Application for the registration of land as a village green
Land to the south of Longmead Close, Norton St Philip
Under s15 of the Commons Act 2006
Objection by Bina Ford

OBJECTOR'S CLOSING SUBMISSIONS

INTRODUCTION

1. These closing submissions are made in addition to and do not repeat the Objector's skeleton argument[1] and opening statement. They should also be read with the statutory declarations made by the witnesses on behalf of the Objector. The evidence in those statutory declarations is not repeated in these submissions. The Inspector is asked to read the Objector's written evidence in its entirety when considering his recommendation.

2. It is clear that Cllr Mrs Oliver is the driving force behind this application. Her character shone through in her oral evidence to the inquiry. Mrs Oliver persuaded the Applicant to make the application and she has driven it forward subsequently, apparently being personally charged to do so by the Applicant when she stood down from the Parish Council in 2015. Mrs Oliver was also on the group which submitted the local green space application, which she accepted in cross-examination (XX) was misleading.[2] It is hard not to view this town or village green (TVG) application as anything other than a personal crusade by Mrs Oliver.

3. As she accepted in XX, Mrs Oliver has been meeting, phoning and emailing Somerset County Council (SCC) officers responsible for TVG applications.[3] Indeed,

[1] Cross-references to paragraphs of the Objector's skeleton argument are made using square brackets.
[2] See RA p155 at 9.3.
[3] See eg RA pp 45-48, 50-51, 54, 57, 66, 102, 107, 108/o, 110, 112-117, 119-120, 147-148, 175-176, 178-182 (especially pages 107, 108/o and 120).

Mrs Oliver described in examination-in-chief (XIC) sitting down side-by-side at the desk of one of the SCC officers with responsibility for TVGs and looking at details of TVG applications on his computer. This is all of concern to the Objector. It risks creating procedural unfairness and/or an appearance of bias. In dealing with the application from now on, SCC will have to act with scrupulous care.

TRIGGER EVENT PROVISIONS

4. The main submissions on the trigger events have been set out in the Objector's skeleton argument and are not repeated here. These submissions deal simply with the secondary issues which have arisen during the course of the inquiry.

The context in this case

5. It is clear that this purported TVG application was made and has been pursued in order to seek to stop the proposed development on the TVG application site ("AS"). This provides the context for considering the application of the trigger events in this case.

6. Mrs Oliver said in her oral evidence that she had been told prior to June 2013 that Longmead Close residents thought that there could be development of the AS, due to the hammerhead arrangement of the road shown on the April 2013 plans sent to Longmead Close residents by Mr Lippiatt. This accords with what was said in correspondence from April 2013 by Colin Purser.[4] Mrs Oliver said in XX that, following the plans sent to residents in April 2013, you would have to be stupid not to think that there might be an application to develop the AS. She also said in XIC that it was the prospect of the development of the AS which drove her to put in a TVG application.

[4] Obj p233, letter agreed to be dated April 2013.

7. Mr Campbell, who was clerk to the Parish Council at the time, accepted in XX that the Applicant's intention in making the purported TVG application was to prevent building on the AS. He explained that the Applicant had been put on alert in 2013 following an application to build on land to the north of the AS (ie the paddocks area).

8. Mr Campbell said that there was a debate at the Parish Council's confidential sessions in June and July 2013 on whether it was appropriate to make a TVG application without informing the landowner. As Mrs Oliver confirmed in XX, the Applicant kept the preparation of a TVG application secret from the landowner, so that it could try to make the TVG application before the second planning application for development of the AS was made.[5] The first purported TVG application was submitted to SCC only a couple of weeks before the second planning application for development of part of the AS was submitted to the local planning authority. It is clear that it was the development proposals, which were first made public in April 2013 in pre-application consultation, which led to the TVG application being made.

9. The Applicant's witnesses, including Mrs Oliver, have made it clear that they do not want to see the development carried out on the part of the AS which already has been granted planning permission. Mrs Oliver frankly admitted that she wanted to stop that development being built out. That is a development which has already been granted planning permission under the town and country planning system which Parliament intended to take priority over the TVG registration system.

10. Both Mr Hasell and Mrs Oliver made clear from their comments in XX that they hold the town and country planning system in contempt. They seek to stop development that those charged by Parliament with planning decision-making – the local planning authority (LPA) and the Planning Inspectorate – consider appropriate. Mr Hasell said that the town and country planning system was flawed, that the LPA was demonstrably incompetent, and that the LPA had misled the Planning Inspectorate.

[5] Mrs Oliver agreed in XX that she knew that the TVG application had to be kept secret from the landowner to avoid a trigger event. She said she knew about trigger events and how important it was to keep the TVG application quiet. The statement at App Vol 3, p346/o also shows that the Applicant knew a planning application was coming, as Mrs Oliver accepted in XX. See also I28 and I29.

He also said that he was not happy for any houses to be built outside the village limits of Norton St Philip (NSP).

11. It is hard to imagine a more anti-development stance, but Mr Hasell and Mrs Oliver are clearly not alone in NSP in wanting to stop development. As Mrs Oliver accepted in XX, people were told that they should complete questionnaires for the TVG application in order to stop development.[6] The Applicant's witnesses generally accepted in XX that their motivation for giving evidence was to prevent the building of houses on the AS.[7]

12. The intention of the amendments introduced by the Growth and Infrastructure Act 2013 (GIA) was to prevent the TVG system being used to stop or delay planned development which was going through the democratically accountable planning system. It is precisely for cases like this that the GIA amendments were introduced in order to ensure that TVG applications were not used to affect or undermine development that was passing through the planning system. It is apparent that the Applicant has sought to subvert the trigger event provisions by beginning to prepare a TVG application following pre-application consultation by the developer, and keeping that secret to avoid the planning application being made more quickly than would otherwise be the case. The Applicant has sought to abuse the system just as much as those who made TVG applications before the trigger event provisions were introduced had done.

The South Bank case

13. The Inspector raised the submissions in the South Bank case as being potentially relevant here. The South Bank case did not, however, deal with the issue arising in this case, namely the application of the phrase "an application for planning permission in relation to the land" to circumstances such as those in relation to the

[6] See eg RA p186-186/o.
[7] Including Brenda Graham who accepted that she was against building on the AS, and Mr Knibbs who said that he was giving evidence to ensure that the AS was not built over. Mr Stretton said that he was giving evidence to see that no development happened on the AS and Mrs Ditchfield accepted that she wanted to stop any development on the AS.

May 2013 application. The South Bank case was also settled before it was fully argued, so there is no decision and no record of the oral arguments. Four points can, however, be made by reference to the submissions in the South Bank case.

14. First, that the statutory provisions should be given their ordinary and grammatical meaning.

15. Secondly, the object or purpose of the statutory provisions is stated in the skeleton argument of the Secretaries of State to be to restrict the ability to apply for registration of land as a village green so as to delay or undermine development proposals (para 4) and to safeguard against the system being used to delay or stall or stop development (paras 23 and 25).

16. Thirdly, the phrase "in relation to the land" has a broad meaning as set out in the skeleton argument of the Secretaries of State (para 10).

17. Fourthly, there was a recognition by some parties that adopting the "red line" area from the planning application would be too blunt and arbitrary an instrument and that it was necessary to ask – as the statute says – whether the planning application relates to land which is the subject of the application for registration as a green. This is in part because the relevant statutory provisions do not form part of the town and country planning code but rather sought to address the inter-relationship between planning and village greens. It would include consideration of what operations were actually involved in realising the development for which permission was sought.

18. These four points echo the submissions made by the Objector in her skeleton argument.

1045 Application in May 2013

19. As is explained at [13]-[25], the May 2013 planning application included and necessitated work being done across the AS, namely the path and the foul drainage.[8] That work was integral to the development for which permission was sought. The need for the foul drainage to go over the AS was explained in the written and oral evidence of Malcolm Lippiatt.[9] The planning application included not just the erection of houses and garages but also all "associated works".[10]

20. The permissive path and foul drainage works were both outside the red line area of the planning application location plan.[11] This is not unusual. The red line area is used to identify the site, not all the land on which all the necessary associated works are to be undertaken. Both works were located within the blue line area on the location plan as land within the same ownership.[12] As is explained in [22], grants of planning permission are not confined to works within the red line area.

21. Had the AS been registered as a village green, that work would have been impossible to carry out on the AS. If the foul drainage could not be installed, or if the footpath could not be installed, the houses could not be occupied as intended or at all. These works were integral to the development and without them, and especially the foul drainage, the development could not in practice have taken place. It is in precisely these circumstances that the GIA was intended to stop applications for TVG registration preventing or hindering development. The GIA was plainly intended to encompass circumstances like this.

22. The Applicant submits that it is not possible to go beyond the red line area, but not only does that ignore the plain words of Schedule 1A, it also elevates the red line area to a determinative status which it does not have in town and country planning law and ignores the reality of planning, which is that not all necessary development will

[8] See eg the statutory declaration of Mr Swinton at Obj pp277, 280-282.
[9] See Obj pp215 (para 2.6), 217 (para 2.13), 277, 281-282 and 341.
[10] Obj p299 at 3.
[11] Confirmed by Malcolm Lippiatt in his oral evidence. See Obj p305.
[12] So there would have been no question of a statutory undertaker using its powers akin to compulsory purchase, as Mr Lippiatt said in XX and RX.

always take place within the red line area. The red line area is not a conclusive rule of law.

23. The *Planning Encyclopaedia* extract at AB39 makes it clear at P72.27 that conditions are not limited to land embraced by the application, and also that a condition requiring the carrying out of works constitutes a grant of planning permission for those purposes even if the condition relates to land not within the planning application. The Applicant is simply wrong to contend that planning permission only covers the land within the red line and not beyond.

24. As has been noted above, using the red line area does not provide the answer to the question whether this is "an application for planning permission in relation to the land".[13] Actual development can both be on more than the red line area (as here) or on not all the red line area. Simply using the red line area would not in such cases achieve the intention of Parliament, which was to prevent proposed development being affected by TVG applications. The plain words actually used in the statute should be applied, as explained in the Objector's skeleton argument.

1821 Application in August 2013

25. It is common ground that this application was a relevant trigger event for the purported TVG application in this case – the only issue is in relation to timing. It was said by Mr Edwards in his Opening Statement that "this planning application does concern an application for planning permission for the Application Land" (para 45).

26. The Applicant's case on this trigger event is that it happened on 13 September 2013. The Objector submits at [26]-[32] that the trigger event occurred on 28 August 2013, and therefore before the purported September 2013 TVG application was submitted. As is explained further below, the September 2013 submission was clearly a new

[13] It should also be noted that a different phrase is used in the provisions in Schedule 1A which relate to plans: "identifies the land for potential development", rather than "an application for planning permission in relation to the land".

"revised application" and not a putting in order of the first purported TVG application.

27. In either event, this trigger event occurred well before the TVG application was purportedly put in order in February 2016. This trigger event would have meant that a TVG application – if such it was – could not have been submitted in February 2016.

PURPORTED TVG APPLICATIONS

28. The relevant law, including the *Church Commissioners* case (AB23), has been set out in the Objector's skeleton argument. The Court of Appeal made it clear that the detailed procedural requirements set out in the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 must be complied with for an application to be valid. It also made clear that, if the errors were not corrected in a short period (see eg paras 43, 59 and 91), then the application is invalid: the possibility of turning an invalid application into a duly made application will have been lost (see eg para 72).

29. The Applicant's suggestion that the Objector should have issued judicial review proceedings is misconceived for the reasons given at [3]. The Applicant is also wrong to suggest that there is a need to show substantial prejudice.[14] This was no part of the Court of Appeal's judgment in *Church Commissioners* (see eg para 66). If it was a requirement, however, there would be no shortage of very serious prejudice to the Objector from allowing a very late amendment to the 2013 application, namely the inability of the development of part of the AS, which was granted planning permission in June 2014, to proceed.

[14] Applicant's Opening Statement, para 15.

First purported TVG application: August 2013

30. It is plain that the first purported TVG application was defective. Regulation 3(1) of the 2007 Regulations provides that an application must be made in accordance with the Regulations, which of course include Regulation 10. Regulation 10 applies to the description of any land which is the subject of an application for registration as a town or village green (see Reg 10(1)).

31. Regulation 10(2)(a) provides that land must be described for the purposes of any application by an Ordnance map accompanying the application and referred to in that application. Regulation 10(3) provides that an Ordnance map accompanying an application must: (a) be on a scale of not less than 1:2,500; (b) show the land to be described by means of distinctive colouring; and, (c) be marked as an exhibit to the statutory declaration in support of the application.

32. The Applicant is entirely incorrect to argue, as it did in opening, that the requirements as to maps are not contained in the 2007 Regulations.[15] It is notable that the defects in this case were similar to those in the *Church Commissioners* case, including as to the provision of maps at an appropriate scale.

33. The August 2013 purported TVG application was deficient, and therefore invalid, in that *inter alia*:

    (1) the map of the AS did not comply with Regulation 10, as it was not an Ordnance map and/or it was not on a scale of not less than 1:2,500; and/or

    (2) there was no map showing the claimed locality, despite the fact that the box at Form 44 section 6 was ticked to say that a map showing the locality was attached.

[15] See Opening Statement paras 26-28.

34. SCC was correct to identify that the application was invalid.[16] As Mr Campbell confirmed in XX, the Applicant accepted that the August 2013 application was defective.

35. It is notable that the application was not kept by SCC but was returned by SCC to the Applicant.[17] There was no application retained by SCC which could have been put in order pursuant to Regulation 5(4). The application was sent back to the Applicant. This reinforces the point that the September 2013 submission was in fact a new "revised application".

Second purported TVG application: September 2013

36. The second purported TVG application, submitted in September 2013, was a revised application and not a putting in order of the first application. Although the application form was the same, virtually all the other information submitted with the September 2013 purported application was new, as confirmed by Mr Campbell in XX.

37. Only the application form, the statutory declaration and the "statement of justification" were the same in the September as in the August 2013 purported application. The 40 odd evidence questionnaires, the maps (including the 1:1250 map of the AS and the locality map), the letter from Mrs Oliver and some of the photographs were new. The "compendium of quotations" document was newly created, being different in substance from that submitted with the August 2013 application. It is plain that, as the covering letter said, this was a "revised application" submitted afresh to SCC in September 2013. It was both in name and in substance a revised application being made anew.

38. As noted at [35], the Court of Appeal made clear in *Church Commissioners* that there is no provision in the 2007 Regulations to resubmit an application, merely to put in order the original application (see paras 71-73). The September 2013 submission

[16] See SCC letter dated 21 August 2013 at App Vol 1, p25.
[17] Confirmed by Mr Campbell in XX; see App Vol 1 p25/o.

could not put in order the purported August 2013 application as that application was not retained by SCC and the September 2013 submission was clearly a "revised application". The September 2013 submission would have gone well beyond anything allowed pursuant to Regulation 5(4) in terms of putting an invalid application in order and would not therefore benefit from the back-dating effect of Regulation 5(4) as identified in *Church Commissioners*.

39. In any event, the second purported TVG application was also defective. As Mr Campbell confirmed in XX, the September 2013 submission did not contain any new statutory declaration but instead merely included the August 2013 statutory declaration again. There was no statutory declaration dated 2 September 2013.[18] As Mr Campbell also accepted in XX, there was no statutory declaration to cover the different documentation submitted in September 2013.[19] Indeed, this documentation had not been in existence at the time the 13 August 2013 statutory declaration was made.

40. The September 2013 application documentation was not covered by a statutory declaration, including in particular the map of the AS land relied on in the September 2013 purported application. This was in breach of the Regulations in some important respects including:

    (1) contrary to Regulations 3 and 10(2)(a), the Ordnance map of the application site was not referred to in the application, as the Ordnance map dated 2 September 2013[20] post-dated the completed Form 44 and indeed was submitted in addition to the map which had been referred to in the August 2013 application;[21]

    (2) contrary to Regulations 3 and 10(3)(c), the Ordnance map was not marked as an exhibit to the statutory declaration in support of the application as the

[18] As Mr Campbell also confirmed in XX.
[19] Mrs Oliver also confirmed in XX that there were only two statutory declarations in this case and that a separate statutory declaration was not submitted with the September 2013 "revised application".
[20] See App Vol 1 p39.
[21] See App Vol 1 p40. Paragraph 3 of Robin Campbell's statutory declaration dated 13 August 2013 referred to the map at p40 and not the map at p39.

