly, a nature trail was established, but runs adjacent to rather than on the Land. None of the prescriptions in Tables II and III of the approved management plan are obviously referable to the Land.

15. The Land appears to have been largely left open and unfenced for the entire period and until September 2010 when the landowners erected a post and rail fence around it with locked gates. Until 2003 an annual hay crop was taken, but even that does not appear to have been actively managed. One incident that is commented on by almost all of the local residents who provided user evidence forms (**"UEFs"**) is that after the last hay crop in 2003, the hay bales were left to rot until they were finally removed at the expense of local residents in 2006.

16. The Applicant has provided 44 UEFs from residents of Harcourt Hill.[18] While some of these are from the same households, they represent a substantial number of the total 54 inhabited homes (of 56 in total). I have no information about how the UEFs were designed, completed and collected, but I note a high degree of congruity between them.

[14] Para.3.10 [703]
[15] See e.g. [699]
[16] [563]
[17] Plan E is at [751]
[18] [113-489]

For instance, as noted above, they almost all refer to the removal of hay bales in 2006 as a *"community activity"*. Also, as I explain below, the way that the questions are formulated is sometimes unhelpful for determining the issue addressed. That said, I give some weight to the UEFs, which show that the Land has been used by local people for many years, mostly for recreational walking, but also for other more occasional activities, such as kite flying, tobogganing or children's games.[19]

17. As noted above, in 2016 the Land was sold the OPT, which has taken over management of the nature park. The OPT is a charity and has committed to keeping the land open for public use, at least insofar as that is not incompatible with nature conservation. That may explain the lack of public interest in the application as, at least in the short term, there is little to be gained by it.

CRITERIA FOR REGISTRATION

18. By s.15(1) of the 2006 Act any person may apply to the commons registration authority (**"CRA"**) to register land as a TVG where ss.(2), (3) or (4) apply. This application is made under s.15(3) which, at the material time[20], set out the following criteria for registration:

> *"(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;*
>
> *(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)."*

19. The burden of showing that the criteria are met falls on an applicant, and it has been held that they must be *"properly and strictly proved"*[21].

[19] A helpful summary is at [99]
[20] The 'grace period' of two years has since been reduced in England to one year
[21] R v Suffolk CC ex p Steed (1996) 75 P & CR 102 at 111 cited in R v Sunderland CC ex p Beresford [2003] UKHL 60 at para.2

20. There is no serious dispute about the interpretation of the criteria in the representations I have seen; however a little further explanation is appropriate.

21. A *"significant number"* of inhabitants is an *"imprecise"* term, which is *"very much a matter of impression"*: the question is whether the use of land is *"sufficient to indicate … that … it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"*.[22]

22. A *"locality"* is an administrative area recognised by law, such as a civil or ecclesiastical parish. On the other hand, a *"neighbourhood"* is a deliberately looser term, which may comprise a housing estate, but must have some meaningful independent existence (it cannot be any line on a map): ultimately a CRA must *"be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness …"*[23].

23. *"Lawful sports and pastimes"* (hereafter **"LSP"**) is a *"single composite class"*, including dog walking, playing with children and any other informal recreation that may be associated with a TVG.[24] It is not likely to include annual bonfires, which *"would … be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds)"*[25].

24. However, the use must be referable to use of a TVG, rather than some lesser assertion of rights, such as a public right of way (**"PROW"**). TVG rights and PROWs are not *"necessarily mutually exclusive"*,[26] however:

> *"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)."*[27]

[22] R (Alfred McAlpine Homes Limited) v Staffordshire CC [2002] EWHC 76 (Admin) per Sullivan J at para.71
[23] Cheltenham Builders Ltd at para.85
[24] R v Oxfordshire County Council ex p Sunningwell Parish Council [2000] 1 AC 335 per Lord Hoffmann at 357
[25] R (Lewis) v Redcar and Cleveland BC (No 2); [2010] UKSC 11; [2010] 2 AC 70 per Lord Walker at para.47
[26] R (Laing Homes Ltd) v Buckinghamshire CC [2003] EWHC 1578; [2004] 1 P & CR 36 per Sullivan J at para.108
[27] Oxfordshire CC v Oxford CC [2004] EWHC 12 (Ch); [2004] Ch 253 per Lightman J at para.102

25. The critical question remains how the matter would have appeared to a reasonable landowner.[28] Where the principal, or a principal, use of land over the 20 year period has been for walking or dog walking across land on defined paths, this is an issue that must be grappled with.

