IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS "SHEPHERD'S MEAD, NORTON ST PHILIP" AS A VILLAGE GREEN (CLR/VG/17)

LEGAL SUBMISSIONS BY THE APPLICANT ON THE ISSUE OF THE FOOT AND MOUTH OUTBREAK

---

1. These submissions are made in response to the three sets of regulations recently discovered by Mr. Andrew Saint in the Registration Authority's archives and relating to possible footpath closures in Somerset during the foot and mouth crisis in 2001 ("the F&M crisis). Put simply, the content of these regulations strengthens the Applicant's case for TVG registration and undermine the Objector's assertion that the Application Land was not lawfully used during the duration of the F&M crisis and thus amounts to an interruption in use sufficient to prevent the acquisition of TVG rights under section 15(2).

2. It is important to emphasise that it was the Objector who asserted, somewhat late in the day, and without any necessary evidential support, that the lawful use may not have been continuous throughout the whole 20-year period, due to the intervention of the F&M crisis. This was not a point made either in the original letter of objection of 31 January 2014, or in the subsequent letter of 26 June 2014, even though the underlying points were unquestionably available, and must have been known, to the Objector at that time. As a matter of procedural fairness the Objector should provide a detailed explanation as to why this had been raised in such a dilatory manner, especially bearing in mind the outright refusal of the Objector to disclose the questionnaires and emails which were sent to various of

the Objector's potential witnesses before their respective statutory declarations were prepared.

3. Viewed overall, the Objector's assertions with regard to the F&M crisis lack both clarity and substance and appear to raise three propositions. First that, as a matter of fact, local inhabitants did not use the Application Land during the F&M crisis in the period of March to July 2001. Secondly, and in the alternative, that if the Application Land was used during that period it could not have been used by a significant number of local inhabitants. Thirdly, and to an extent independent of these two alternatives, the Application Land could not have been used, lawfully, during the F&M crisis closure period because the footpaths leading to and across the Application land had been closed and that any use of the footpaths would have been unlawful. The recently discovered three sets of regulations are therefore most relevant to this third proposition and, consequently, these Legal Submissions only briefly address the substance of the Objector's assertions contained in paragraphs 116-156 of the Objector's Closing Submissions that these three sets of regulations touch and concentrate in more detail on the assertions set out in paragraphs 156-171 regarding the lawfulness of use during the F&M crisis.

4. In paragraph 116 of the Objector's Closing Submissions the point is made that the Applicant does not rely on section 15(6) of the Commons Act 2006 but that assertion must be seen in the context of the extreme lateness of the Objector's submissions raising the issue of the F&M crisis. Furthermore, the Objector's particularization of the F&M crisis point lacks coherence but it appears that the Objector disputes, as a matter of fact, the Applicant's evidence that, notwithstanding the F&M crisis, a significant number of local inhabitants continued to use the Application Land throughout the period of that crisis. No evidence has been produced by the Objector to substantiate this point whereas, in contrast, the Applicant's case, supported by its witnesses, has been consistent and clear throughout - as a matter of fact, the Application Land continued to be used by a significant number of local inhabitants throughout the F&M crisis. The Objector also appears to assert that, if the Application Land was used during the F&M crisis, this use was somehow unlawful and amounted to an interruption of lawful use.

5. The first occasion that this F&M crisis point was alluded to by the Objector in any substance was in the Statutory Declaration of Laila Jhaveri sworn on 13 January 2017 i.e. almost three years after the original letter of objection. Moreover, Laila Jhaveri gave evidence that there was no statutory closure of the Application Land and "Unlike some areas during the foot and mouth outbreak, at no time was access to the application land prohibited to members of the public by reason of any enactment" – see paragraph 5.1. However the most that she could say was that "it appears that the footpaths in Norton St Philip (including the paths on the application land) were closed on 1 March 2001 and they remained closed until 14 July 2001." – see paragraph 4.1. In paragraph 6.5 she states (without any supporting evidence and contrary to the oral evidence of the Applicant's witnesses): "Signs would have been erected in Norton St Philip and there was a lot of publicity at that time asking people not to go not land where there was livestock". Moreover, there was no evidence from any witness (and especially Bina Ford the landowner) that there were any such signs in the vicinity of, or on, the Application Land – indeed a number of witnesses were firm in their evidence that there were no such signs. It follows that the Objector's assertion as presented to the inquiry in, for example, paragraph 121 of the Closing Submissions (where it is stated that "Posters would have been erected by NSP Parish Council" by the Objector) is nothing more than mere speculation, wholly unsupported by any evidence and thus must be disregarded. These points are of relevance to paragraphs 156-171 of the Objector's Closing Submissions.