Ordnance map post-dated the statutory declaration sworn on 13 August 2013 which was submitted with the second purported application;[22] and/or

(3) contrary to Regulation 3(2)(d)(i), the application was not supported by a statutory declaration as set out in Form 44, because the primary function of the text of the declaration in Form 44 – to swear that the facts set out in the application are fully and truly stated[23] – was not performed by the statutory declaration dated 13 August 2013 which accompanied the September 2013 submission, because the statutory declaration pre-dated the "revised application", which was indeed fundamentally different from that covered by the 13 August 2013 declaration.

41. Any one of these three would have been enough to mean that the September 2013 "revised application" was defective and invalid, either of itself or as a means to put an August 2013 application in order.

42. There was, in short and as noted at [37], no statutory declaration covering the fundamentally different "revised application" which was submitted in September 2013. It was the lack of an appropriate statutory declaration of September 2013 which SCC identified as the flaw in its letter dated 21 January 2016, although at the time the letter was written SCC did not know how serious the matter was.[24] The lack of a re-sworn statutory declaration to cover new material submitted was also one of the defects in the *Church Commissioners* case.

Third purported TVG application: February 2016

43. The third purported TVG application was defective because the statutory declaration dated 22 February 2016 was fundamentally flawed, for any of three separate reasons.

[22] See App Vol 1 p33.
[23] The statement at the end of the statutory declaration in Form 44 says that "signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence" and provides that any map should be an exhibit to the statutory declaration.
[24] The "slight inconsistency" reference was because at the time SCC did not know whether it merely did not have a copy on its file of a statutory declaration dated September 2013 or whether the problem was more fundamental. It turned out to be a fundamental problem, as there was no declaration of September 2013 at all.

44. First, as explained at [43], it did not comply with Regulation 3(3) because the statutory declaration was not made by the person who signed the application on behalf of the Applicant.

45. Secondly, and independently, the text of the statutory declaration was wholly inadequate to do what was required by the Regulations. Regulation 3(2)(d)(i) requires that an application must be supported by a statutory declaration as set out in Form 44. The main thing that the text of the declaration in Form 44 requires is that the statutory declaration swears that the facts set out in the application are fully and truly stated.

46. The text of Nicola Duke's statutory declaration dated 22 February 2016 fails entirely to perform this essential function of swearing that the facts set out in the application submitted in September 2013 are true. Mrs Oliver explained in her oral evidence that she had written the text of Nicola Duke's statutory declaration. The caveat in paragraph 2 of the statutory declaration ("except as referred to in Clause 3") means that the statutory declaration did not swear that the facts set out in the application were fully and truly stated. If anything, it does the opposite, excepting from the declaration in paragraph 2 the material listed in paragraph 3. Mrs Oliver accepted in XX that the statutory declaration does read as though it does not swear to the truth of the material submitted. She said in response to a question from the Inspector during XX that paragraph 2 makes an exception for what is stated in paragraph 3. The statutory declaration is fundamentally defective.

47. Thirdly, the statutory declaration is defective in that what is contained in paragraph 3 of the declaration in Form 44, namely to swear that the map produced as part of the declaration is the map referred to in part 5 of the application, was entirely omitted. This fundamental element of Form 44 was wholly absent.

48. Any one of the above three reasons would be enough to breach the requirement of Regulation 3(2)(d)(i). None of these, let alone all of them, could be said to be an adaptation as the case requires within the meaning of that provision. It is a requirement of Regulation 3(3), as well as Form 44, that the statutory declaration be

made by the person who signed the application on behalf of the Applicant. It is also the basic function of paragraphs 2 and 3 of the declaration in Form 44 to swear to the truth of the facts set out in the application and the map referred to in part 5 of the application. The amended text fundamentally alters the whole purpose and effect of the statutory declaration.

49. Further and in any event, the third purported application was too late to put either 2013 purported TVG application in order anyway (see [38]-[42]). A period of nearly two and a half years to put right an application made in 2013 plainly would not be short and would not be reasonable. Even if the February 2016 statutory declaration was not fundamentally flawed, it would not have been effective to put in order an application made in 2013. Any application would also therefore be ruled out due to the effective trigger event or events.

Overall position on purported TVG applications

50. The result, as explained at [43], is that no valid or effective TVG application has ever been made in this case.

OVERALL CHRONOLOGY

51. As was noted in opening, it is important to understand some important matters of chronology when assessing the evidence. In 2008, Bina Ford began winding down her teaching operations at NSP, following her back operation in 2007. Although teaching continued, it was less intense from 2008 onwards. In 2011, Mrs Ford moved away. In 2007/2008, Terry Mills ceased using the AS other than occasionally in the winter.[25] In the period from 2011 to 2015, Mr Mills did not use the AS at all.

52. So, whilst before 2008 the AS was in regular use and under regular surveillance by Bina Ford, and also Terry Mills, in the period from 2008 to 2011, the use was less

[25] See Obj p237, para 4.

intense. Most importantly, in 2011 the previous use of the land ceased and the surveillance by Mrs Ford ceased entirely.[26] The circumstances of the last two years of the 20 year period would have been very different indeed from those which applied in the first 15 years of the period.[27] The circumstances in 2008 to 2011 would also have been different.

53. This would have affected not only the use of the AS and the surveillance of it, but also the maintenance and physical condition of the AS. The nettles on the western boundary would have grown up more than before and the brambles in the hedge on the eastern boundary would have grown into the AS.

54. It is important to approach the assessment of this case, particularly the Applicant's evidence, bearing these facts in mind, especially the very different state of affairs from 2011 after Bina Ford left NSP.

APPLICANT'S EVIDENCE[28]

55. It is clear that the Applicant has made every effort to collect evidence for the inquiry. This means that the Inspector can have confidence that all the evidence which the Applicant could have produced in support of the application has been put before the inquiry.

56. It is interesting to note the location of the houses of those who came to give evidence. Many are close to the application site.[29] Those who live close to the AS would all stand to lose something – perhaps in amenity or in the value of their houses – if the AS came to be developed. Some of the Applicant's witnesses were frank about

[26] Mrs Ford said in XX that she felt that since she had moved away villagers had run amok on her land and that she felt a bit emotional about it because of how much the land meant to her and because when she was first informed of the application she had just had a triple heart bypass operation and her father had recently died. She also said that she did not visit the land after 2011 more than once every two months.
[27] The AS was let to Sian Blackmar from April 2012, but her active use of the land was limited to putting her horses and ponies in there during the autumn and winter months from 2012 to 2015.
[28] Mr Edwards said, rightly, in his oral opening that the questionnaires showing use after the end of the relevant 20 year period are not relevant (see App Vol 4, tab 4). The Inspector also said, rightly, during the XIC of Mrs Oliver that the only relevant time period for consideration is the 20 year period from 1993 to 2013.
[29] For example, those at Longmead Close, Upper Farm Close, Town Barton, Town End (including the Drum) and Tellisford Lane, as well as the Old Shop on the High Street which backs on to Town Barton.

wanting to stop development; others less so. It was clear, in some cases at least, that this motivation coloured their evidence and prevented them from giving evidence genuinely aimed at assisting the Inspector to get a complete and correct picture of the use of the AS.

57. It is not possible to draw any meaningful conclusions from a tabulation of questionnaire answers,[30] not least as such a tabulation loses what little contextual information is provided in the questionnaires. Reading through the questionnaires in tab 3 of Volume 4 of the Applicant's bundle, for example, it is apparent that:

(1) most of the claimed use could be entirely explicable by the presence of the public rights of way (PROWs), as it comprises things which would be within the wide ambit of the use of the four PROWs on the AS;

(2) some of the claimed use is simply walking through the land en route elsewhere;[31]

(3) some people say that they have hardly ever used the land, eg a couple of times a year;[32]

(4) some of the claimed use is reported by people who started using the land in the 1930s, 1940s or 1950s;

(5) some of the claimed use only commenced after Bina Ford began to wind down her teaching in 2008 or even after she moved out in 2011;

(6) some of the claimed use finished well before the relevant 20 year period started, eg 1936, 1960 and 1980;

[30] The Applicant's table is not accepted because it is fundamentally flawed. The "frequency of land use" categories are flawed in that they require all the evidence to be reported in only five categories, the least of which is "occasionally" – which would not accurately represent the evidence when some people say they used the AS only a couple of times a year or had stopped using it before the relevant 20 year period.
[31] See eg App Vol 5, pp559, 572, 580, 629, 633, 653, 703, 746.
[32] See eg App Vol 5, pp576, 584, 625, 629, 696.

(7) there are numerous questionnaires from within the same families which are reporting the same activities repeatedly, rather than freestanding activities undertaken by separate people.

58. Much the same picture emerges from considering the material in tab 2 of Volume 3 of the Applicant's bundle, with even more repetition of the same family names in those who gave oral evidence. There are repeated references in this written material to the main use being for walking, to the walking being done on the footpaths or worn paths, and to walking through the land as part[33] of a longer walk. There are also repeated references to walking through the land in order to avoid the busy main roads through the village and to using the land because people live close to it.[34] And there is a common thread that the claimed use of the AS was not very frequent.[35]

59. These are the common themes from the written evidence,[36] as they were from the oral evidence. In XX, Mrs Brewis for example accepted that walking was the most common activity and that use by children was both by young children and by those that lived nearby, especially from the bottom of the village.

60. It is also the case that, because many of the questionnaires, and indeed the witness statements, have been prepared jointly by two people, they report what was seen or done by both persons, both independently and jointly. This leads not only to over-stating the claimed use but also confusion about exactly what happened.[37]

61. Moreover, no distinction was drawn between those who lived in NSP and those who lived elsewhere, in either the statements or the questionnaires.[38] This would also lead to the claimed use which could count for TVG purposes being over-stated. It would

[33] See eg App Vol 3, pp377/o (Q16), 476/o. An example from the oral evidence is Mrs Cox, who said that she walked through the AS about half the time and walked on the AS – either diagonally across or around the edge – the other half the time she was on the AS. And Mr Stretton said in XX that he would walk through the AS as a scenic route or as a cut through as part of a longer route around the village.
[34] Mr Campbell for example agreed in XX that he used the land less when he moved further away, to Monmouth Paddock.
[35] See eg App Vol 3, pp377, 419 (Q13), 497 (Q13).
[36] See eg App Vol 3, pp373/o, 383/o, 406/o, 414, 430/o, 455/o, 463/o.
[37] Mrs Brewis for example in her XIC said she was a steward for the Monmouth Rebellion, because that was what was stated in her written evidence, but then later had to correct this when she realised that it was her husband and not her who was the steward. The use of joint evidence like this seemed to be prompting false memories. All the joint evidence needs to be treated with extreme caution.
[38] Confirmed by Mrs Oliver and Mr Hasell in XX.

also lead to the reports of the use that people had seen being over-stated, as it would include use by everyone and not just inhabitants of NSP.

62. It is also the case that the statements and questionnaires report all that people claimed to have done and seen over the entire period that they have known the land.[39] It is apparent that many people have known the land for a long time, which is unsurprising given that it is criss-crossed by four PROWs. But this means that people are not reporting what they claim to have done or seen over the relevant 20 year period but in some cases periods of 30 or more years. There are people who have known the land for 50, 60, 70 or 80 years.

63. The Applicant's witnesses had identified all that they could remember having seen done on the AS, over the entire period they had known the land, and for all the land. Although some witnesses had known the land only for a very short time, others had known it for many years. The picture presented in the evidence is therefore a condensed or concentrated picture of use which would tend to suggest a much more intense use of the land than was ever the case. This evidence does need therefore to be treated with considerable caution. The use needs to be greatly discounted to get to a picture reflecting what would have been available to be seen during the 20 year period.

64. Based on the tabulation produced by Mrs Oliver,[40] it appears that of the 98 odd questionnaires, 40 are people who included in their answers the period before 1993. This renders these questionnaires effectively useless, as it is impossible to tell whether what they claim to have seen or done occurred during the 20 year period. This is important because it was clear from the oral evidence that many things done or observed were done or observed only on a few occasions[41] or outside the 20 year period (eg playing with children). No conclusions can safely be drawn from the contents of those 40 questionnaires.

[39] Confirmed by the Applicant's witnesses in XX.
[40] Which is not accepted as being correct.
[41] Particularly things like kite flying, ball games, cycling, picnicking, and snow-related uses.

65. It is also apparent from Mrs Oliver's tabulation that, of the 98 odd questionnaires, 20 are from people who started using the land in 2010 and after. They would therefore have experienced the period after Terry Mills had stopped using the land, after Bina Ford had wound down her teaching operation at NSP, and indeed after Bina Ford had moved away in 2011. The evidence from these 20 is entirely unable to tell you anything about the use of the AS during the bulk of the period under consideration, in very different circumstances to those which applied after 2010. Again, no conclusions can safely be drawn from the contents of these 20 questionnaires about the use of the land across the relevant 20 year period.

66. This means that the majority of the questionnaires and statements – around two-thirds – are unable to convey any meaningful information for the purposes of assessing this TVG application. This is separate from and additional to the point that the questionnaires are in any event simply unable to tell you anything meaningful about the claimed use of the AS because of their design.

67. There is another reason why the evidence has to be treated with caution and discounted, namely because others could have seen the same things at around the same time. Someone undertaking an activity on the land would give evidence of that, and then a number of people might give evidence of having seen that activity. The evidence could be taken to give a picture of the activity happening on a substantial number of occasions when in fact it was a one-off. A good example of this would be the so-called "igloo".

68. The questionnaires tell you nothing of value about the claimed use, even where focussed on the relevant 20 year period, as they tell you nothing about the location, character, frequency, timing, duration and the like of the activities claimed to be undertaken or observed. As the Applicant's witness statements in this case are so thin and so limited, the same point can be made about most if not all the witness statements as well. A good example is Brenda Graham's evidence. Without cross-examination it would not have been known that she got her dog only in June 2013, just two months before the end of the 20 year period.[42]

[42] Similarly, without XX, it would not have been known that Mr Stretton only got his dog in February 2012.

69. Importantly in this case the questionnaires and statements do not tell you anything about whether the activities claimed – including things like walking, dog walking, jogging/running, picnicking, nature observation, etc – were on or close to the four PROWs, let alone the other well-established worn paths on the land. It is impossible to draw conclusions from the questionnaires about whether the claimed use would in all the circumstances have been referable to the exercise of actual and potential public rights of way. All the evidence from the questionnaires and witness statements is at best ambiguous.

70. The majority of the Applicant's marked-up "Map B" pictures provide no further information to assist the Applicant, because they tend to show activities happening on or near the PROWs and the well-established worn paths. The Map B information, to the extent that anything can be drawn from it, supports the Objector's evidence that any use was on or near to the worn paths (including in particular in the southern tip).

71. This is a critical consideration for judging what would have been apparent to a landowner and whether the use was of a sufficient quantity and quality to qualify to make the land a village green.

72. On examination, for example through XX, it is discovered how limited, how infrequent, how short-lived and how confined the claimed uses are actually said to be. A very different picture emerges when one looks below the very superficial picture presented by the questionnaires and the witness statements. As is common in cases such as this, a very different picture emerges when one considers the detail than appears from the very broad brush and imprecise questionnaire responses and witness statements.

73. The questionnaires also prompt the answers in them. Sometimes that is expressly, as in the case of the 2016 questionnaire telling people what locality to write in. In other cases the prompting is by putting a list of activities before people to tick. That answers are prompted, rather than being genuine open recollections, is demonstrated by the fact that no one has mentioned rugby. In the area around Bath where rugby is so popular, if the land had been used on any real scale for recreation, it is unthinkable

that no children would have thrown a rugby ball around – but it is not mentioned in the Applicant's evidence.

74. The very limited nature, extent and frequency of the use is also shown by the fact that the Applicant's evidence shows that many people have not even seen some of the activities that people claim they have taken part in eg kites, rounders, picnics etc.

75. What evidence is being presented by the Applicant, especially in the written evidence but also in the oral evidence, represents only snapshots focussed on occasions when the land was used most intensively or most memorably. The true and complete picture cannot be assembled from a collection of such snapshots. In short, whether consciously or not, the Applicant's evidence is exaggerated and does not present a true picture of what any actual use of the AS would have been.

76. It also needs to be remembered that the people called to give oral evidence largely had similar characteristics. Most of them lived close to the AS and on the eastern side of the village.[43] Many of them had a small garden. It was also notable that many of those who claimed to have used the land had a particular reason for doing so, which would not be representative of the local community more generally. A good example is Mr Saddiq who explained that his family had moved from Manchester and were attracted by the green space.