26. Further use must be *"as of right"*. Substantial judicial attention has been given to this criterion. In simple terms, it means that the use must not have been by force (or contentious), nor by stealth (or secret), nor by licence (or permissive).[29] Permission can be implied from conduct.[30]

27. Activities of a landowner that are compatible with LSP, such as taking a single hay crop from a meadow, do not prevent use from being *"as of right"*, even if local inhabitants may sometimes defer to such activities.[31] The question in each case is whether the quality of local inhabitants' use of land, taken as a whole, is such as to put a reasonable landowner on notice that rights were being asserted over their land.[32]

28. I make two additional comments in light of the parties' written cases.

29. First, the Applicant relies upon certain passages of Lord Scott in R (Beresford) v Sunderland CC [2004] 1 AC 889. However, a substantial amount of that reasoning was disapproved in the subsequent case of R (Barkas) v North Yorkshire CC [2014] UKSC 31; [2015] AC 195. In fairness to the Applicant, the Supreme Court's decision also post-dates his representations. The conclusion in Barkas was that land held pursuant to a provision giving a statutory right for public use[33] could not be registered as a TVG as the use would be *"by right"* rather than *"as of right"*. Further, the Supreme Court confirmed that it is enough to defeat registration *"if the landowner has in some way actually communicated agreement to what would otherwise be a trespass"*.[34]

[28] Ibid. para.103
[29] *nec vi, nec clam, nec precario*
[30] Beresford per Lord Bingham at para.5
[31] Lewis v Redcar per Lord Walker at para.28
[32] Ibid. at paras.36, 69, 107, 112
[33] In that case s.12(1) of the Housing Act 1985
[34] Para.29

30. Secondly, the Applicant refers to the Green Belt status of the Land and policies and previous decisions that would protect it from development.[35] Substantial development of the Land may be unlikely given those protections – as well as the fact that the land is now owned by the OPT. However such considerations are of no relevance to the Council's determination of the application.

DISCUSSION

31. Rather than set out the parties' respective cases separately, I intend to work through the criteria explaining my conclusions on whether each is satisfied to the requisite standard of proof.

20 year period

32. There is no dispute that on 15 September 2010, the then landowners erected a post and rail fence around the Land and that while gates were provided at access points these were kept locked. The Land was then used (albeit for a relatively limited period) as a paddock for horses. Evidence submitted on behalf of the landowners[36] states that the fencing made no difference to public access as people continued to walk around the edge of the field. I find that hard to follow. It seems clear from local residents' answers to question 28 of the UEFs that they experienced the locked gates as an obstruction to their use after September 2010. Further, as I saw on my site visit, the fencing completely surrounds the Land and leaves no real scope for access outside its perimeter.

33. Use of the Land by climbing over a locked gate would be by force (or contentious) and so not *"as of right"*. I am therefore satisfied, at least in this respect, that qualifying use ceased on 15 September 2010 so the relevant 20 year period is 15 September 1990 to 15 September 2010.

[35] Extracts are included in the bundle at [45-51] and [53-57]
[36] Paul Reast [765] and Naomi Crawford [767-769]

34. I do not accept the objection that the application is time barred[37]. However, that does not mean that the nature and quality of use in that 20 year period necessarily meets the criteria for registration. Nor, in my view, is the cropping regime of the Land up until the 1980s (intensive or otherwise) of any real relevance, given that the 20 year period did not commence until 1990. It is common ground that from at least the late 1980s the predominant agricultural use of the land was the taking of an annual hay crop: the land was effectively left fallow.[38] Such use would not be incompatible with the exercise of TVG rights.