6. Similarly, the comment in paragraph 122, that "Local people would at the time have known about the clear advice given about not walking in fields that may contain livestock and about the closure of footpaths in Somerset" is also nothing more than mere speculative assertion devoid of any supporting evidence. Thus the Objector's assertion in paragraphs 120-150 that the Application Land may not have been used during the period of March to July 2001 is pure conjecture, as is the assertion in paragraphs 151- 155 that, in the alternative, if the Application Land had been used during that period then it would not have been by a significant number

of the local inhabitants. Neither of these two alternative scenarios was supported by any evidence and relies entirely on speculation and insinuation.

7. It is also important to repeat that the Objector has had over three years to discover and produce any supporting evidence and has lamentably failed to produce a shred of credible evidence. It is reasonable, therefore, to conclude that no evidence was produced for the simple reason that no such evidence exists and that the footpaths were not, as a matter of fact and law, closed.

8. In the final analysis, whether the Application Land was used throughout the duration of the F&M crisis and, if so, whether it was by a significant number of local inhabitants is a matter of factual judgment for the inspector to make. The other aspect of the Objector's assertion, contained within paragraphs 156-171, presupposes that, as a matter of fact, the Application Land was so used but asserts that this use was somehow "unlawful" and must be discounted and that there is a resulting break in the continuity of use that is more than *de minimis*. It is noted, however, that no supporting legal authority for this assertion has been provided by the Objector. It is for the Objector to make good its point in this regard.

9. It is the Applicant's submission that, put simply, there is no merit whatsoever in the Objector's unsubstantiated assertions. This can be demonstrated by addressing the following relevant questions:

(a) Is there any evidence that the footpaths on the Application Land were ever lawfully closed during the F&M crisis;

(b) If so, what effect did that have given that it is beyond dispute that access to the Application Land could be effected from Tellisford Lane without going on the footpath;

(c) If the Application Land was not subject to statutory closure (as appears to be accepted by the Objector) how did any use of those parts of the land over which the footpaths are said to run but were being used for

TVG purposes (as opposed to rights of way purposes) relate to any footpath closure; and

(d) For how long did the closure of the specific footpaths last.

10. The absence of any supporting evidence produced by the Objector to make good the point is more surprising given that the Objector suggested to several of the Applicant's witnesses that they committed a criminal offence by using the Application Land during the F&M crisis. Whilst that was a serious allegation and was wholly unsupported by any evidence, it is manifestly wrong for the reasons set out below.

(a) Is there any evidence that the footpaths on the Application Land were ever closed during the F&M crisis?

11. It is for the Objector to prove, on the balance of probability, that the use of the Application Land (or access to it) was prevented by law, to identify the relevant legal instrument and to specify over what period such use would have been unlawful. The Objector has manifestly failed to do so in each and every regard.

12. The Objector has accepted that the Application Land was never subject to any statutory closure and therefore its use for TVG purposes throughout that period would not have been unlawful. The Applicant's witnesses were clear and consistent in this regard: use of the land for TVG purposes continued throughout the duration of the F&M crisis.

13. It follows that the only remaining issue was whether access to the Application land was unlawful during an identifiable period in the F&M crisis. It is for the Objector to establish this. It produced no evidence in support and the recently discovered sets of regulations, taken with Ms Jhaveri's evidence, fatally undermine the Objector's position. Furthermore, the Applicant (not the Objector) inspected the Registration Authority's files and uncovered a Declaration, apparently made by it under Article 35B of the Foot and Mouth Disease Order 1983

(as amended) but not due to take effect until 2 March 2001. Whether it ever took any legal effect and, if so, to what extent is so unclear to be of no evidential value. In addition the Declaration contained a number of inherent drafting uncertainties as to its application, such as the lack of any definition as to what was meant by "urban areas", what was meant by "the movement of any person out of an area identified in that declaration", what was meant by "published in such manner as it sees fit" and what steps (if any) were actually taken to publish it (bearing in mind that the legislation clearly required some form of publicity and, therefore, if there was no such publicity whatsoever the Declaration would not have been effective). It is also important to bear in mind that the Objector accepted that Norton St Philip was not in an infected area at any time during the F&M crisis.