77. The witnesses were also no doubt selected for the evidence they could give. Mr Knibbs, for example, said in XIC that his boys would run around a lot more than other children[44] and Mr Hasell said in XIC that his family were very keen walkers and runners. What was claimed by one witness about what might at first blush appear to be a recreational use of the AS cannot be attributed to all those who completed written evidence. Overall, the witnesses who gave oral evidence would not be representative of the inhabitants of the locality.

[43] Mrs Brewis, for example, described the land in chief as "the field at the back".
[44] He also had a small, thin garden.

78. That the main road was a dangerous one to cross was a common theme of the Applicant's evidence, including that of Mrs Oliver.[45] Mrs Oliver said in XIC that she very rarely walked down the High Street as the pavements were narrow. It was apparent from the site visit that the A366 Farleigh Road and the High Street – including the sharp bend by the Fleur de Lys – is dangerous. There are relatively high volumes of traffic, passing at some speed, including lorries and vans. The main road has the effect of isolating the area south of Farleigh Road and east of the High Street from the northern and western parts of NSP, at least as far as children are concerned or those – like Mrs Oliver – who are worried about vehicles hitting them when they are walking along the narrow (or absent) pavements with dogs.[46]

79. Many people claimed that the reason they used the AS, especially with children, was that they did not have to cross the main road, as they would if they were going to Church Mead.[47] Ms Graham's son, for example, was not allowed to go from Longmead Close to Church Mead to play.[48] That point of course works in reverse.[49] People from the other side of the main road would not cross the dangerous road to come to the AS when they could go to Church Mead or elsewhere. Mrs Ditchfield said in XX that the problem was crossing the road and that the road separated the east and west parts of the village. Those who lived on the other side of main road closer to Church Mead would not have been coming to use the AS, either at all or with anything like the same frequency or for certain claimed activities (like children's play).

80. It is notable that almost everyone who gave oral evidence for the Applicant lived on the east side of the main road, as well as living close to the AS.[50] This is reinforced by the fact that the postcode analysis produced by Mrs Oliver at the end of the inquiry shows that two-thirds of all the questionnaire respondents live on the east of the main

[45] App Vol 3, p338/o, para 1. See also eg App Vol 3, p286/o.
[46] Mr Hasell also said in XX that nobody wanted to walk down the High Street.
[47] Church Mead has been available and laid out as a recreation ground, including with a children's play area, since the 1970s and therefore throughout the relevant 20 year period.
[48] App Vol 3, p295.
[49] As was accepted by eg Mr Stretton and Mrs Ditchfield in XX.
[50] 12 of the Applicant's 15 witnesses lived in the quadrant of NSP south of Farleigh Road and east of the High Street (including on Tellisford Lane).

road. This is a very crude measure but it highlights the bias across all the respondents and not just those with children.

81. It is important to bear this point in mind when considering the totality of the Applicant's evidence and what it really shows about the claimed use of the AS for lawful sports and pastimes (LSP). The oral evidence at the inquiry has focussed on those who would be most likely to use the AS and use it frequently. That would not apply generally. It is also relevant to the question whether the AS really has been used to show that a general right for the local community to use the whole of the land for recreation was being asserted.

82. It is also important to take each questionnaire individually, especially those who did not also complete any form of narrative statement. But many questionnaires show that claimed use spanned a very long period, so any answers to questions cannot be attributed to the relevant 20 year period. Moreover, many of the questionnaires simply describe uses which can perfectly well be read as being related to the PROWs on the land, such as walking and dog walking.

THE OBJECTOR'S EVIDENCE

83. By contrast to the Applicant, the Objector's evidence was not only provided as narrative statements but it was also sworn as statutory declarations. These statutory declarations can be given very considerable weight. If any statutory declaration is false in any material particular then the witness will have committed an offence under s5 of the Perjury Act 1911 and will be liable to imprisonment for up to two years. Moreover, ten of the Objector's witnesses, including Bina Ford, gave oral evidence and were cross-examined. This evidence withstood testing by cross-examination.[51] The weight to be given to it would therefore be further enhanced. But it also

[51] Mr Edwards appeared to be seeking to demonstrate in XX that the witnesses had been told what to say, but all those questioned in this way by Mr Edwards described an entirely proper process of a solicitor taking instructions by telephone, drafting a statement for review by the witness, the witness then amending the draft statement as necessary to ensure that they were entirely satisfied with it, and the solicitor then producing a final version – which was signed before an independent solicitor engaged solely for the purposes of swearing the statutory declarations. All the witnesses cross-examined confirmed that the statutory declarations reflected the words they had used and that they were happy with the contents of the declarations.

demonstrates that the evidence given in the statutory declarations is correct in all material particulars. Where witnesses were not called at the inquiry – for example because they were abroad, or unable to secure child care, or due to being busy with work – there can be confidence that their evidence is as robust as that which was subject to cross-examination.

APPLICATION SITE AND ACCESS TO IT

84. The access points that the public used to gain access to the AS were the stiles in the four corners of the AS, known during the inquiry as UFC, NE, TL and TE.[52] These four stiles were on PROWs. Save for a few particular exceptions, all the public access to the AS was via these four stiles and on PROWs.[53] The AS was throughout the period kept secure with fencing, hedges and walls in order to keep animals in.

85. There was also access to the AS from the gate in the boundary of the Willows, where Bina Ford had granted permission to Paddy Rich so that he could access the PROW adjacent to his boundary to walk his dog.[54]

86. Mrs Ditchfield explained in XIC that members of her family used to access the land in part by climbing over the wall between their house and the AS.[55] Ms Graham also described in XIC coming through the paddock area and climbing over the fence and into the AS.[56] This and similar use would be forcible access to the AS and any consequent use would not therefore be as of right [49]. Such use cannot be counted for the purposes of the purported TVG application.

[52] The stiles at UFC and TE were changed to gates only in 2013, as explained by Mrs Oliver.
[53] For example, Paddy Rich of the Willows had permission to put a gate in from his house, and some (eg Mrs Ditchfield and Mrs Graham) described climbing over a wall or a fence (but this use would have been *vi*). There was no evidence of access via the field gate to Tellisford Lane, which was usually kept locked.
[54] The gate (covered by a fence panel) is shown on the photo at App Vol 5, p795. See also App Vol 3, p489, Q11.
[55] See also App Vol 3, p263/o, para 4, and p275 (Q11). Mrs Ditchfield confirmed in XX that it was her husband and older daughter who would access the AS in this way, and that she and their younger daughter would go in over the stile at TL. Mr Stretton confirmed in XX that he knew that some neighbours had climbed over the wall to get into the AS.
[56] The post and rail fence and field gate from the paddocks and teaching field area to the AS is shown on the photo at App Vol 5, p819.

87. The Objector's evidence was that hay cropping was not done every year. This was corroborated by some of the Applicant's witnesses.[57] The evidence was that it was done in mid to late August when it was done. The hay cropping did not affect the claimed use of the land (save when cutting and baling[58] taking place) as people said that they generally kept on the worn paths, around the edge or across the land, and did not go into the long grass. This reflected what the position was when the hay was cut and drying on the land.[59] More often than not, there was very long grass on the AS rather than short grass.[60] This is perhaps why so many of the Applicant's witnesses described the AS as a meadow. But of course, as was clear from the evidence, the long grass would have limited what was done on the AS and where it was done.

2012 fenced area

88. Both Mrs Ditchfield and Mrs Day described the fenced off area where Shetland ponies were grazed in 2012.[61] This was fenced off with two lines of electric fence tape, but not electrified. Mrs Oliver described the area in XIC as a "compound".[62] Mrs Ditchfield said that she had not gone close to the fence as she thought it was an electric fence. Mr Hasell also said that he did not know it was not electrified and that he was not in the habit of testing such things.

89. Mrs Day described the enclosure set against the hedge as having been set up in November 2012, which accords with the date of the photographs from Mrs Ditchfield. Mrs Day confirmed that the fence was effective to keep people out, as well as to keep the ponies in. When questioned by Mr Edwards, she said that people would keep out of the enclosure out of good manners. Others like Mrs Ditchfield and Mr Hasell

[57] For example, Mr Campbell in XX, who said that he did not think it was every year.
[58] A photo of a baling machine is at App Vol 5, p872.
[59] Mrs Ditchfield said in IQs that she would keep well away from the cut hay and walk around the edge of the field which was unaffected. Mr Bishop said in XIC that he would stick to the paths and not let his dog run into the cut hay. Mrs Cox said in XX that she would tend to stick to the PROW from UFC to TE when the hay was lying.
[60] See eg Mr Stretton in XX and other witnesses.
[61] It was half way up the eastern boundary, running for about a third of the length of the eastern boundary, and extending about a third of the way out across the field, as described by Mrs Ditchfield. It is also shown on the photographs from Mrs Ditchfield (I8-I9).
[62] When asked in IQs whether the fenced area had changed, Mrs Oliver said that she was not sure and was just guessing. She said in XX that she had no reason to doubt what Mrs Day had said and that she would defer to Mrs Day's evidence.

would have thought that the fence was electrified. Mrs Day said that her pony was in there for about four weeks and that she did not know how long the fence was up after that.

90. It is apparent that the fenced enclosure was in place for a month at least. It was a significant area. The fence, which appeared to be an electric fence, and the ponies inside, would have prevented any recreational use of that land. As is explained at [57], where there is an interruption to use like this, it will prevent registration of the affected land. Whatever the outcome of this case on the other issues, the area of this fenced enclosure cannot be registered as village green.

PUBLIC RIGHTS OF WAY AND WORN PATHS

91. As it was put in the Applicant's evidence, there are "public footpaths criss-crossing the entire area" of the AS.[63] The PROWs linked most of the likely destinations, that is from stile to stile across land, and along two edges of the AS. The PROWs largely reflect where people would want to be going, from stile to stile across the land,[64] and along two sides of the land. Due to the presence of the four PROWs, the AS was available for people to use on the footpaths, including with dogs. There could have been no objection to this and indeed there would have been no point in objecting to the use, and perhaps occasional excessive use, of the PROWs on the AS. It would not have been possible to stop things happening on, or in practice near, the PROWs.

92. The routes of the PROWs would have been apparent to people. There were the normal PROW direction signs on the stiles. The top plank of the stile would have indicated the direction of the PROW from TE, NE and TL.[65] At UFC there was a three-way fingerpost sign,[66] showing the direction of the three PROWs running from

[63] App Vol 3, p290, Q10 (Brenda Graham). See also the 6 June 2014 planning appeal decision letter at Obj p366 paras 7-8.
[64] Mrs Ditchfield said in XX that logically speaking people would want to be walking from gate to gate.
[65] Mrs Ditchfield said in IQs that the presence of a stile indicated a right of way. See the photos at eg App Vol 5, pp797-798. Mr Hasell accepted that generally the top plank of a stile was aligned in the direction of the PROW, although he could not recollect the position for the AS. In XIC, Mrs Oliver only commented on the TL stile having to be rebuilt from time-to-time when the field gate at TL had been used for tractors and the like to access the AS.
[66] See eg the photo at App Vol 5, p795.

there. There was also the local footpath map erected on the side of the George in 2004, which shows the lines of the PROWs on the land, and the OS map on the other side of the George on the path in to Church Mead.

93. Worn paths reflected the routes of the PROWs. They were the physical manifestation of the PROWs.[67] There was in truth little difference from the legal lines of the PROWs and the walked routes. Even Mr Campbell in IQs only went as far as to say that he was "not convinced" that the worn routes were "entirely" as the PROW map. They were as close to them as makes no difference and as close to them as one would ever find in practice where a path is not fenced off or marked throughout its length in some way.

94. Where there was a departure from the line of the PROWs it is apparent from the oral evidence that this was limited and only to the extent necessary to negotiate areas where the line of the PROW had become overgrown. People are perfectly entitled, within the PROW right, to deviate from the path where the line is impassable due to its condition.

95. Dr Awan, for example, said in XIC that the western PROW line from TE to UFC was overgrown and that people just made a little detour to avoid that area. Mr Hasell described in XIC how people would try to walk the line of the PROW down the western edge as best they could.[68] Mr Hasell said that the western path went broadly along the route of the PROW but it was necessary to go out around a patch of nettles next to the garden of Orchard Leaze. He said that this had been getting progressively worse over the years and that although it was impossible to walk in this area in the summer it was OK to do so in the winter.

96. Although the aerial photographs show that there have often been patches of nettles or similar on the western boundary near Orchard Leaze, it is only in the 2013 aerial photograph that the area is large. The August 2005 aerial photograph shows the area

[67] Mrs Cox, for example, said in XIC, in response to a question from the Inspector, that her Map B showed PROW being the well-worn paths across the field.
[68] Mrs Oliver also described in XIC not being able to walk the western PROW route from UFC until it got closer to Ranmore Cottage at TE. Mr Saddiq however said in XX that his youngest daughter would use the western PROW route as part of her walk to and from the village school.

as having been mown. It is apparent that descriptions of having to make a detour on the western PROW would only have been applicable towards the end of the 20 year period, after Bina Ford and Terry Mills reduced or ended their use of the AS. It is also clear from Mr Hasell's evidence in XX that it was possible to walk the route of the western path in the winter.

97. To the extent that they can be seen from the aerial photographs, it is apparent that the worn routes of the PROWs between TE and NE, and between UFC and NE, were effectively on the line of the PROWs. This plainly represents use of the PROWs. It is well-established that, where there is a PROW over an open field from point to point but no defined track, the public right of way is not limited to a precise line shown on the definitive map but includes a reasonable width either side.

98. The line of the worn path from UFC to TL which can be seen from the aerial photographs is also effectively on the legal line of the PROW. The worn path curves somewhat towards TE. But it is apparent that the legal line of the PROW FR 11/15 from UFC to TL on the definitive map is not dead straight but rather slightly kinked.[69] The Parish Council's 2004 PROW map mounted on the side of the George also shows the route of the footpath from UFC to TL not as being dead straight but with a kink in towards TE. The worn path from UFC to TL joins the same two points as the PROW and follows the same direction as the PROW, without diverting. It simply bends or curves in the middle portion. Mr Campbell, the former parish clerk, accepted in XX that the worn path represented a curved route along the line of the PROW FP11/15 from UFC to TL.[70]

99. In almost all the aerial photographs the curve in the path from UFC to TL apparent is not a significant one. It is only in the latest aerial photograph, from 2013, that the curve is more pronounced. It is also apparent from the aerial photographs that this slightly curved route was not in addition to any worn path on the legal route of the

[69] RA p275.
[70] Mrs Oliver was reluctant to say much about this in XX but did accept that the worn path showed how people walked the route of the PROW from UFC to TL.

PROW, but was how that PROW route was walked on the ground. This walked route represented the line of the PROW from UFC to TL.[71]

100. Use of the worn route from UFC to TL, like the other worn routes,[72] would represent use of the PROW. At the very least it would amount to use which, to echo the words of Lightman J, would have appeared to the landowner to be referable to use of the public footpath.

101. Mrs Oliver's evidence was that in addition to the four PROWs there were also four other well-established walking routes.[73] She described these in XX. They amount effectively to routes which go, along with PROWs, to create the circular route around the edge of the AS, including the routes on the eastern perimeter and along the edge of the AS from TE to TL. It might previously have been possible to apply to modify the definitive map to seek to add these routes, as Ms Graham suggested to SCC.[74] This demonstrates that the walking on these routes would have been in the nature of use referable to a potential PROW and not a TVG right.

102. It is apparent from most of the marked-up "Map B" pictures that people were using the PROW routes effectively as shown on the definitive map (with the addition, in some cases, of the other worn routes to create the full circular boundary path).[75] The great majority of people who marked-up a map to show the routes they had used marked it in a way showing that the western, northern and diagonal routes they walked effectively accorded with the legal lines of the PROWs as recorded on the definitive map. The general picture, both from these marked-up maps and the oral evidence, was of people walking across the AS diagonally or around the edge of the AS.

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[71] Mrs Ditchfield for example accepted in response to questions from the Inspector during XX that the path from UFC to TL was a slightly different line but the same route as the PROW and represented where the route of the PROW goes on the ground.
[72] That is, those from UFC to NE, UFC to TE, and TE to NE.
[73] See App Vol 3, p338/o.
[74] RA pp61-62. Mr Stretton said in XX that he had assumed that the eastern route was a PROW.
[75] See eg App Vol 4, pp551/o, 561/o, 570, 574/o, 586/o, 594/o, 598/o, 612/o, 623/o, 627/o, 631/o, 643/o, 647/o, 655/o, 662, 677/o, 681/o, 685/o, 694/o, 705/o, 709/o, 713/o, 717/o, 744; and, App Vol 3, pp229, 244, 247, 253/o, 258, 303/o, 329, 333/o, 337, 340/o, 349, 365, 368, 382, 389, 399, 405, 412, 425, 429/o, 432/o, 439/o, 443, 457, 461/o, 478/o, 487, 526/o, 528/o.