35. It is appropriate here to address the argument that the 20 year period was interrupted for a period of some 4-5 months (from March to July) in 2003 when an electric fence was erected and the Land was used for sheep grazing. It seems to be common ground that there was some such fencing in 2003, however there is a dispute as to its extent and effect. Andrew Colinswood's evidence is that he *"fenced the whole field off with electric fencing"*.[39] The Applicant counters that the fence can only have covered a small part of the field and he has produced a survey of users to demonstrate that it did not affect use.[40] Pamela Hutchence recalls sheep in 2003, and comments that *"there must have been some temporary fencing arrangement"* but that it did not affect her access: she continued to *"walk through the field"* as before.[41] It is difficult to resolve factual disputes such as this without hearing evidence. However, it seems to me more likely on the balance of probabilities that only a small area was fenced off for sheep in 2003 and that did not prevent access across the Land in the way that local inhabitants were accustomed to. It would have prevented use of *part* of the Land, but not to such an extent or for such a length of time as to interrupt public use. For similar reasons, nor do I think that the limited fencing off of a small area of the Land would in the circumstances

[37] Objection statement, para.4 [495]
[38] See e.g. statement of Anthony Gresswell [519]; statement of Andrew Colinswood [525]; Justin Hutchence's UEF [217]
[39] Statement, para.5 [525]
[40] Comments on objection [835]
[41] Statement [811]

have itself given rise to an implied licence or permission to use the land.[42] I discuss more generally whether the use relied upon was *"as of right"* below.

Use for lawful sports and pastimes

36. The application relies upon a range of activities said to have been indulged in by local inhabitants over the relevant 20 year period.[43] These include walking, dog-walking, children's games, flying model aircraft, horse riding, bird watching and admiring the view. I accept that all of the activities listed are capable of qualifying as LSP bar the fireworks parties and/or bonfires which I think would both have been too sporadic to count in themselves and would have been of doubtful legality.[44]

37. A more substantial issue is whether walking or dog-walking across the Land counts as use of the Land as LSP for TVG registration or whether it is at least equally attributable to a putative PROW. As set out above, if use is ambivalent, it should be assumed that it counts in favour of the lesser right, a footpath, so would not be LSP.

38. There are no recognised PROWs over the Land at present. However, by far the most substantial category of use relied upon is walking, with or without dogs. Question 12 of the UEFs asks *"[t]o your knowledge are there any public paths crossing the land?"*. The question is not particularly helpful, in that it does not ask about the way in which people walked across the land, which may suffice to establish a PROW, even if there are not already recognised public paths. Nevertheless, a number of users responded that there *are* public paths across the Land.[45] It seems fairly clear that there were several identifiable routes across the Land: Mark Lawrence in his UEF refers to these as *"clearly trampled and regularly used"*.

[42] The situation is not analogous to R (Mann) v Somerset CC (CO/3885/2011) [579-622] relied upon in the objection statement (para.36 [511])
[43] Listed at para.5.3 of the application statement [41-43]
[44] See Lewis v Redcar per Lord Walker at para.47; the evidence of fireworks parties is that they were only occasional and took place largely in the 1980s, so before the relevant 20 year period [218]
[45] See Ian Battersbry [122], Michael and Moira Geekie [170], Justin Hutchence [218], Stanley and Pamela Hutchence [226], Roger Hutchence [234], Leila Lawrence [272], Mark Lawrence [280] and Neil Warriner [456]

39. The majority of other users, while they do not acknowledge existing public paths, note that there are paths across the land.[46] Without having heard evidence, it is impossible to be exact as to where these worn paths would have been, but it is likely that they would have linked certain access points to the start of nature trail (an attractive destination for recreational walkers). In this regard, I note that Mr and Mrs Hayward state that they used the Land to access the local nature reserve[47] and Fionnuala Maynard refers to using the Land as *"access to the woods"*.[48]