14. Furthermore, according to the exhibit LJ8 (Objector's Bundle page 175 at paragraph 6.3) the underlying power for the Declaration was revoked in 2 March 2001, the same date that it was due to take effect and subsequently replaced by some unidentified (by her) regulations on 13 March 2001. It is possible that these may be the regulations discovered by Mr. Saint. If so then, for the reasons set out below, it fatally undermines the Objector's assertion. Moreover, Ms Jhaveri could not demonstrate, for example, whether there were any relevant saving provisions in relation to the Declaration, let alone what would have been the effect (if any) of such saving provisions. It also begs the inevitable question: if there were relevant savings provisions why were the regulations on 13 March 2001 considered necessary?

15. These evidential difficulties were further compounded by the fact that, as the Objector's own evidence demonstrated clearly indicated at LJ3 page 141, the National Audit Office report recorded that on 16 March 2001 the "Power for local authorities to impose large-scale footpath closures revoked". This may well explain why the posting of signs recorded in the Parish Council minute of 15 March 2001 (LJ12 at page 192) never resulted in any posted going up on Saturday 17 or Sunday 18 March 2001.

16. Even more significantly, the three sets of regulations discovered by Mr. Saint of the Registration Authority since the close of the inquiry are also highly pertinent and support the Applicant's case. Crucially, all three documents are dated 13 March 2001. They are:

(1) Somerset County Council (Foot and Mouth Disease) Regulations 2001 (numbered in the register as 11954). It confirms that the Declaration of 1st March 2001 was revoked with effect from 14 March 2001. The Regulations are stated to come into force on 14 March 2001. Regulation 3 and 4, together, confirm that not all footpaths were closed – those lying wholly within "urban areas" (not defined) were excluded. Furthermore, the note makes clear that these regulations "shall not restrict the movement of any person on or onto a made-up carriageway";

(2) Somerset County Council (Foot and Mouth Disease)(No.2) Regulations 2001 (numbered in the register as 11956) – which appears to apply to roads used as a public footpath and byways open to all traffic) and therefore are not relevant to the public footpaths on the Application Land; and

(3) Somerset County Council (Foot and Mouth Disease) Regulations 2001 (numbered in the register as 11955) which appear to show that the Regulations at (1) above were amended on the same day (but to take effect on 16 March 2001) by excluding from Regulation 3 of the Somerset County Council (Foot and Mouth Disease) Regulations 2001 footpaths listed in the schedule.

17. These documents remove any residual uncertainty. All three documents pre-date the 16 March 2001, the date on which the Objector's own evidence demonstrates, and as the National Audit Office report (referred to above) records, the "Power for local authorities to impose large-scale footpath closures" was "revoked". It is also highly significant that neither Mr. Saint nor the Objector have been unable to unearth any other relevant regulations or other documents dated after 13 March 2001 that would have had the effect of lawfully closing some or all the footpaths in this part of Somerset, a fact that is also consistent with the findings of the National Audit Office report. Thus there is no evidence of any relevant

regulation having been made, or other legislative action taken, closing any of the relevant footpaths in the vicinity of, or on, the Application Land that would have been rendered access to or use of that land unlawful. Indeed this also may well explain why the posting of signs recorded in the Parish Council minute of 15 March 2001 (LJ12 at page 192). In short, the evidence shows that the regulations which were made on 13 March 2001 and said to take effect on 14 March 2001 and were discussed by the Parish Council on 15 March 2001 who intended to post them two days later never took effect because the underlying power was withdrawn on Friday 16 March 2001.

18. Thus there is no evidence that any of the footpaths on the Application Land, or in the vicinity of it, were ever legally or physically closed at any time during the F&M crisis thus preventing its use for TVG purposes. In reality, the Objector's "evidence" is no more than pure speculative opinion and not only lacks any supporting evidence and is wholly unreliable but also is inconsistent with the three sets of regulations. In short there is no evidence to support the Objector's assertion that any of the footpaths on the Application Land, or in its vicinity, were ever closed during the F&M crisis.

(b) What effect did that have given that it is beyond dispute that access to the Application land could be effected from Tellisford Lane without going on the footpath?