103. Mr Hasell said in XIC that people would walk the route along the eastern edge just as if it was a PROW. And Mrs Oliver in XIC described the eastern path as being part of the way people walk to create a circular route. Mrs Ford gave in her oral evidence an explanation of how the eastern path came to be worn, and why the presence of the worn path did not indicate that people were walking along there: because the path had become worn from the riding of horses by her and others from the stables around the edge of the field, especially on the eastern side.

104. Notably, the worn paths all link to PROWs.[76] In addition to the worn paths which effectively followed the route of the four PROWs, there were worn paths between TE and TL and on the eastern edge from NE to TL. Not only did these worn paths complete a circuit of the outside of the AS, they linked to the stiles which were not otherwise linked by PROWs and also joined at either end to PROWs. Walking on worn paths in this way is precisely the sort of walking which could lead to the creation of a new PROW.

105. It was accepted by the Applicant's witnesses that they would always be on some PROW at some point when using the AS.[77] Various witnesses for the Applicant (including Mrs Brewis, Mr Kay and Mr Hasell) accepted in XX that use of the AS would have to start and end in defined places (ie the stiles) and that anyone coming on to the AS would enter on a PROW and leave on a PROW. They also accepted that the diagonal and circular routes commonly walked by people would all start and end on PROW and would all include some PROW in their route. Mr Knibbs also said in XX that he would always enter the AS via the stile on the PROW at TL and that, once on the AS, someone was bound to be on a PROW at some point, including two sides of the circular route. This is important not only for how the use of the AS would have appeared to the landowner but also in relation to the lawfulness of any use during the foot-and-mouth (F&M) period.

[76] As described by Mrs Oliver, App Vol 3, p338/o, para 1.
[77] Accepted eg in IQs by Mr Knibbs.

ANIMALS ON THE APPLICATION SITE

106. The presence of animals was a well-established feature of the AS. People called it the horse field or the sheep field and referred to the presence of muck in the field. Indeed, Mr Hasell called it the "sheep muck field".[78] Many witnesses confirmed the presence on the land of horses, sheep and cattle.[79] Livestock appears to be present on the aerial photographs taken in June 1994, October 1998 and July 2006.

107. The oral evidence given by the Applicant's witnesses accords in many respects with that in the statutory declaration from Terry Mills. The sheep would be on the land for a couple of weeks at a time.[80] Whilst a few of the Applicant's witnesses could not apparently remember sheep being present in the spring, Mr Hasell said in XIC that he remembered a flock of 30 to 40 sheep present in the spring time. There were sheep and lambs present.[81]

108. Witnesses also remembered cattle being on the land, and being kept there for longer periods at a time than the sheep,[82] albeit not in as many years as the sheep. Whilst cattle have not been present so much in recent years, various of the Applicant's witnesses had specific memories of cattle on the land in the 2000s.[83] This again generally accords with the evidence from Terry Mills.

109. Witnesses described cattle being on the land in some numbers.[84] Mr Hasell described them in XIC as a small herd of cattle which he saw on the land occasionally. When asked in XIC how many comprised a small herd, Mr Hasell said a dozen. Some

[78] App Vol 3, p296/o.
[79] For example, Mrs Brewis in XIC. See the statutory declaration of Terry Mills at Obj p238.
[80] Mr Campbell said in further XX following IQs that he accepted that the sheep would be there for 2 or 3 weeks at a time and that they would come and go in the summer and autumn.
[81] As described by Mrs Oliver in XIC.
[82] Mr Campbell, for example, said in IQs that the cattle were present less frequently than the sheep but they would be there much longer than sheep were.
[83] Mr Parker remembered cattle getting into his garden in 2004 as it was the year his step-father died. Dr Awan said in IQs that he had seen cattle in the field a couple of times since 2011.
[84] For example, Mrs Brewis said in IQs that it was perhaps 20 cattle she recalled.

witnesses had clear recollections of cattle in relatively recent years.[85] Those who could not remember cattle did not positively say that they had not been there.[86]

110. The result of this keeping of livestock on the AS was described by Mr Hasell in XIC as being that normally the grass would grow long until it was cut in late summer or early autumn. This reflected the evidence given by the Applicant's witnesses, that usually the grass would be growing long on the AS throughout the summer until it was cut in late summer (mid to late August), although witnesses said (correctly) that the grass was not cut every year. More often than not, therefore, the position would have been one of long grass on the AS throughout the summer months (eg June to August) including much of the school summer holiday period.

111. Evidence from both sides shows that the use of the AS for horses was frequent and intensive. Apart from the small paddocks, the AS was the only land Bina Ford had to put horses out on. For example, Mr Knibbs said in XIC that horses were on the AS very frequently. Paul, Catherine and Jonathan Franz called the land the Horses Field.[87] Paul Franz said in XX that there were always horses in the AS, although they tended to be at the northern end rather than the southern end. Mrs Brewis said in her questionnaire that she often saw Bina Ford riding her horses around the AS,[88] and Meriel Lee also said that she had seen Mrs Ford "exercise her horses on a circuit on the meadow".[89] The field shelter[90] would only have been constructed in around 2004 if horses were being kept on the field then, otherwise there would be no need for the shelter at all.

112. The consensus of the evidence from the Applicant's witnesses was that they recalled seeing between two and four horses at a time kept in the AS, and usually in the northern part of the AS (near to the paddocks and stables access into the field). Bina Ford's evidence shows that various horses were kept on the AS for various periods,

[85] Mrs Ditchfield recalled cattle on the land in 2011 (App Vol 3, p263/o), which fitted with Mr Franz saying in IQs that he saw cattle in the field 6 or 7 years ago. Mrs Oliver also said in XIC that she thought she had seen cattle once in the period 2009 to 2011.
[86] Mr Knibbs, for example, said in XIC that there may have been cows on the AS but he could not remember.
[87] App Vol 3, p279; p426/o, Q3; p434/o, Q2.
[88] App Vol 3, p234/o, Q28.
[89] App Vol 3, p327/o.
[90] See photo of the field shelter at Obj p90.

including periods of weeks and months. The use of the land by Bina Ford and those at her stables is considered further below.

113. Mr Campbell said in XX that people behaved differently on the AS when horses were present. He accepted that people would want to keep their dogs away from the horses and would generally keep their dogs under close control if not on a lead, and also generally keep to the paths. Mr Campbell also accepted that young children would not have been allowed to play unsupervised around horses, and described an incident when a horse had unexpectedly galloped up to him. Mrs Cox said in XX that the horses were huge animals and that she never saw children playing unsupervised near the horses.[91]

114. It is clear that the presence of animals on the land did affect the claimed use to some extent. Mrs Ditchfield, for example, said in XIC that when there were sheep on the land she would just walk around the edge of the field. Mr Bishop said in XIC and in XX that he avoided the field when cattle were there. Mr Kay said that cattle can be dangerous and that people would keep away from the cattle in the AS. Mr Stretton said in XX that he would not walk his dog in the field when sheep were there, even on a lead. He also said in IQs that he would not want to go into the field if it would scare the horses, and that there would be a number of times in a year when he would not go into the land as a result. He explained in XX that he would go to other places where there were no animals instead including Church Mead.

115. Mr Knibbs said in XIC that if there were animals in the field when he was walking his dog he would either avoid the field or put his dog on a lead. Other evidence shows that people tended to put their dogs on a lead when animals were present.[92] Mrs Oliver said in XX that she would have her dog on a lead when animals were in the AS (and she described in XIC putting her dog on a lead as soon as she saw a horse in the AS, in this case being ridden by Bina Ford). The evidence shows that, as would be common sense, people tended to have dogs on leads especially when there

[91] Other of the Applicant's witnesses, including Mr Kay, agreed that children would not be allowed to play around horses, as they were large animals and the children might get kicked or trampled.
[92] See eg App Vol 4, p689, Q32. Mrs Cox, for example, said in XX that she would not let her dog off the lead in the AS if she knew there were animals in the field.

were animals present in the AS. Mrs Ditchfield said in XX that she had only seen the odd dog not on a lead in the AS.

FOOT-AND-MOUTH

Introduction

116. The Applicant does not rely on s15(6) of the Commons Act 2006 in relation to the foot-and-mouth (F&M) outbreak, as is confirmed in paragraph 49 of its Opening Statement. The period of F&M cannot therefore be disregarded in this case.

117. Instead, the Applicant contends that local inhabitants continued to use the AS during the F&M outbreak. This submission is not credible and is contrary to the great majority of the evidence.

118. As noted at [46], and as the Applicant also accepted in its Opening Statement (para 3), the Applicant bears the burden of proof and this includes properly and strictly proving all the elements of the statutory definition. The Applicant bears the burden of proving both that all the claimed use was lawful throughout the 20 year period and that the claimed use by a significant number of the inhabitants of the locality continued throughout the 20 year period. The Applicant can make good neither of these two propositions in relation to the F&M period, at least from March to July 2001, as is explained further below.

119. It is notable that, as explained by Mr Hasell in his oral evidence, the Applicant considered the F&M position in January 2017, and visited SCC to view the files following Mr Saint's invitation to do so, but then produced no documentary evidence on F&M, either before or during the inquiry. The Applicant could have sought to adduce documentary evidence on F&M, as well as the oral evidence given in XIC by a few witnesses, but chose not to do so.

Whether the AS was used during March to July 2001

120. The F&M outbreak began on 20 February 2001. It was a devastating disease for farmers and filled the media for many months, especially in the early months of the outbreak. People were urged to avoid farmland to avoid the disease spreading[93] and people were advised against rural walks.[94] The NFU appealed for people to stay out of the countryside and Prince Charles urged people to keep movement in the countryside to a minimum.[95] The Chief Veterinary Office told people not to cross land where livestock are or may be kept.[96] By early March 2001, almost all footpaths were closed and walking was severely curtailed.[97] There was a widespread perception that the countryside was closed, which continued long after it had ceased to be the reality.[98] Counties including Somerset,[99] Wiltshire and Devon were affected by F&M.

121. In Somerset, there was a blanket closure of all footpaths in the county outside urban areas from March 2001 to June/July 2001.[100] The footpaths were closed even if no notices were posted,[101] but signs[102] were erected and there was also extensive local publicity.[103] Posters would also have been erected by NSP Parish Council.[104] There were cattle and sheep in the AS at the time that F&M struck and until the movement restrictions were lifted many months later.[105]

122. 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. They would have known this from the national and local media, even if

[93] Obj pp117, 167.
[94] Obj p167.
[95] Obj p169-170.
[96] Obj p188.
[97] Obj p146.
[98] Obj p146.
[99] See Obj p174 at 4.1.
[100] Obj pp175-185.
[101] Obj p185.
[102] See eg Obj p176 at 6.8 and p178 at 8.5.
[103] Obj p185.
[104] Obj p192.
[105] Obj p44 at 6.1, pp239-240 at 15-18, and p206 at 8 – as confirmed by Bina Ford in XX.

there were no specific notices or signs, or if they had not seen them. They would have known that they should not go into the AS and they would not have done so.

123. Some of the Applicant's witnesses agreed that they would have obeyed the countryside code.[106] Mr Hasell accepted in XX that he would follow the countryside code, including using stiles where there are stiles and following paths where there are paths, and that it was a reasonable inference that other NSP locals did the same. Other witnesses for the Applicant said that they would have obeyed the essential rules in the code or otherwise recognised the basic common sense rules of behaviour in the countryside. Mr Campbell for example put these basic rules of the countryside in XX as being to respect animals and generally behave in a responsible way in the countryside. Mr Kay said in XX that local people would have respected the basic common sense conventions of the countryside, including following paths where there are paths and keeping dogs under effective control. And Mrs Ditchfield said that most people in NSP are very respectful of the rules of the countryside.

124. This general tendency on the part of NSP residents to observe the basic rules of the countryside, as would be common sense, would also have applied to the extreme situation during F&M. Indeed, many of the Applicant's witnesses accepted that they would not have used the field during F&M.

125. Mr Bishop positively remembered not using the field during F&M and instead going elsewhere. In XX Mr Bishop said he did not walk any footpaths during F&M, including those on the AS, and instead walked elsewhere. He said that the position with the footpaths during F&M was widely known locally and that locals generally would have avoided footpaths during F&M.

126. Mr Bishop confirmed in re-examination (RX) that there were cattle in the AS in 2001 and that during the F&M outbreak he avoided the AS, as he avoided all footpaths during the F&M outbreak. He was clear that he was deterred from using the AS due to F&M, even though he did not remember seeing F&M signs anywhere around NSP.

[106] For example, Mr Hasell in XIC.

127. In response to questions from the Inspector, Mr Bishop repeated that he did not go on footpaths for a period of 4 to 6 months, and said that instead he would walk along roads or drive to other places to walk.[107] Mr Bishop explained in IQs that he knew from the media that they had closed the footpaths in the county. He only started walking on paths again when he heard that everything was clear.

128. Mrs Brewis said in response to questions from the Inspector that she remembered footpaths being closed during F&M and that it did not make sense to go through the AS or any field during the F&M outbreak. She said in XX that people respected the field and the animals. She also said in XX that she remembered the footpaths being closed and that she would have remembered if the AS paths were being used contrary to the closure. There would of course be good views over the AS from Ranmore Cottage. Mrs Brewis also said in XX that there was no reason why locals would not have observed the F&M restrictions and that locals knew that the countryside was closed during F&M.

129. Mrs Cox said in XX that, although she did not recall seeing notices closing the PROW on the AS, she did remember the publicity about closing PROW and also the advice to keep out of fields that may have animals in them. She said that she would not have gone into the AS or across the AS on the paths during the F&M outbreak. She said that there were plenty of country lanes to walk on. Mrs Cox confirmed in XX that she was sure she did not go into the AS during the F&M outbreak. She also said that she thought that NSP locals would also generally take notice from the news that they should not go into the AS during the outbreak.

130. Mr Kay also did not remember seeing signs on the AS entrances, but he did remember that footpaths had been closed throughout Somerset and agreed that this would have included the paths on the AS and also that local people would have known this at the time. He also agreed that people had been told to stay out of fields that may have animals in them, in order to stop spreading the disease by foot, and that locals would have observed these restrictions. In addition, Mr Kay said that it was perfectly possible that there was livestock on the AS at the time of F&M.

[107] He mentioned a country park towards Trowbridge.

131. Most of the Applicant's witnesses who were present during the F&M period were not asked in XIC about F&M and did not therefore say that they had used the land during the F&M period.[108] It is telling that most of the Applicant's witnesses who could have used the land during F&M were not asked in XIC whether they did or not.[109] When it was raised in XX, most of the Applicant's witnesses who were present at the time said that they did not use or would not have used the AS during the period of F&M closure.[110]

132. It is notable that witnesses do not remember seeing any F&M signs up anywhere in NSP, but it is unthinkable that there were none. Not only were such notices erected throughout the county, but NSP Parish Council said it was going to erect posters. By far the most likely explanation is not that there were no signs but rather that now, some 16 years on, people do not remember them.

133. Unsurprisingly, none of the Applicant's witnesses positively stated that there were no signs erected during F&M some 16 years ago. Those who commented on this said just that they could not recall signs in NSP including on the land. Just because witnesses could not remember seeing signs did not mean that they were not there. Mr Parker could not remember, even on the day he was giving evidence, that there was a fingerpost sign at UFC, which is right next to his house and is the entrance he says he uses to access the AS.

134. Mr Campbell said in XX that he was not asserting that there were no signs for F&M, just that he could not remember whether there were signs. Having considered the Parish Council minutes of March 2001,[111] Mr Campbell agreed that it was reasonable to assume that the posters were erected.

[108] For example, Mr Bishop, Mrs Brewis, Mr Campbell, Mrs Cox, Mr Franz and Mr Kay.
[109] F&M was not mentioned in any of the Applicant's witness statements and there were no questions in the pro forma questionnaire about F&M; nor were there questions in the questionnaire which could lead to a conclusion that people continued to use the land even during F&M even where they did not mention it (eg Questions 32 and 34 could not lead to such a conclusion being drawn, as they only ask about being "prevented from using the Land" and about attempts "by notice or fencing … to prevent or discourage use").
[110] For example, Mr Bishop, Mrs Brewis, Mr Campbell, Mrs Cox, Mr Franz and Mr Kay.
[111] Obj p192.