40. The minute of a meeting of 7 September 2010 organised to discuss the proposed fencing is revealing. At that meeting, concern was expressed that the fencing would prevent walking and it is recorded that:

> *"Sandra Dwek pointed out the clearly defined track which had been created by people crossing the field to the Nature Trail, but which would become unavailable once the fencing was complete."*[49]

41. The previous landowner's evidence is consistent with this. Geoffrey Allison recalls dog walkers occasionally walking on established paths – *"all headed towards the openings into the nature trail"*.[50]

42. It is also relevant that the grass was only occasionally cut, which would tend to promote the use of certain desire lines for most of the year.

43. Overall, it seems to me that the great majority of local inhabitants' use of the Land was linear use of paths, generally in the direction of the Nature Trail. Such use is consistent

[46] See Roger Cowley [138], Sheila Cowley [146], Sandra Dwek [154], Mr and Mrs Hayward [188], Mr and Mrs Hinkins [194], Martin Hockey [202], Susan Hockey [210], Richard Jeffrey [258], Dr HG Liddy [289], Pandora Liddy [300], David and Joanne Lockwood [308], Philip and Celia Massey [328], Julia May [337], Richard May [348], Fionnuala Maynard [355], Nicholas Maynard [364], David Miller [372] Patrice Miller [380]; Ruth Muschel [389]; Jane Pretorius [400]; Paul Richards [408]; Jennifer Sapsford [424], Gilliane Sills [432], Richard Sills [440], Mr and Mrs Strickson [448], David Wyatt [472] and Diane Wyatt [481]
[47] UEF [186]
[48] UEF [356]
[49] [829]
[50] Statement, para.6 [529])

with a putative PROW and therefore should be discounted for the purposes of this application. In any event, without a clearer explanation of the exact routes that walkers took across the Land, which the UEFs do not provide, I am unable to recommend that the walking or dog walking relied upon could count towards TVG registration.

44. Some of the other LSP relied upon, such as blackberry picking, may or may not have been incidental to such walking, so too should be discounted. Again, I have no information about the location of such activities that could lead me to conclude otherwise. That leaves activities such as children's play and kite flying (etc.) which I consider below.

Use by a significant number

45. That next question is whether the remaining LSP was sufficient to indicate that the Land was in general use by the local community.

46. Here, again, the UEFs are not very helpful. Question 15 asks *"[h]ow often do/did you use the land (apart from public paths)?"*. It therefore attempts to distinguish between TVG and PROW use. However, as noted above, most users acknowledged the existence of paths, but not public paths. Therefore while the UEFs attest to regular use, it is impossible to ascertain the frequency with which games with children, picnics, model aircraft flying and nature study (etc.) took place. It seems to me that there is a reasonable argument that non-walking activities were only occasional. I say this for three reasons. First, as the grass was only cut annually, the Land would not always have been available for such LSP. Secondly, the Applicant accepts that electric fencing was erected for some 4-5 months in 2003 on at least part of the Land, yet it did not interfere with anyone's use. Thirdly, following the last annual hay crop in 2003, bales were left on the Land for three years before any action was taken to remove them (and by which time they were rotting and attracting rats). I also note that some activities, such as tobogganing, would by their nature have been only occasional. However, I am in no position to determine the matter without more detailed evidence than is provided in the UEFs. Without such evidence, I am unable to conclude that a significant number of local

inhabitants used the Land for qualifying LSP between 1990 and 2010 so as to put a reasonable landowner on notice that TVG rights were being asserted.

47. There are two statements in objection from individuals who claim not to have seen people carrying out any (or any wider) LSP on the land.[51] I have not been able to test those recollections, but they add some weight to the objection on this point. That said, it is easy for individuals who would have had no particular interest (or reason to be interested) in public use of land to conflate not recalling such use with recalling that there was no such use.