19. Notwithstanding this, and assuming solely for the purpose of addressing this question that the footpaths were lawfully closed at some stage [for which there is no evidence whatsoever], it is important to highlight the limited effect of those Regulations. It is also important to remember that the Application Land was not agricultural land. It formed no part of a farm and the limited untested evidence of occasional use for grazing sheep or cattle (which was not capable of being tested due to the failure of Mr Mills to appear) cannot alter that fact.

20. All three sets of Regulations make clear that they "shall not restrict the movement of any person on or onto a made-up carriageway". At all times access to the Application Land from the Tellisford Lane entrance was possible and therefore

would not contravene those regulations – see paragraph 167 where the Objector accepts, somewhat inevitably, the correctness of that proposition: "Whilst it was possible to access the AS via the Willows gate, over walls or fences, or via the Tellisford Lane field gate". Thus it must be accepted that, as a matter of law and fact, access to the Application Land could not have been prevented by these regulations come what may.

21. Similarly, the Regulations do not apply to footpaths within "urban areas". The Regulations do not provide any definition of, or limitation to, that term but there are footpaths leading to the Application Land that pass between houses and lie within "urban areas". Thus the regulations would not apply to them. In any event, where there is a criminal sanction, any defect or ambiguity in drafting would be construed against the County Council as the prosecuting authority.

22. The reliance by the Objector in paragraph 169 on the comment of Lord Walker of Gestingthorpe JSC in the Supreme Court's decision in *R(Lewis) v Redcar and Cleveland BC (No.2)* [2010] UKSC 11 is also misconceived and taken wholly out of context. It was addressing a completely different issue which can clearly be seen demonstrated from a reading of the whole of the relevant passage from Lord Walker's opinion where he stated:

> "29. I have already referred to *Fitch v Fitch*, the case about cricket and hay- making at Steeple Bumpstead in Essex. The report is brief, but what Heath J is reported as having said is a forthright declaration of the need for coexistence between concurrent rights:
>
> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, that 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. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers."
>
> 30. Against that Mr Laurence QC relied on the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in *Sunningwell* [2000] 1 AC 335, 350-351, quoted at para [18] above) called "the unifying element" in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right.

31. The first of the old authorities relied on by Mr Laurence was *Bright v Walker* (1834) 1 CM & R 211, 219, a case on a private right of way, in which Parke B spoke of use of a way "openly and in the manner that a person rightfully entitled would have used it". I read that reference to the manner of use as emphasising the importance of open use, rather than as prescribing an additional requirement. On its facts the case raised as much of an issue as to *vi* as to *clam* since gates had been erected and broken down during the relevant period. The point of law in the case turned on the peculiarity that the freehold owner of the servient tenement was a corporation sole.

32. The next case relied on (another case about a claim to a private way) was *Hollins v Verney* (1884) 13 QBD 304 (there is a fuller statement of the facts in the first instance report (1883) 11 QBD 715). Lindley LJ (giving the judgment of the Court of Appeal) observed at p315:

"No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute."

33. The second sentence of this passage begins with "Moreover", suggesting that Lindley LJ was adding to the requirement that the use should be continuous. But the passage as a whole seems to be emphasising that the use must be openly (or obviously) continuous (the latter word being used three more times in the passage). The emphasis on continuity is understandable since the weight of the evidence was that the way was not used between 1853 and 1866, or between 1868 and 1881. It was used exclusively, or almost exclusively, for carting timber and underwood which was cut on a 15-year rotational system. The use relied on was too sparse for any jury to find section 2 of the Prescription Act 1832 satisfied.

34. In *Bridle v Ruby* [1989] QB 169 the plaintiff established a right of way by prescription despite his personal belief that he had such a right by grant. Ralph Gibson LJ said at p178:

"The requirement that user be 'as of right' means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing that the claimant by his conduct is asserting the right to do what he is doing without the owner's permission. If the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right. The fact that the claimant mistakenly thinks that he derived the right, which he is openly asserting, from a particular source, such as the conveyance to him of his property, does not by itself show that the nature of the user was materially different or would be seen by the owner of the land as other than user as of right."

That the claimant's private beliefs are generally irrelevant, in the prescription of either private or public rights, was finally confirmed by the House of Lords in *Sunningwell* (see paras [18] and [19] above).