135. The suggestion put to Mr Hasell in RX, that the Parish Council would not have put up the posters on the weekend of 17/18 March 2001 because the powers to close footpaths were revoked is entirely misplaced. The F&M regulations made by SCC on 13 March 2001 would have continued in effect by virtue of the transitional provision in Article 3 of SI 2001/1078,[112] when that SI came into force at 11pm on 16 March 2001. The SCC Executive Board report of 2 July 2001 is clear that the closure by regulation was effective and remained in place through to at least June/July 2001.[113] The footpaths were and remained closed in March 2001 and there would have been no reason whatsoever for the Parish Council not to erect the posters it resolved to erect on that weekend in March 2001.

136. Although F&M signs are neither a legal nor practical necessity for the observance of the footpath closure, the Applicant's oral evidence on F&M focussed on the alleged absence of signs on the AS entrances. It is the lack of a memory of seeing signs which has led the few witnesses who gave oral evidence for the Applicant on F&M to say that they must have continued to use the land. Those witnesses accepted – as they had to – that they would not have used the land if they saw signs on the AS entrances.

137. The lack of signs on the AS entrances – if that was the position – would not be a genuine reason not to have heard of the restrictions that applied during F&M, as they were clearly very much in the news in the relevant months (February to July 2001). None of the witnesses could recall seeing F&M signs in NSP but many of the Applicant's witnesses said that they kept out of the AS at the time. That would have been the general pattern. People did not need telling what the situation was by signs when they would already have known so much from the media and elsewhere.

138. The clear advice in February 2001 was to keep out of the countryside and to keep out of fields which may have animals in them, as would have applied to the AS. It was widely know at the time, including via the media, that footpaths outside urban areas were all closed. As Mr Campbell confirmed in XX, the AS is part of the countryside and is perceived as being part of the countryside. There can be no doubt that it would have been covered by the footpath closure and that people would have appreciated

[112] The Foot-and-Mouth Disease (Amendment) (England) (No 4) Order 2001.
[113] See Obj pp175-176 (para 6.3).

this. Mr Hasell said in XX that the AS was definitely rural rather than urban and that if SCC had closed footpaths he presumed it would have covered the AS.

139. Not only is it incredible that people would have used the AS during the F&M outbreak, it is also incredible that people could recollect the specific 4.5 month period now, some 16 years later, and say, for certain, that they did use it then – especially when the few of the Applicant's witnesses who did suggest this had memories which were very far from clear.

140. Mr Parker was asked a leading question in XIC about whether he accessed the land during the period February to May 2001. That answer should be given limited weight given how it was elicited and how limited the evidence was. In XX, Mr Parker maintained that because his shooting had not been interrupted by F&M, and because he could not remember seeing F&M signs on the AS, he would have continued to use the land. Not only did he have no specific memory of continuing to use the land at this time, it was apparent that the inference he drew from the continuation of his shooting was entirely misplaced. The period of F&M footpath closures fell between the end of the shooting season on 1 February and the commencement of buying in young birds in summer 2001. Mr Parker's insistence that there were never any footpaths closed due to F&M was obviously wrong.

141. Mr Parker's evidence was simply not credible. This applies to his evidence about using the land during the F&M period but it also applies to other claims by him. His oral XIC about his gun dog training was grossly over-stated. If he was using the AS for training dogs as much and as often as he said, it would have been seen. Not only would it have been seen by Bina Ford but it would have been seen by other people. Apart from the Brewis family – who were referring to another person dog training and not Mr Parker – none of the Applicant's many questionnaires refer to having seen dog training on the AS. As was apparent from the site visit, Mr Parker's claims of what he could see from his conservatory were grossly over-stated. He also said that his conservatory was set only 18 inches below the AS, which was a gross under-estimate.

142. There were various other obvious errors and contradictions in Mr Parker's oral evidence,[114] as well as guesses rather than recollections. When asked to estimate the date when the field shelter was constructed in the AS next to his house, he twice said it was 1985, which was wrong by 20 years. Mr Parker said that he was absolutely sure that there had been jumps on the AS between 1993 and 2013, and that they were there all the time. He maintained that position even after being shown the aerial photographs. Overall, Mr Parker's evidence was hopelessly confused and unreliable. It is entirely incredible that he would remember what was happening during the four specific months in 2001 he was asked about.

143. Mr Knibbs was another witness with inaccurate memories. When asked when F&M was, he said it was in the period from 2010 to 2012, being wrong by a decade. When asked how long F&M lasted, he said it lasted two or three years. It lasted only one year. Mr Knibbs could also not remember ever seeing the field shelter which was erected around autumn 2004 and was on the AS for at least a couple of years if not longer. He was also significantly wrong about the date he got his first dog.[115]

144. Mr Knibbs also did not use the land very frequently – once a week in good weather and closer to once a fortnight otherwise – and usually at weekends. He said that periods of a month could pass without him going into the AS. His descriptions of his walking routes show that his walking was mostly on lanes, predominantly Tellisford Lane,[116] and not on the AS. He said that he had other places he would go to walk his dog. This might well explain why F&M footpath closures did not make so much of an impression that he would remember them today.

145. When asked in XIC whether he saw F&M notices on the AS, Mr Knibbs said he did not recall seeing any but could not honestly say with any certainty. He did not say that there were no signs, just that he did not remember them. Mr Knibbs did say in

[114] Including as to development plans he had seen, the golfing he claimed to have seen on the AS, whether he had read the Applicant's evidence and how much of it he had read, whether he could see the AS from all his windows, etc.
[115] In XIC he said it was 1994 or 1995, but when asked in XX to work it back from the known age and date of death of the dog, he accepted that it could not have been earlier than 1998 or 1999 (as the dog was 16 years old when it died in c 2013).
[116] Also eg Bloody Lane and Mackley Lane.

XIC that if he had seen signs he would not have gone into the AS. In reality, people would have obeyed the F&M restrictions however they heard about them.

146. Mr Hasell said in XIC that during the F&M period in 2001 the whole village focus was on preparing for the public inquiry on the chicken factory site. He said in XIC that the work was of such magnitude that it seemed to engulf the whole village. He was doing this in his spare time whilst also working as A&E operations manager in Bath and helping to co-ordinate a new hospital building project. This is likely to explain why Mr Hasell did not remember F&M locally – he was absorbed by fighting the development proposals. This would apply to the other anti-development residents of NSP, including of course some of those who gave oral evidence to this inquiry. Mr Hasell's memory of 2001 was poor, even for events of importance to him.[117] In XX he said he could not remember some things like when the fingerpost sign was erected on the AS or when the stiles at UFC and TE were changed to gates. Mr Hasell's use of the AS was in any event very limited: he did not own a dog and would just walk through the AS, mostly as part of a larger walk, only several times a year and mainly then in the summer.[118] There is no reason at all why he would have remembered the PROWs on the AS being closed prior to the summer in 2001, some 16 years ago. He agreed in XX that he could not specifically recall walking in the AS in 2001.

147. The evidence shows that there was livestock being kept in the field around 2001. Mrs Brewis, for example, described an attack by a dog on a sheep in the field in 2000. Mr Knibbs said in XIC that if animals were in the field he would try to avoid it or put his dog on a lead. He would, therefore, have avoided the AS during F&M as there was livestock in the field at the time. This is made clear in the statutory declaration of Terry Mills[119] and confirmed as being correct also in Barbara Keevil's statutory declaration and in Bina Ford's evidence.[120] None of the Applicant's witnesses has given evidence positively to show that there was not livestock in the AS during F&M.

[117] Mr Hasell joined the Parish Council in 2001 but could not remember whether he was co-opted or had to stand for election. Nor could he remember how many times he had stood for election.
[118] All accepted by Mr Hasell in XX.
[119] See Obj pp239-240.
[120] See Obj p44.

148. Bina Ford was clear in her written and oral evidence as to why she remembered there being livestock on the AS during F&M, namely that she could not use the AS for riding because of the presence of livestock and had to use the manege at Norton House every day when training for her appearance representing Britain at the competition in France in May 2001.[121] Mrs Ford explained that she needed to have three fit horses to take for the competition and that she was not able to ride on her own land as she normally would because of livestock there during F&M. She said that she could remember this very well. She said it was a long period of time to ride in only one place.

149. Mr Campbell made it clear in XX that he was not saying that people did use the AS during F&M. He said that rational and sensible people would have kept out of the AS during F&M and agreed that people in NSP would have behaved in that way. He also accepted that the advice not to use footpaths and keep out of fields that may have animals in them was in the news, and was advice that locals in NSP would respect, and that it was a reasonable assumption that locals would have observed the restrictions.

150. There is strong evidence that people would not have used the AS during F&M and did not use the AS during F&M. The only evidence to the contrary is vague and general evidence from a couple of witnesses whose memories were clearly unreliable. The only rational conclusion from the totality of the evidence is that people did not use the AS during the period of closure from March to July 2001.

Whether a significant number of the inhabitants of the locality continued to use the AS

151. Alternatively, even if not everyone ceased using the AS during F&M, those who allegedly did use the AS during F&M in the 4.5 month period from March to July

[121] Mr Edwards asked Nikki Baker whether she remembered F&M and Miss Baker said that she did not and could not remember that they had to stop going to shows. This was wrong, as both Ms Jhaveri and Mrs Ford confirmed. It is worth remembering that Miss Baker would have been about 11 years old at the time of the F&M outbreak (she was 27 years old in January 2017), would not have really understood what was happening with F&M, and that nothing would have happened to upset her at the time of F&M as she continued to ride at Norton House, as Mrs Ford explained in IQs.

2001 would not amount to a significant number of the inhabitants of the locality. In the 2001 Census there were 848 people living in the parish of NSP.[122]

152. Even taken at its highest, the Applicant's evidence would show only a handful of people using the AS during F&M. Indeed, Mr Knibbs in IQs said that he did not know anyone else who used the AS during the F&M outbreak and had never met anyone else on the AS during the outbreak.

153. The Applicant's evidence must also be seen in context of the Objector's evidence – both in sworn statutory declarations[123] and in oral evidence – which shows how Bina Ford and Terry Mills would have been vigilant to ensure that no one was using the AS during F&M. Anything more than a purely de minimis level of use of the AS would have been observed.

154. Therefore, even if one or two people did continue to use the AS during the F&M period of PROW closure, it is apparent that this was not the general pattern. It would have been very much the exception rather than the rule.

155. The evidence goes nowhere towards discharging the burden of proof on the Applicant to show that a significant number of the inhabitants of the parish continued to use the AS for LSP during the 4.5 month period of PROW closure during the F&M outbreak from March to July 2001. The only rational conclusion open on the evidence is that a significant number of the inhabitants of the locality did not continue to use the AS for LSP throughout all the 20 year period.

The lawfulness of any use during the F&M footpath closure period

156. Even if there was use during the F&M footpath closure period from March to July 2001, it would have been unlawful. The AS was not closed under the Foot and Mouth Disease Order 1983 but the PROWs on the AS were closed under the 1983 Order.

[122] Obj p289.
[123] See eg Obj p44 (para 6.1) and p240 (para 18).

157. As is recorded in the SCC Executive Board report dated 2 July 2001, a declaration closing rights of way was made by SCC on 1 March 2001, pursuant to the provisions of the 1983 Order which were inserted by the Foot-and-Mouth Disease (Amendment) (England) Order 2001 (SI 2001/571). SI 2001/571 came into force at 2pm on 27 February 2001.

158. The SCC declaration was made under Article 35B of the 1983 Order, as inserted by SI 2001/571. It was made on 1 March 2001 (I13). The declaration provided that "with effect from 2 March 2001" all public footpaths in the county were closed and the movement of any person on any such right of way was prohibited. The only exception was in paragraph 2, namely those footpaths lying wholly within urban areas. The declaration clearly applied to the AS, as it is not lying wholly with an urban area.[124]

159. Paragraph 3 of the declaration recorded that contravention of the declaration was a criminal offence under s73 of the Animal Health Act 1981. This was also noted in the explanatory notes to SI 2001/571.

160. Although the Foot-and-Mouth Disease (Amendment) (England) (No 2) Order 2001 (SI 2001/680) substituted a differently drafted Article 35B in the 1983 Order as from 2 March 2001, which allowed regulations to be made by local authorities, Article 3 of SI 2001/680 provided for the continuing effect of a previously made declaration. Article 3 provided that any declaration made by a local authority under Article 35B of the 1983 Order prior to its substitution by SI 2001/680 would continue to have effect. The SCC declaration had been made on 1 March 2001. It was therefore unaffected by the change made by SI 2001/680. SI 2001/680 was expressed to come into force at 7pm on 2 March 2001 (Article 1).

161. SCC then did make regulations under the substituted Article 35B on 13 March 2001 applying to all of Somerset except the urban areas. As is recorded at paragraph 6.3 of

[124] As confirmed in XX by eg Mr Campbell and Mr Hasell.

the Executive Board report,[125] SCC made regulations which replaced the 1 March 2001 declaration on 13 March 2001. The declaration clearly continued in effect until it was replaced by the 13 March 2001 regulations. Contravention of the regulations would also have been a criminal offence under s73 of the Animal Health Act 1981, as the explanatory notes to SI 2001/680 made clear.

162. It appeared to be suggested in the XX of Ms Jhaveri that SI 2001/680 removed the power conferred by SI 2001/571 before it could be exercised. This is plainly wrong for two reasons. First, as Ms Jhaveri said in XX, the declaration was made by SCC on 1 March 2001 before SI 2001/680 was made on 2 March 2001.

163. Secondly, it is well-established that where a provision is said to come into force on a particular day, it takes effect at the beginning of that day. 2 March 2001 began immediately after midnight on 1 March 2001. The 1 March 2001 SCC declaration would therefore have come into effect at the first moment of 2 March 2001, as the clock ticked past midnight into 2 March 2001, some 19 hours before SI 2001/680 took effect at 7pm on 2 March 2001.

164. The Foot-and-Mouth Disease (Amendment) (England) (No 4) Order 2001 (SI 2001/1078) was made on 16 March 2001. SI 2001/1078 removed the power in Article 35B of the 1983 Order but took effect from 11pm on 16 March 2001 (Article 1). As is recorded in the Executive Board report, SCC made its regulations under Article 35B on 13 March 2001. Again, there was a transitional provision. Article 3 of SI 2001/1078 provided that any restrictions on access to footpaths imposed under the 1983 Order before it was amended by SI 2001/1078 would continue.

165. As is clear from the statutory provisions and also from the SCC Executive Board report, all footpaths outside urban areas in Somerset were closed from March 2001 onwards without a break. There would have been no period when SCC did not have an effective order (whether declaration or regulations) in place. The declaration ran from 2 to 13 March 2001 and the regulations ran on from 13 March 2001. The

[125] Obj p175.

contemporaneous documentation shows that all footpaths in Somerset outside urban areas were closed from 2 March 2001 through to June or July 2001.[126] In this case, the closure of the PROWs on the AS was effective from 2 March 2001 through to 14 July 2001.[127]

166. As noted above, the Applicant has the burden of proof to establish that the claimed use was lawful throughout the 20 year period. During the period of the F&M footpath closure it would have been a criminal offence to use the PROWs on or to access the AS.

167. Whilst it was possible to access the AS via the Willows gate, over walls or fences, or via the Tellisford Lane field gate,[128] these accesses to the AS were not used by the local inhabitants.[129] Mr Campbell said in XX that in practice the only way used to get into the AS was on the PROWs. Mr Hasell accepted in XX that people would access the AS via the four PROWs.

168. Accessing the AS via a PROW, as people would have done if they did access the AS during the period of the F&M footpath closure, would have been criminal and not therefore lawful. Moreover, walking on or otherwise using the PROWs on the AS during the period of the F&M footpath closure would have been criminal and not therefore lawful. As was accepted by the Applicant's witnesses in XX, as noted earlier, people would always be on some PROW at some point when using the AS, both as they came onto the AS over the stiles and as they moved around the AS, given that the AS was cross-crossed by PROWs. Accessing and using the AS during the period of F&M footpath closure would, therefore, have been criminal and not lawful.