Neighbourhood within a locality

48. The Applicant relies upon the neighbourhood of Harcourt Hill within the locality of North Hinksey Parish. The claimed neighbourhood is at the southern end of the Parish, which is clearly a qualifying locality. While the evidence about the neighbourhood is fairly limited[52], Harcourt Hill seems to me to be sufficiently cohesive and well-defined to qualify for the purposes of s.15(3) of the 2006 Act. The plan at [23] shows Harcourt Hill as an area comprising four roads: Harcourt Hill, Vernon Road, Stanton Road and Grosvenor Avenue. The statement at [25] sets out that these houses were mostly built as a single estate in the 1950s and 1960s. The neighbourhood seems to me to have a certain architectural and stylistic coherence. It is also served by a long-standing Residents' Association and a Neighbourhood Watch scheme.

Use "as of right"

49. If the Applicant could demonstrate sufficient use to put a landowner on notice of TVG rights, the question would arise as to whether the use was nonetheless vitiated on account of being by force (or contentious), by stealth (or secret) or by licence (or permissive) – or not *"as of right"*. The initial burden of demonstrating this falls on the objector.

[51] Andrew Colinswood, paras.4 and 9 [525] and Geoffrey Allison, para.5 [529]
[52] Question 9 of the UEFs is of very limited use: it is highly suggestive, asking *"[d]o you consider yourself to be a local inhabitant in respect of the land?"* and listing certain *"recognisable facilities"* for respondents to tick, including residents' association and neighbourhood watch

50. Here, the objection statement contends that public use was permissive or *"by right"* on the basis that it formed part of a Nature Park provided by the landowners. The evidence for this contention is the 1994 Planning Permission and the associated s.106 agreements and management plans, as well as certain publicity and correspondence.

51. I disagree that this would make any use *"by right"* rather than *"as of right"*: I think the position quite different from that contemplated in Barkas[53] which related to land held under statutory powers. Instead the question is whether the landowners granted an implied licence to local inhabitants to use the Land by the position that they adopted in relation to the 1994 Planning Permission, including through the course of negotiations with the District Council and their wider communications.

52. I agree with the Applicant that there was some confusion as to exactly what role the Land played in the nature park. The 1994 management plan provided that areas not required for grazing would be *"made available to the public for walking / picnicking / enjoying the countryside"*[54]. However, as I understand it, that plan did not clearly include the Land. The 1995 management plan included at least some of the Land, but it was only in 2002 that all of the Land was unequivocally included in the nature park. Further while the management plan associated with the 2002 agreement contained the overall objective to *"facilitate public access"*[55] there were no particular prescriptions relating to the Land. However, it seems clear that the District Council and local inhabitants wanted the Land to be included in the nature park and pressed for it. As the Applicant notes at para.23 of his comments on the objection, *"… our concern was that the landowners did not wish the Field to be included in the Nature Park"*.[56] The exclusion of at least part of the Land was noted at the planning meeting of 26 October 1995 and the Cobham Resource Consultants plan was apparently amended to include all of it at the insistence of the District Council.[57]

[53] Cf. objection statement, paras.38-41 [511-513]
[54] Para.3.3 [77]
[55] Para.1.5 [85]
[56] [789]
[57] See e.g. David Wyatt's statement at para.8 [848]

53. It appears that locals were aware of this at the time. The application statement is clear that:

> *"The field is part of the Hinksey Heights Nature Park, created in about 1994 by the landowners as required by planning consent granted for the creation of the Hinksey Heights Golf Course."*[58]

54. The comments in response to the objection reiterate that *"[t]here is no dispute that local residents and the Residents Association were aware that the Field was included in the Nature Park"*.[59] That understanding appears to have had a direct bearing on public use: para.5.3.2 of the application statement notes that *"[s]ince the field was included in the Nature Park opened in 1994 use of the field for walking has increased"*.[60]