35. The last authority calling for mention on this point is *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* [1992] SLT 1035 (Court of Session), 1993 SC (HL) 44 (House of Lords). In the Court of Session the Lord President (Lord Hope), after considering several authorities, observed (at p1041):

> "The significance of these passages for present purposes is that, where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance."
>
> Lord Hope's reference to the manner of use must, I think, be related to the unusual facts of the case (set out in detail at pp1037-1038). The issue was whether there was a public right of way over an extensive walkway in a new town, designed to separate pedestrian from vehicular traffic. It gave access to the town centre where there were numerous shops (whose tenants no doubt had private rights of way for themselves and their customers). But the walk was also used for access to public places such as the railway station, the church, a health centre and a swimming pool. It was held that the use of the way "had the character of general public use of a town centre pedestrian thoroughfare" (p1042). The House of Lords upheld this decision. It is worth noting that Lord Jauncey of Tullichettle stated, at p47,
>
> "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor."

23. Thus Lord Walker's comments do not support the Objector's assertion; he was dealing with a completely different point.

24. Furthermore, the assertion that any use of the footpaths on the Application Land would have constituted a criminal offence is itself misconceived, as can be seen from the only reported case dealing with the relevant law mentioned below (and which related to a breach of regulations regarding rabies). As the F&M crisis regulations make clear, any contravention may have constituted an offence under section 73 of the Animal Health Act 1981. Section 73 states that:

> "A person is guilty of an offence against this Act who, without lawful authority or excuse, proof of which shall lie on him—
> (a) does anything in contravention of this Act, or of an order of the Minister, or of a regulation of a local authority; or
> (b) fails to give, produce, observe or do any notice, licence, rule or thing which by this Act or such an order or regulation he is required to give, produce, observe or do."

25. Given the drafting uncertainties in these regulations highlighted above, it is clear the prosecution would have had to demonstrate beyond reasonable doubt that the regulations were lawfully made and published, applied to the use by any person accused of the footpaths on the Application Land (and those leading to it from within the adjacent residential areas) *for the purpose of movement* as opposed to entry on to the Application Land for TVG purposes and that access had not be gained from the Tellisford Lane gate. Furthermore, given all the surrounding

drafting and other uncertainties highlighted above, there is also a "lawful excuse" statutory defence which would have to be addressed – see *City of London Corporation v Eurostar (UK) Limited* [2004] EWHC 187 (Admin) which concerns section 73 and which discusses the decision in *Cambridgeshire and Isle of Ely CC v Rust* [1972] 2 QB 426 regarding lawful excuse. Thus the use of the footpaths on the Application Land for TVG purposes (as opposed to the purpose of movement) would not have constituted a criminal offence and was not unlawful.

26. It can be concluded, therefore, that the evidence does not show that access to, or use of, the Application Land was ever prohibited by law at any time during the F&M crisis. The assertion in paragraph 169 that "An activity will not qualify as a lawful sport and pastime if it involves a criminal offence, but something does not need to go as far as being a criminal offence before it ceases to be a lawful sport and pastime for TVG purposes" also lacks any supporting evidence, case law or other legal authority. Indeed, the evidence of the Applicant is clear and unequivocal: access was never prevented during the F&M crisis and the Application Land continued to be used lawfully throughout and all the relevant documents including the three sets of regulations discovered by Mr. Saint support this.

(c) If the Application Land was not subject to statutory closure (as appears to be accepted by the Objector) how did any use of those parts of the land over which the footpaths are said to run but were being used for TVG purposes (as opposed to rights of way purposes) relate to any footpath closure?

27. This is addressed above. If the Application Land was being used for TVG purposes then it was not being used 'for the movement of any person onto any public footpath…". The two are distinct and separate uses of the Application Land. Furthermore, the regulations would only catch those parts of the Application Land over which the public footpaths actually run and were being used as such, and bearing in mind the evidence that the *de facto* and definitive routes do not necessarily coincide.

(d) For how long did the closure of the specific footpaths last?

28. There is no evidence to show that the specific footpaths were ever closed and unsurprisingly there is no evidence to indicate, if they were closed, how long any closure lasted.

29. In conclusion, the Applicant thanks Mr. Saint for his endeavours and submits that the three sets of regulations are entirely consistent with, and fully support, the case for registration of the Application land as a TVG.

MARTIN EDWARDS
Cornerstone Barristers
Friday 5 May 2017