[126] See Obj pp175-176, 181-183, 185.
[127] See Obj p109, para 4.3. Ms Jhaveri said in her oral evidence that she was pretty certain that this was the correct position and that there was very little uncertainty as although she had not seen the SCC regulations the Executive Board report was very clear. At the earliest, the PROW on the AS would have been re-opened on 2 June 2001, leaving a closure period of 3 months (confirmed by Ms Jhaveri in oral evidence).
[128] As Mr Hasell said in RX, the Tellisford Lane field gate was normally locked. As was seen from the site visit, given the way the gate and the stile was constructed, the field gate would only remain shut if it was locked (or fixed in some other way) to the upright of the stile. Mr Hasell accepted in XX that people did not use the field gate to enter the AS in his experience.
[129] Save for those who specifically identified this, eg Ms Graham and Mrs Ditchfield, who both arrived well after F&M. Mr Kay said he had used the field gate in around 2003/2004 when he was taking a bicycle into the AS for his children to learn on.

169. 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. The Supreme Court in *Lewis* (AB25) quotes at paragraph 29 the case of *Fitch*, which said that "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". Lord Hope also says in *Lewis* at paragraph 67 that the word "lawful" indicates that the sports and pastimes "must not be such as will be likely to cause injury or damage to the owner's property".

170. Even if some of the claimed activity on the land during F&M was not on the PROWs, it would still not count as lawful sports and pastimes, as it would be undertaken following unlawfully accessing the AS and would include at least partly if not wholly unlawful activity on the PROWs on the AS. It is clear from *Fitch* that any use of the AS after entering in an unlawful way would not qualify as a lawful sport and pastime.[130]

171. Accordingly, the position was that:

(1) any use during the period of the F&M footpath closure from March 2001 to July 2001[131] would have been unlawful due to the criminal sanctions applied to contravening the F&M restrictions, including SCC's declaration and regulations, as access to the AS in practice would have occurred in an unlawful way and any recreational use of the AS would inevitably have included part unlawful use of PROWs on the land; and/or

(2) any use during the period of the F&M outbreak from 20 February 2001 until at least the end of 2001 – the period when livestock was kept in the AS during the F&M outbreak[132] – would not have been lawful for the purposes of s15(2)

[130] In much the same way that use after forcible entry would be *vi*.
[131] Or at the earliest June 2001.
[132] Obj p239, para 16.

as it would not have been a fair or proper use, and would have risked causing injury or damage to the livestock by infection.

OBSERVATION AND USE BY OR ON BEHALF OF THE LANDOWNER

172. There are photographs in the Objector's evidence which give an idea of the views that would have been available across the AS before the last set of houses were built.[133] There would have been views from the garden of Longmead House at ground level at the top of the ha-ha, and there would have been views from the paddocks and the teaching field. It was possible from the site visit, in the positions of the ha-ha and the post and rail fence, to get an appreciation of what those views were. There would have been very good views of virtually all the AS, except perhaps the southern tip and the far end behind the mound and the tree.

173. Those views would have been available to those who lived at Longmead – including Bina Ford, those who lived with her whilst working at the stables, and her father – and those who worked at the stables and who would have been in the paddocks or the teaching field for much of the time. The inquiry heard evidence from Claire Newport who worked there as a groom from 1995 to 1997 and from Gail Baker who worked there as a groom from 1999 to 2001. There would be a very great deal of surveillance of the AS by the landowner and those who worked for and visited her.

174. The AS would also have been under observation by those people from the stables who went on the AS. This would include those who went on to the AS to exercise or ride horses. Bina Ford went on to the AS to ride the horses she trained, both those she owned and those she was training for other people, two or three days a week for some hours.[134] Others who had horses at the stables would do likewise, as for example Claire Newport and Gail and Nikki Baker explained in their oral evidence.

[133] See eg Obj pp227, 255A, 256.
[134] Bina Ford's evidence about the use of the AS for training horses was corroborated by others who gave oral evidence who worked for her including Claire Newport and Gail Baker.

175. It would also include those who went on to the AS to check on the horses that were kept in the AS from time-to-time. The evidence from, for example, Claire Newport and Gail Baker showed that horses would be checked two or three times a day when they were kept in the AS, for up to half an hour each time.

176. Mrs Ford explained that there were essentially two parts to her work with horses at NSP. The first was training horses for showjumping, both horses she owned and horses which were at the stables for her to train. This did not involve jumping so much as keeping the horses in peak condition. The other part of the work at NSP was teaching showjumping. Mrs Ford did not teach many children and worked mainly with experienced showjumpers who had their own horses. It was advanced training. As she said, she had trained four Olympic medallists over the years, including three at NSP.

177. The evidence of Bina Ford was that she had a number of horses in training at any one time – both horses she owned and others that she had for training – and that they would be trained before lunchtime, with the training commencing at whatever time was necessary to get the training done by lunchtime.[135] The number of horses in training would depend on the number of stables available, and varied from around four to a maximum of seven, with the average over the years being closer to four. Each would be trained for about an hour a day, except when particular horses were at competitions or resting.

178. The training done each day would vary[136] but would include working them on the flat, as Mrs Ford described it, on the AS two or three days a week. The training was not for jumping[137] but to keep them fit and supple. Mrs Ford described that on the AS she would start and end by walking the horses around to warm them up and down, and that she would canter the more "fizzy" horses around the edge of the AS and ride the more "stodgy" horses around in circles in the north-eastern quadrant of the AS, where she used an area of 40m by 60m.

[135] Sometimes eg a 5am start to get it done by lunchtime.
[136] It would include for example what was described as "road work". Mrs Ford said that she had to undertake a variety of training in order to keep the horses interested.
[137] Mrs Ford explained that the horses were experienced jumpers and did not need to train to jump at home.

179. The showjumping training which would take place from March through to October each year would usually be after lunchtime and would go into the evenings in the summer. Mrs Ford explained that she had to spend a lot of time in the teaching field, not only when teaching but also moving jumps between lessons and waiting between lessons in good weather. Mrs Ford explained that she would spend most of the daylight hours after lunch teaching, five days a week on average, when she was not away teaching or competing. As Mrs Ford explained, although the great bulk of the teaching was on the teaching field, occasionally she would come through into the north-eastern part of the AS to help pupils with their "flatwork".

180. The evidence given by Bina Ford is corroborated and supported by the evidence of those who lived and worked with her. They would have spent considerable periods of time in the paddocks and the teaching field,[138] including moving jumps between and during lessons, and sitting or standing around during lessons, as well as riding on the AS. This was not confined to the working week and was not confined to office hours. This evidence made clear that horses were regularly and frequently ridden on the AS and that the AS was used to turn horses out on, sometimes for significant periods of time.

181. The evidence given by Bina Ford is also corroborated and supported by the evidence of those who brought their daughters for lessons and who would have to wait around the teaching area during the lessons. Some at least of the Applicant's witnesses also confirmed that Bina Ford would often have been teaching and working just to the north of the AS, and that she put horses out into the AS.[139] There is also evidence from others who had lessons from Mrs Ford, including some who kept their horses at her stables.

182. Of course the use of, or ability to observe, the AS differed between witnesses, with some being more comprehensive than others. But all were consistent. And all were clear in their recollections, including their opportunity to see what if anything was happening on the AS and why they would have remembered it. Miss Baker also

[138] Claire Newport said it would have been 50/50 the time spent in the yard and stables as against the time spent on the land south of Longmead House.
[139] For example, Mr Campbell in XX. He also confirmed that Mrs Ford would have cared for her horses, not least as she made her living through them.

made it clear in IQs that anything like children playing in the AS while horses were being ridden in the teaching field would definitely have spooked the kind of horses used for jumping and would have been noticed. She said that they would definitely have been aware of anything like that happening on the AS whilst they were in the teaching field.

183. In XX, Bina Ford was asked whether she knew some of the people who had submitted questionnaires. What was not put to her was what those questionnaires show. Geoff Angell said he used the land from 1936 to 1980.[140] Fred Du Plessis just used the land for walking.[141] Richard Williams was given permission by Bina Ford to use the AS.[142] David Millett said he used the land from 1949 to 1960.[143] Bernice Palmer, who used the land from 1930, only used it as an adult for walking.[144] It is not surprising therefore that Bina Ford did not see these people using the AS for recreational uses during the relevant 20 year period, because their evidence shows they did not do this.

184. In IQs the Inspector asked Mrs Ford how the evidence of the two parties could be reconciled. She very fairly recognised that she was away most weekends, sometimes just for a (long) day and sometimes overnight. It is apparent from the evidence, as would be common sense, that the claimed use was more at the weekends than during the week. This could be a part of the explanation. The Applicant's witnesses, like for example Mrs Cox, said that they tended to use the AS more at weekends.[145] But of course using the land when the owner was known to be away would render such use *clam* as it would be an activity that the landowner would not see [50].[146]

185. There are other reasons for the apparent difference in the evidence between the parties. First, the Applicant is claiming as recreational use for TVG purposes use which was in fact, and would have appeared to be, referable to the use of the PROWs – on the lines walked – and the occasional excessive use of the PROWs. Secondly,

[140] App Vol 4, p537/o, Q5.
[141] App Vol 4, p596, Q14.
[142] See eg App Vol 4, p661.
[143] App Vol 4, p674/o, Q5.
[144] App Vol 4, p700, Q13.
[145] Although people also claimed to use the AS during summer evenings and during school summer holidays.
[146] See *Gadsden* at 14-60.

the Applicant's evidence is over-stated and exaggerated. As has been noted earlier, the Applicant's evidence represents only snapshots focussed on occasions when the land was used most intensively or most memorably; the true and complete picture cannot be assembled from a collection of such snapshots. Thirdly, it is apparent from the evidence that the majority of the claimed use which was less clearly related to a PROW use – eg children's play – was focussed in the southern tip. This would have been furthest away from the areas used by Bina Ford – both the north-eastern part of the AS and the teaching field – and therefore less likely to be seen and heard by her and those who worked for and with her. It would also have been screened in large part by the mound and the tree.[147]

186. When these matters are borne in mind, and the very limited nature of the claimed recreational use is properly understood – as was clear from the oral evidence and is apparent from a careful examination of the Applicant's written evidence – it is perfectly possible to understand why Bina Ford and those living and working with her did not see any recreational use of the AS. That is because it was not happening to any significant extent.

187. As Bina Ford and the Objector's other witnesses explained cogently, not only would any significant recreational use of the AS beyond walking on the paths have been apparent, it would have been incompatible with the use made of the AS, especially by those riding horses on the AS.

188. The courts have asked sometimes whether recreational use was sufficient to have suggested to a reasonable landowner that the inhabitants were exercising a right to engage in lawful sports and pastimes across the whole of the site. This is because in most cases of TVG applications there was an absentee landowner. This case is very different. In this case the landowner was not only living there but was working there, on and immediately next to the AS.

[147] In IQs, when asked by the Inspector if it was possible to see all parts of the AS equally well, Mr Lippiatt said that the further south you looked the further away it was, and that what was obscured by the mound and the tree was the only part that could not be seen. Mrs Ford said in XIC that the view from the teaching field over the AS was absolutely clear until the tree and the mound and that people could not be seen behind either the mound or the tree.

189. The law is that those claiming a TVG right must by their conduct bring home to the landowner that a right is being asserted against him (or her). When asking how the matter would have appeared to the owner of the land, we know the answer to that, as Bina Ford has told us in her written and oral evidence. It looked like people using – and occasionally attempting to over-use – the PROWs.

190. Whenever Bina Ford saw people exceeding the entitlement conferred by the presence of the PROWs, she challenged them. She did not have to challenge them very often, because people did not often go beyond what the PROWs on the land allowed them to do.[148] Mrs Ford described in XX that she challenged people who in her opinion were trespassing on her land. She said that she had to act when she saw a couple of children who were playing near TE on three occasions, and that they moved off pretty quickly when they saw her coming.[149]

191. Mrs Ford was clear in XX that she did not have to challenge people very often, and did not have to put up any signs, because there was no need – because people did not wander from the paths and, except on a few occasions, did not do anything other than what they would be expected do to on paths.

192. Mrs Brewis, who knew Bina Ford, agreed in XX that Mrs Ford would have cared for her horses, would have ensured that nothing happened to put them at risk, and would have kept the land in good condition and free from hazards. She also said that she had seen Mrs Ford and others from the stables riding on the AS. And she agreed that Mrs Ford would often be teaching and working just to the north of the AS, from where there were views across the AS. Mrs Brewis also said in XX that if children had been playing on the AS it would have been seen and heard from the teaching field. This all supports Mrs Ford's evidence about how she would have behaved towards people trespassing on the land away from the PROWs.

193. It is important not to lose sight of the evidence of Bina Ford as landowner, and those others who lived and worked with her there and who corroborate her account of the

[148] This was corroborated by eg Gail Baker in XX. She said she knew Bina Ford would have challenged anyone off the PROW but that this was not necessary because such use was a non-issue.
[149] The first time was on foot and the second two times Mrs Ford said all she had to do to clear them off was ride in their direction.

very limited use of the AS and that it rarely if ever went beyond the walking of the paths on the AS, with or without dogs.

194. There is another reason why the difference in evidence might have arisen and that is the situation in the last five years or so of the relevant 20 year period, especially from 2011 to 2013. Bina Ford moved away in 2011. She was not there to keep watch over the AS any more, nor to use it. By 2011 Terry Mills had also stopped using the AS. The AS was not subject to surveillance in the way that it was previously. It is also fair to say that the AS was used less in the period from 2008 to 2011. Bina Ford began to wind down her teaching at NSP from 2008, after her back operation in 2007. In the period from 2008 to 2011, Terry Mills was only using the AS occasionally during the winter. There would have been less surveillance during the period 2008 to 2011, and then far less from 2011 to 2013.

195. When the Applicant's witnesses come to give evidence, they will report what they recall best or most clearly. This is likely to be use during recent years. It might be use from 2013 to 2017, after the relevant 20 year period. But if recalling use during the relevant 20 year period, it is far more likely that people would recall what they had done in recent rather than early years. It is also the case that some of the Applicant's witnesses only moved to NSP after Bina Ford began winding down her teaching at NSP or, indeed, after Bina had moved away entirely in 2011.

196. It is very likely therefore that in evidence Bina Ford was recalling the time when she lived and worked at NSP, whereas the Applicant's witnesses were recalling a time when she did not live there or at least did not work there as intensively as she had done prior to 2008. Mrs Ford's evidence relates to the bulk of the relevant 20 year period. The difference in the evidence can readily be understood once it is appreciated that most of the Applicant's witnesses would not be focussing – or even have been able to recall – the first 15 years of the relevant 20 year period.

197. It is also notable that Steve Nelson lived in Longmead Close for almost four years from January 2011 to September 2014, as well as working at the development site for much of the time, and that he did not see any significant recreational use of the AS.

198. It must also be remembered that Bina Ford's father lived in Longmead House for much of the 20 year period. The evidence from both sides was that the canopy of the trees at the bottom of the garden of Longmead House was sufficiently high to be able to see southwards towards the AS at ground level. There are photographs which give an indication of what that view would have been like.[150] Mrs Ford explained in XX that her father would have told her if he had seen or heard anything happening on the AS when she did not.

CLAIMED LINEAR AND FOOTPATH RELATED USE

199. Given that so much claimed use in this case was either on or near the PROW, or was a "linear" use on the established worn paths, very careful consideration needs to be given how to treat the evidence in light of the law. The law was summarised at [53]-[56].

200. First, where there are already PROWs, use would only count for TVG purposes if it is not reasonably explicable as referable to the existence of the PROWs, including the occasional excessive use of the PROWs. When considering this it is necessary to bear in mind what can lawfully be done as part of a public footpath use. This is wide, as was established in *DPP v Jones* [1999] 1 AC 240. It includes things done when out walking like sketching, photographing, picnicking, children playing around, watching nature, and taking in the view.[151]

201. Given the presence of PROWs criss-crossing the AS, and in particular the concentration of PROWs near UFC and TE, a great deal of use would have appeared to have been happening on or near PROWs on the AS. As the Applicant's witnesses agreed in XX,[152] the AS was available for people to use on the PROWs, so there was in practice no ability to stop things happening on or near the PROWs. Almost all the types of claimed uses would fall within the ambit of what could be reasonably explicable as referable to the existence of the PROWs, including the occasional

[150] See eg Obj p256 and also p255A (from a higher level than ground floor).
[151] See eg *DPP v Jones* at 255H-256A, 257D, 266E, 279D-E, 280C, 281E-F.
[152] Mrs Brewis and Mr Kay for example.

excessive use of the PROWs. This would not only include those activities listed above, but also picking fruit and cycling. Overall, a great deal of the claimed TVG use would have to be discounted from consideration, namely almost all of that which was on or near the PROWs.