55. The UEFs are again not very helpful on this point. The consistent answer to Question 28 is that local inhabitants did not seek permission to use the Land. However, that is not inconsistent with them believing that permission had already been granted by the landowners. Philip and Celia Massey's response was as follows:

> *"I believe the field to have "Nature Park" status and so open to the public"*.[61]

56. It seems to me that the precarious nature of local inhabitants' use of the Land, linked to the nature park provided in connection with the 1994 Permission, was communicated as a matter of fact. It is possible that some users were not aware of the position. The landowners may be criticised for not having been consistent or clear about their intentions for the Land. However, overall, it seems to me that the essential message was clear: that a nature park would be established and that the public would be allowed to access those parts not required for nature conservation, including the Land.

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[58] Para.1.4 [35]
[59] [775]
[60] [41]
[61] UEF [329]

57. This is therefore an additional factor that counts against registration. Even were there a sufficient use of the Land for LSP, such use, at least after 2002 (and probably earlier), was permissive.

58. It appears that the landowners publicised the nature park in various leaflets. Anthony Gresswell and John Brimble state that they hand delivered leaflets to residents of Harcourt Hill.[62] There was also a local meeting to explain the golf course and nature park proposals on 5 November 1995. One of leaflets[63], entitled *"THE NATURE PARK"* contains the following text:

> *"Most of the land area not required for golfing is now open for public use and enjoyment as a Nature Park. This includes areas of woodland, water, permanent meadows and former "Set-Aside" fields.*
>
> *The Nature Park will continue to be used for "extensive" agricultural operations such as low-density livestock husbandry, whilst being managed with conservation in mind and with a view to admitting the public to all parts of the nature Park, except where agricultural or management requirements dictate otherwise"* [549].[64]

59. I accept that the *"former "Set-Aside" fields"* was intended to include the Land.

60. The Applicant states that residents have no record of the leaflets relied upon by the objectors, and instead exhibits other leaflets that do not refer directly to the Land (one of the leaflets put in by the Applicant shows the nature park as a separate area). It is impossible for me fully to resolve this issue without testing the evidence. However, even were the leaflets not delivered as assiduously as is suggested, I have no doubt publicity setting out the public permission to use the Land was produced and would have been seen by some local residents. The material produced may not have been

[62] Anthony Gresswell statement, para.10 [521]; John Brimble statement, para.5 [533]
[63] Presumably from 1996 or 1997 as it refers to the golfing year starting in April 1997
[64] The same text appears in a subsequent leaflet dated February 1998 [551]

always consistent. However, it reinforces my conclusion that public use of the land in the relevant period was by licence and therefore not *"as of right"*.

61. For the avoidance of doubt, I should add that I do not think that the additional correspondence relied upon by the objectors[65] adds anything material.

62. A final point to mention is the commitment at para.10.2 of the Second Schedule to the 2002 s.106 agreement that the applicants erect a post and wire fence between certain locations if so requested by the District Council, specifically in order to *discourage* public access. Such fencing if erected would have been on a similar alignment to the fencing that was erected in 2010.[66] The Applicant argues that local residents were not aware of the provision, which was not in any event carried out, and that they would have objected had it been. In my view, the provision underscores that from the landowners' and the District Council's perspective, public access to the Land in 2002 was precarious. I accept that it may not have been communicated more widely. Even if it was not communicated more widely, it does not affect my above conclusion that use of the Land since at least 2002 (and probably before) was precarious.

CONCLUSION

63. For all the above reasons, I recommend that the application be rejected on the basis that the Applicant has failed to satisfy the criteria in s.15(3) of the 2006 Act. In particular, the Applicant has not demonstrated that a significant number of inhabitants used the land for LSP in the relevant period or that such use that was indulged in was *"as of right"* as opposed to by licence.

NED WESTAWAY

4 FEBRUARY 2019

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[65] At [559], [565], [567-71] and [623-629]
[66] That is between points A-B and C-D on Plan G [97]