202. Secondly, there is the position where there is not (yet) a public footpath. This would apply to the claimed use on or close to the worn paths on the AS. This would include the eastern route from TL to NE, as well as the route from TE to TL, as well as any other non-PROW parts of the circular route around the edge of the AS. The question is how it would have appeared to a reasonable landowner. Unless the evidence unambiguously shows that the use in question represents the assertion of a right to indulge in LSP across the whole of the land, the use should not be counted for TVG purposes.

203. In this case, the great majority of the use which was not on the PROW was on the other worn paths. This includes not only walking but also dog walking, running, jogging, cycling and various other activities which took place on the worn paths, including walking along the eastern path picking blackberries or looking at the natural environment.

204. It is clear that the great majority of the use of the land was for walking, with and without dogs.[153] In her questionnaire, for example, Mrs Ditchfield said that "lots of people just use [the AS] as a short cut, regular walking or dog walking".[154] This was reinforced by for example Mr Hasell in XIC.[155] When asked to describe the use of the land in XIC, Mrs Brewis spoke of people regularly walking across the paths and around the boundary with their dogs. This was a common pattern. It was walking, including with dogs, which was described as the main use of the land by the witnesses. Even then it was not all that frequent.[156]

[153] Mrs Brewis said in XIC that her use was "just walking" apart from jogging around when she had health problems.
[154] App Vol 3, p275/o, Q17.
[155] He said in XIC he would use the AS as a short cut when he was visiting as it would avoid the narrow pavements on the main road and offer a more pleasant way to walk.
[156] It is notable that, for example, Mr Saddiq confirmed in response to questions from the Inspector that the only other people he had ever seen on the land were dog walkers, and these only occasionally when he was on the land. Mrs Ditchfield said in IQs that, including both what she saw from her home and when she was on the land, she might see a dog walker on the land once a week in the summer.

205. Some of the walking was on the PROWs. Some of the walkers did stick to the PROWs.[157] Mr Knibbs said that people walking dogs tended to stay to the defined public footpaths.[158] Most of the rest of the claimed walking was on the circular route around the perimeter.[159] This is apparent from the written statements as well as the oral evidence given at the inquiry.[160] In her questionnaire, for example, Mrs Oliver said that she used the circular footpaths as a walking and jogging circuit.[161]

206. When Mr Campbell was asked in XIC to describe the walking he had seen, he described walking across the land from UFC to TL – saying it was on the general route of the PROW – and along the northern and eastern boundaries (the former also being a PROW route). Mr Bishop, for example, in XIC said that people would generally walk in a circuit around the land, whether or not they had dogs. He simply walked through the land as part of the route of one of his regular circular walks around NSP.[162] As the map on the side of the George shows, there is no shortage in NSP of PROWs and country lanes to form walking routes. Many people would simply have been using the AS as part of a larger route. Many people would not have been walking on the AS very often, given the choice of other routes in and around NSP available to them.

207. Mr Campbell said in XIC that, of those walking, the majority were dog walkers, but that there were also some without dogs. Again this is a typical description given by the Applicant's witnesses of what they had seen.

208. The Applicant's other witnesses also described dog walking as being on the boundary route formed of the eastern, western and northern paths, or diagonally across the

[157] Mrs Brewis in XIC.
[158] App Vol 3, p317, para 7.
[159] Mrs Brewis in XIC, for example, described people walking on PROW, from gate to gate, and around the perimeter.
[160] See eg App Vol 3, pp363, 452 (Q12).
[161] App Vol 3, p344, Q14; and XIC.
[162] See App Vol 3, p227/o. Also, Mr Stretton described in IQs that he would "circumnavigate" the field as part of a longer walking route, as a figure of eight or a wider loop – he would simply be walking the land as part of a longer walking route.

AS.[163] Ms Graham, for example, said in IQs that most people were walking dogs on the defined routes. Mr Hasell said in XIC that dog walkers tend to walk the perimeter of the AS. And Mrs Oliver also said in XIC that dog walkers would "naturally" walk around the AS. Mrs Ditchfield said in XX that most people would walk their dog around the edge and that you would only see the odd dog walker in the main thick of the field.

209. It was also apparent from the oral evidence that much of the dog walking on the AS was with dogs on leads. Mr Bishop, for example, said in XIC that he always had his dog on a lead. Dr Awan said in XX that he had his dog always on a lead. Other of the Applicant's witnesses described seeing dogs both on and off the lead.[164] Mr Knibbs said in XIC that if there were animals in the field he would either avoid it or put his dog on a lead, even though it could be trusted to follow him if it was off a lead. There was also limited evidence of balls being thrown for dogs. Indeed, hardly any of the Applicant's witnesses described balls being thrown for dogs.[165] As was noted at [55], a dog's wanderings would not in any event suggest to a reasonable landowner that the person walking the dog was exercising a right to use land away from the worn path for recreation.

210. It is apparent that there were paths worn by use on the land throughout the relevant period. These have already been described. They were defined routes on the ground that people used to walk across and around the edge of the land. Mr Kay, for example, accepted in XX that the worn paths would be followed by people, as a natural instinct, and that people would tend to stick to worn paths where they existed. The evidence was that the worn paths were present, broadly consistently, throughout the relevant 20 year period – although some changes are apparent on the aerial photographs from the latest years in the period (2010 and 2013).

[163] Mr Campbell in XIC, for example, described the routes used by dog walkers as being the boundary paths together with walking in the direction of the PROW diagonally across the land from UFC to TL. In XIC Mr Knibbs described his typical dog walk (if there were no animals in the field) as being coming in from TL and doing a circuit of the perimeter in either direction before going back out at TL. In XX Mr Franz said that he walked the dog on a circuit of the field on the worn path around the edge. Mrs Ditchfield said in XX that the dog walking was around the AS.

[164] For example, Mr Campbell in XIC.

[165] The exception perhaps was Mrs Oliver. Mr Campbell said in IQs that it was not easy to find the balls in the longer grass so that dog walkers might throw a ball up for a dog to catch but not throw them distances away from the paths.

211. The worn paths would only have been maintained as such by being used by people. Once they were in existence they would be more likely to be used, especially for example when the grass had grown longer,[166] as it usually did throughout the spring and summer months. It was clear from the Applicant's oral evidence that most of the people walking were on the worn routes rather than off them.[167] This is of course what would be expected.

212. The non-PROW path most commonly mentioned was that along the eastern boundary. Other routes were also mentioned. Some were used more than others.[168] All the worn routes mentioned by the witnesses linked to the PROW.

213. Many of the witnesses described walking through the AS as part of a larger route.[169] Mrs Graham, for example, explained a "round the block" walk which she would do in both directions, which would include walking around the boundary route on the AS, but also included a number of roads and other places (including Church Mead). This is also apparent from the written statements of witnesses not called to give oral evidence.[170]

214. Walking through the AS, even on the boundary route rather than directly across the land, would plainly be a walking use and not a LSP for TVG purposes. It is apparent that much of the walking on the land was walking through the land, going from one place to another. This could not count as a LSP on any analysis. There were many witnesses who said that they would walk through the field, either as a short cut or to avoid the busy main road.[171]

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[166] Mr Campbell in XIC for example said that people would be more likely to walk on the path when the grass was longer.

[167] See eg Ms Graham in IQs. She also said that she would only go off the defined paths herself if she walked off to chat to someone. Mrs Ditchfield said in XX that quite often people walking would be on the circular route and that a fair amount of people walked the circular path.

[168] Mrs Brewis for example said in XIC that there was a worn route from TE, running horizontally across towards an Elm tree, eastwards to the eastern boundary path – and she said when she reached the eastern boundary she would either walk northwards to the NE stile or down (southwards) and around the edge of the land.

[169] Including Mr Bishop.

[170] See eg App Vol 3, p363.

[171] For example, Mrs Brewis said in XIC that she would walk in the field to get to Tellisford Lane rather than go by the road, and would skirt the perimeter of the field from TE to TL to do so. People also described using the AS as a short cut to the shop, although the shop only opened in its first incarnation during 2013.

215. The claimed use for jogging or running followed the same pattern as the claimed use for walking. That was all on the worn paths. Some of it was simply passing through the land[172] and the rest was on the boundary circular path.[173] Jogging or running was also a very short-lived activity, both in the sense that most people reported doing it only for specific and limited periods[174] and also for not very long when it did happen.[175] The jogging reported was also either people running through the land or doing a circuit around the edge of the land on the worn circular path.[176]

216. The cycling that is claimed to have taken place was not only little children[177] but was also on the worn paths.[178] Mr Franz described in XX walking his bike through the AS from TL to UFC. Mr Kay said in XX that he had used the worn paths on the AS to teach his children to ride a bicycle.[179] This is all just as much a linear use of the land as walking. It was also something very limited, as it was not seen at all by many people.[180]

217. Nature uses were nature walks, rather than separate, freestanding activities.[181] The use comprised of nothing more than looking at the natural environment whilst

[172] Mr Campbell said in XIC he did not run around the land but would run from UFC to TL and carry on down Tellisford Lane. He said that he would go in the general direction of the PROW, whether it was strictly the PROW or not. Mr Hasell in XIC described how his son would run around and over the AS to access other parts of his running routes, and said that he and his wife did likewise when they were training for the Bath half marathon in 2006 and 2007 respectively. He said that they did do circuits of the AS but used it principally as a route through the AS to get to somewhere else.

[173] Mrs Brewis said in XIC for example that she would have used the worn paths for jogging and normally would go around the boundary, from TE up the western edge and then across the northern edge to the stile at NE – which would of course be on or close to the routes of two PROW. Mr Saddiq described in XX that his sons would either run a circuit of the AS or run across the northern edge to NE and out to the A36, and that his daughter ran a circuit of the AS when training for her cross-country.

[174] Eg training for one attempt to run the Bath half marathon (eg Mr and Mrs Hasell and Mr Kay's wife). Mr Campbell said in IQs that his "spasmodic running" comprised of 5 or 6 attempts, for only a month or so each, over the period from 1994 to 2000.

[175] Mrs Brewis, for example, said in XIC that she would only ever do one lap of the field when jogging. Mr Kay said that, when training for the Bath half marathon, his wife ran circuits of the AS for a while but then began to take a longer route which did not pass through the AS.

[176] See eg Mr Bishop in XIC.

[177] As eg Mrs Oliver put it in XIC.

[178] See eg Mrs Brewis's XIC and Mrs Oliver in XX. See also the photographs provided by Mrs Ditchfield of her daughter cycling on the northern footpath from NE to UFC, which she accepted in XX were representative of what they had done.

[179] When they were about 6 or 7 years old.

[180] See eg App Vol 3 pp 223, 242, 251, 284, 290, 302, 325, 332, 335.

[181] See eg the description in XIC by Mrs Ditchfield of going for a walk and collecting flowers and finding butterflies.

walking.[182] Moreover, the nature walks would largely take place on worn boundary paths, comprised in part of PROW.[183] They were also things that happened so infrequently that some of the Applicant's witnesses had never seen it.[184]

218. It is notable that virtually all the photographs and videos submitted by the Applicant showing activity on the AS show it happening on worn paths. This really does demonstrate that the recreational activity was directly related to, and happening on or close to, the worn paths. There is no photographic or video evidence of any material recreational use away from worn paths (except in the snow). This is not surprising as it reflects the picture that developed from the oral evidence at the inquiry. The use of the land was largely on the worn paths, even when the nature of the claimed activity might perhaps suggest otherwise at first blush.

219. It was clear from the evidence that much of what was claimed as children playing was in fact related to the paths. The video clips from Mrs Ditchfield – which she described in XIC as being what her children did quite a lot, just simply running or walking through the field – showed her children on the worn paths. Mrs Ditchfield confirmed in XX that most of the children's play was on the worn paths. There was nothing additional or different happening from what you would expect to find with use of footpaths.

220. The great majority of the claimed use of the AS was walking, both with and without dogs. A considerable amount of that – as well as many of the other uses – would have been on or near to the PROWs, so that it would be reasonably explicable as referable to the existence of the PROWs, including the occasional excessive use of the PROWs. None of that would count for TVG purposes.

221. Almost all of the rest of the walking, both with and without dogs, and some of the other claimed uses, would have been on the established worn paths. This would have

[182] The AS was in any event of minimal nature conservation value: Obj p389.
[183] Mrs Brewis described flower collecting by her children as around the boundaries of the field, and butterfly catching, by her daughter Sally, as also being along the boundaries of the field. Dr Awan's description of his nature photographs were all near the worn paths (including the PROW and the boundary route) as well as near the mound. Ms Graham said that their birdwatching would happen on the eastern boundary.
[184] For example, Mr Saddiq said in IQs that he had never seen anyone birdwatching. Mr Knibbs in XIC said that he had never seen others birdwatching. Mr Hasell said in XIC that he did not see birdwatching very often.

been use which could have led to a new PROW emerging. It would have been use which appeared to be referable to emerging rights of way. It would not unambiguously show that there was the assertion of a right to indulge in LSP across the whole of the land. It should not therefore be counted for TVG purposes.

222. Overall, almost all – the very great majority – of the claimed use would not count as LSP for TVG purposes and must be discounted from consideration.

PARTICULAR CLAIMED ACTIVITIES

Picnics

223. It is apparent that what was claimed as picnics in the written evidence cannot properly be called picnics. They were very rare,[185] proved by the fact that some witnesses had never seen them.[186] They were short-lived, ad hoc and involved a snack rather than a meal.[187] Mr Hasell described it in XIC as young kids having a very informal picnic when the weather was very good in summer. Mrs Oliver said in XIC that she had only seen a picnic once in the nine years or so she had known the AS.

224. There were witnesses who accepted never having seen picnicking on the land.[188] Mr Knibbs said in XIC that it was not even common to see people sitting on the grass in the AS through the 20 year period. If people were not even sitting on the grass – for obvious reasons as the field was known to some as the sheep muck field (with more dogs in recent years of course) – it is most unlikely that people would ever want to picnic in the AS.

225. The places where it was said in evidence that picnics had taken place were or on near the PROWs, especially where the two PROWs converge in the corner near TE. This

[185] Mrs Cox said she had only seen it two or three times, just in from the entrance at TE (near where two PROW converge).
[186] See eg App Vol 3 pp 223, 242, 251.
[187] Mrs Brewis, for example, said in XIC that when her children made dens they would take a rucsack with biscuits in. Mr Knibbs said in XX that it was a snack, with just a few things taken from the kitchen.
[188] For example Mr Saddiq in IQs.

is therefore a use that would have been explicable by reference to the (perhaps excessive) use of the PROWs.

Blackberry and mushroom picking

226. There was almost universal agreement that the blackberries were on the eastern boundary.[189] There was a suggestion that they had grown through the hedge into the AS field.[190] There was also universal agreement amongst the Applicant's witnesses that the blackberries were collected for cooking and consumption off the AS. As noted in [51], picking blackberries for consumption off the AS – rather than consuming them on the AS – would not be a sport or pastime for TVG purposes.

227. It was also apparent from the oral evidence that people would walk along the eastern boundary worn path collecting blackberries. Mrs Oliver said in her written evidence that the blackberries were "clearly accessed off a path", ie the eastern path.[191] Such a use would not be referable to LSP use across the whole of the AS but instead simply the use of the path (as a potential PROW) on the eastern boundary route, which itself formed part of the perimeter route.

228. There were some witnesses who said that they have never even seen blackberry picking,[192] let alone taken part in it. This shows how limited the activity really would have been. Even those who said that they had seen blackberry picking recognised that they had not seen it very often at all.[193] And those who claimed that they participated in it also recognised that it was very short-lived.[194] It was also highly seasonal.

[189] Ms Graham, for example, said in XIC that there were not blackberries anywhere on the land except along the eastern boundary.
[190] Which would explain why they were not present when Bina Ford was resident and kept the land in good condition.
[191] App Vol 3, p342.
[192] Eg Mrs Brewis in XIC.
[193] Mr Campbell in XIC said he had not observed it very much.
[194] Mr Knibbs said in XIC that it was very occasional and not very often, and that it wasn't a big deal and people did not do a lot of it.

229. For any of these reasons, the blackberry picking contributes nothing, or nothing of any significance, to the claimed use of the land for LSP for TVG purposes.[195]

230. The claimed use for collecting mushrooms was also highly seasonally and also just collecting them whilst people were already out on a walk.[196] It is apparent that it hardly ever happened.[197] And unsurprisingly they were also taken home and cooked.[198] As with blackberries, this contributes nothing to the claimed use of the land for LSP for TVG purposes.

Playing in snow

231. Not only did it snow only rarely,[199] but the circumstances that were necessary for children to play in the field – namely when it snowed, and the snow laid, and when children were at home[200] – were very rare. There were many years when it did not show at all.[201] And Dr Awan said in XX that snow does not lie for long in this area. Snow-related activities would have been short-lived. It is also apparent that the AS was not very busy at all even when it was used in the snow.[202]

232. The fact that it was rare is underscored by the fact the photographs of play in the snow all come from the same time (January 2013). It is also notable that everyone who gave evidence reporting the making of igloos accepted that they were all reporting the same single event from January 2013, which was in fact nothing more than the building of a circular wall rather than an igloo.

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[195] The same would apply to sloes, albeit even more so, as virtually no one even claimed to have seen sloes being picked.
[196] See eg Mrs Brewis in XX.
[197] Mrs Brewis, for example, said in XIC that she would be lucky to pick mushrooms more than once or twice a year.
[198] See eg Mrs Brewis and Mr Franz in XX.
[199] The word used by a number of witnesses including Mr Stretton (App Vol 3, p355) and Mrs Ditchfield (App Vol 3, p264).
[200] As explained by Mrs Brewis in XIC and XX.
[201] Mr Campbell said in XIC that it snowed when his girls were younger (pre-1993) but then it did not snow for quite a long time after that. Mrs Cox said that over a ten year period they might have had their sledge out maybe only four times. Mrs Brewis said in XX you could go for two or three years without there being any snow. Mr Kay said in XX that there was not that much snow during the 2000s.
[202] Mr Stretton's video of January 2013 pans around most of the AS and shows that there was no one else present at the time, including on the mound, even though he said it was taken on a weekend day.

233. It is also clear that use in the snow was only by small children.[203] Sledging was only reported as happening on the mound in the southern tip, but the mound[204] would only have been of interest for sledging when children were little.[205] Mr Hasell said in XIC that the mound would have been an ideal introduction to sledging for young children, as it was a safer area for young children. The evidence was clear that, apart from a few instances of young children being pulled along on a sledge by their parents, all the claimed sledging was said to have happened on the mound and not anywhere else on the AS. Mrs Oliver said in XX that the sledging took place on the mound.

Kites

234. The claimed use for flying kites was also both rare[206] and short-lived.[207] Mr Bishop, for example, described in XIC that he had seen one family attempting to fly a kite but that it had been spectacularly unsuccessful. Mrs Brewis said that her family tried to fly a kite in the period before 1993 but went down to Church Mead in the end as it was easier under foot. This is reinforced by the point that many of the Applicant's witnesses accept never having seen kite flying.[208]

235. Kite flying is also something which cannot in practice in this case be divorced from the PROWs. Mrs Brewis, for example, explained in XIC that her son would run along the footpath when he was trying to fly his kite.

236. Kite-flying is a good example of something being a short-lived fad. These are claimed activities which would hardly ever have happened on the AS, because they would have been at most a passing phase which happened a few times in any one year. Mr Campbell said that kite flying was a thing of enthusiasm that would only be

[203] Mr Campbell said in XIC that it would be used by "little children" when it snowed enough at weekends.
[204] Mrs Brewis said that the mound was 15 ft high but all the other witnesses for the Applicant asked about it agreed that it was in fact about 6 ft high.
[205] As Mr Campbell said in XIC.
[206] Mr Hasell said in XIC, for example, you might go a year without seeing any kite flying on the AS. Mrs Oliver said in XIC that she had seen kite flying four times in the nine years that she had known the AS.
[207] Mrs Brewis, for example, said in XIC that her son did not do it a lot.
[208] Mr Saddiq, for example, had only seen his children trying to fly a kite. Similarly, Mr Campbell in XIC said that he had not seen anybody else flying a kite. And Mr Knibbs said in XIC that he had never seen anyone else flying a kite.

done for a short period, describing each kite being flown only on a few occasions over a number of weeks when it was acquired, before interest was lost. Mrs Ditchfield said in XX that they had been given a kite in 2012, that it was a phase that children went through, and that it had been done a handful of times of a period of some months. Ms Graham said that they had just flown a kite as they bought it when they were on holiday and her husband wanted to try it.[209] There were other clear examples of claimed uses being mere fads.[210]

Ball games

237. It was apparent from the Applicant's oral evidence that ball games were very limited in terms of their scale, frequency, extent and duration. Some ball games were not seen by some people.[211] Many people reported saying that they had never seen cricket on the land.[212] Mrs Oliver confirmed that she had never seen any ball games on the AS.[213]

238. As to football, no one claimed use for more than just a small football kickabout,[214] not even a match of any sort. This is apparent from the great number of people who said that they had never seen any team games on the land. The description by Mr Campbell in XIC was typical of this claimed use: young children simply kicking a ball about or keeping it up. This was echoed by Mr Hasell in XIC who described it as kids kicking a ball around when they were young, noting that they would go to Church Mead for a game of football. Mr Kay described it as just kicking a ball around.

[209] Ms Graham said it was a matter of hope over expectation and that the land was not very good for flying kites. Mrs Cox told a similar story about trying to fly a kite they had bought on a holiday to Cornwall one year.
[210] An example is Mrs Brewis's son practising casting fishing lines, as she explained in her XIC. Another example is the spasmodic or short-lived periods of running activity claimed on the land. And also Ms Graham's son's rocket, which she described in XIC as being things done in concentrated spurts as things took the fancy of her son.
[211] See eg App Vol 3 pp 223, 242, 272, 276, 290, 313, 320, 332, 335, 344.
[212] See eg Mrs Brewis in XIC.
[213] See App Vol 3, p344/o.
[214] See eg Mrs Brewis in XIC.

239. Mr Knibbs said in XIC that when the field had not been cut the grass was too thick to play football – he said you would be wasting your time. He also said that, when football did occur, it would happen in the southern half of the AS. He also said that he had seen others playing football only occasionally and that it was not a regular thing, and that it was only kickabout stuff anyway.

240. One of the few witnesses who spoke of rounders explained that it was played not with a bat but with a stick.[215] It really was the most limited claim of rounders that can be imagined.[216] Mr Hasell said in XIC that he had only seen it many, many years ago and indicated that it was in the southern area. As was apparent from the site visit, the land was not really suitable for ball games, especially in the central and northern areas, due to the nature of the surface. The Applicant's witnesses were also clear that the AS was not used for ball games when the grass was long, as it was in the central and northern areas in particular, for much of the year including in the summer. It was only really the southern tip of the land where it was said that ball games were played with any frequency.

241. Some of the claimed ball games took place on the worn route of the main diagonal PROW, as the only place without long grass.[217] This would not count as a LSP for TVG purposes.

Children's play (including ball games)

242. The claimed use of children going to the AS with their parents would plainly relate only to very young children – those who were "pre-school" as Mrs Ditchfield described them in XIC. It would not often have been use with babies or toddlers, as Mrs Oliver said in XIC that you could not get a pushchair over the stiles. Those activities would have been very limited. They would not have lasted long and they would not have covered much ground. When asked about his activities, Mr Knibbs

[215] Mrs Brewis in XIC.
[216] Mrs Cox said her reference to rounders was just to her daughter practising throwing, hitting and catching with another person.
[217] Mrs Brewis, for example, said in XIC that her daughters would hit a tennis ball with tennis racquets on the worn path, noting that you had to stay on the path because the tennis ball would not bounce off the path (see App Vol 3, p393/o).

said that it would be what parents do with small boys when you take them out. There was also the play park at Church Mead which would have been a far more likely destination for parents with young children.

243. As to claims of children playing without adult supervision, it is clear that there was a 'window' in time when it is claimed that children used the land on their own.[218] Children had to be old enough to be let out on their own,[219] but even then their parents would not want them going very far and certainly not crossing the dangerous main road. This would not be when they were young.[220] And it would not be when they were older[221] and able to go further afield. Children would also clearly lose interest in the land when they got older.[222] There is nothing to attract older children to the land. Mrs Cox, for example, explained in XX that she would allow her daughter to go to the AS with a friend when she was about 8 years old,[223] and then on her own when she was about 13 years old, but that she would then go further afield when she was older than that.

244. The claimed use by children on their own would have been concentrated in a period when they were old enough to go out on their own[224] but not so old that they could go far or cross the main road. Mr Bishop, for example, said in XIC that he had seen young children as part of families but not teenagers.

245. It was also clear that claims of this type of use were limited to people who lived not only on the south and eastern side of the main roads (the A366 Farleigh Road and the High Street) but also in close proximity to the AS. The evidence repeatedly showed

[218] This was explained, for example, by Mr Kay in his oral evidence.
[219] As for example Mrs Ditchfield explained in XX that she would not let her children out on the AS on their own when they were younger.
[220] Mrs Brewis said in XIC for example that when her children were smaller they were not allowed out in the field on their own but that the children were allowed out on the land as they grew older as she could keep an eye on them from Ranmore Cottage – as she said in XIC, the TE pedestrian access is right by Ranmore Cottage. Mr Kay said in XX that use by children was when they were too young to go to Church Mead as that would involve crossing a busy road.
[221] Mrs Ditchfield in XIC said her girls were interested in nature on the land because they were quite young.
[222] Mr Campbell said in XIC that when he and his wife separated in 2003, his daughters (by then 16 and 18 years old) were no longer focussed on the AS. Mr Hasell said in XIC that his family's use of the land changed as the children had grown, but also depended on the time of year and weather.
[223] Mr Knibbs said in XX that he would let his children go on their own when they got to about 8 years old.
[224] Mr Campbell said in XIC that his children would start to go out to the land on their own when they were 8 and 6 years old.

that those who claimed to use the land did so because they lived nearby.[225] Mrs Brewis, for example, said in XIC that she used it as it was "so convenient to us".

246. It is necessary to ask how many households close to the AS in this eastern part of NSP would have had, at any one point in time in the 20 year period, children who were old enough to play on the AS but not so old that they would be able to cross the main road and venture further afield, such as to Church Mead. The answer would plainly be not many at all. This is shown by the number of witnesses who gave oral evidence whose children did not use the land at all or for much of the relevant 20 year period. Quite a few of the Applicant's witnesses accepted that their children were not of an age[226] to play on the AS during some or all the 20 year period.[227] Mr Hasell for example accepted that the activities described in paragraphs 8 and 9 of his statement would not have been during the relevant 20 year period. Mr Franz also accepted that what he described in paragraphs 2 to 4 of his statement would have been before 1993. In truth, at any one point in time in the 20 year period, only a few children would have fitted the profile which emerged from the evidence for those claiming to have used the AS for recreation.

247. Use by children would also have been limited to periods of time when the weather was good and on days when there was no school. Witnesses repeatedly recognised that the use was "far more"[228] during school holidays than at other times. In response to a question from the Inspector, Mrs Brewis said that it was during the summer school holidays that children would play on the land (in the southern tip).

248. It is apparent that claims of children playing related in the main to the southern tip. This is considered further below. Instances of play mentioned other than in the southern tip were few and really only where people played near to either the UFC or the TE entrance because they came in that way. That use would be very limited, not least as it would be closer to the teaching field and the paddocks, but it would also be

[225] Mr Campbell said in XIC that when he moved in around 2006 he used the land once a fortnight rather than once a week when he lived closer.
[226] Mrs Brewis, for example, explained in XIC that in 1993 her children were 15 (Tim) and 13 (Sally) years old. Mr Campbell said in XIC that some of the activity with his daughters was outside the period under consideration. Similar concessions were also made by Mr Parker and Mr Hasell.
[227] Mr Knibbs in XIC, for example, said that the photos at pp318-318/o were taken in 1993 or a year earlier.
[228] Mrs Brewis in XIC.

in places where a number of PROWs converge and therefore reasonably explicable as the occasional excessive use of the PROWs.

Other matters

249. Some of the activities relied on were not LSP at all, on any analysis.[229] Moreover, some of the claimed activities did not take place on the land at all. For example, much of the photography was of the field, not on the field.[230] The Monmouth Rebellion is entirely irrelevant as a claimed LSP. The land was only used for parking cars and was with the permission of the landowner.[231]

Conclusion

250. Apart from ball games, all the other claimed recreational uses were either highly seasonal or highly weather dependent. They would have been very infrequent and would not have lasted for long. Even activities like children playing and ball games would have been concentrated into specific periods, such as weekends, summer evenings and the summer school holidays. They would not have been happening at all on most of the days of the year.

251. Some claimed uses would have been within the ambit of what could be reasonably explicable as referable to the existence of the PROWs, including the occasional excessive use of the PROWs. Many of the claimed activities happened on the worn paths and/or the PROWs. This included not only cycling but also activities done whilst out on a walk, such as nature activities and taking photographs. Those things were not separate activities in truth but were things done whilst, and incidental to, walking. They cannot be counted as separate LSP in addition to the walking which was the main activity, and which did not itself qualify as a LSP.

[229] An example being Mrs Brewis's son Tim beating down the nettles in the field along the boundary of their property.
[230] As was explained by Mrs Brewis in XIC for example.
[231] As Mrs Brewis, who was on the Church Mead Committee, said in XIC.

252. The limited use for anything other than a linear use[232] is demonstrated by the sample of 56 questionnaires in tab 3 of Volume 4 of the Applicant's bundle. Despite in some cases people completing questionnaires reporting claimed use dating back to the 1930s, 1940s or 1950s, the majority of the respondents have never even *seen* many activities:

91% (51) had never seen cricket
84% (47) had never seen bicycles
82% (46) had never seen rounders
75% (42) had never seen team games
73% (41) had never seen football
64% (36) had never seen picnics
59% (33) had never seen kites

253. The fact that almost three-quarters of people had never seen any football, in all the years that they knew the land – going back many decades in some cases – is important. It shows that these things, if they did happen, did not happen very often at all. As was apparent from the oral evidence, activities like this happened only a handful of times in the entire period someone knew the land. And in many cases they were also confined to particular areas of the land (such as the southern tip).

254. These are illustrations of why the evidence from the questionnaires needs to be treated with a very large degree of caution. In many cases, the questionnaires simply do not show what at face value they suggest. Whilst the questionnaires only say very little about what has been seen – as it is not possible to know where, when and how often it was seen – the fact that certain activities were never seen at all by a majority of the people over all the time they knew the land is telling. Activities like this would hardly ever have happened on the AS. The use was overwhelmingly of a linear nature, and primarily walking.

255. Importantly, many of those who have provided evidence for the Applicant did not use the AS very often at all. Mr Hasell, for example, only used the AS "several times a

[232] For example, walking (with and without dogs), jogging, running, etc.

year".[233] Even Mr Kay, who lived immediately next to the TL entrance, only used the land "weekly".[234]

USE OF THE SOUTHERN TIP

256. It is apparent from the evidence that the claimed use for things other than walking and similar activities like jogging was in the southern tip of the land.[235] Mr Kay said in answer to a question from the Inspector that 80-90% of the activity took place in the southern tip. He explained that the grass in the southern tip would get more worn down as it was where Mr Mills would deliver and collect his animals, and that this was also where the mound and the tree were. Mr Kay said in XX that the children always played in the bottom (southern) part of the AS. He described the ball games as happening in this southern tip. The southern tip area was the site of most of the claimed ball games.[236]

257. The southern tip is where it is claimed that dens[237] were made (and the related picnics were claimed to happen)[238] and the tree that was played in.[239] The area of the mound and the tree was the focus for the great majority of the other claimed activities eg children's play.[240] Mrs Oliver described the mound as a "magnet" for children.[241] Mr Hasell said in XIC that the mound was used as a play area. Mr Stretton described the mound as being the "HQ" when children played games on the AS. Mrs Ditchfield accepted in XX that the southern tip was where all the interest was and described the use of the mound and the "derelict" tree in the southern tip.

[233] App Vol 3, p301, Q13. See also his wife's evidence at p624.
[234] App Vol 3, p308, Q13.
[235] A photo showing the southern tip area is at App Vol 5, p846. Photos showing the mound are at App Vol 5, pp855, 858.
[236] Mrs Brewis, for example, in XIC said that children would kick a football around in the southern part near the mound.
[237] See eg Map B at App Vol 3, p432/o.
[238] Eg Mrs Brewis in XIC.
[239] See eg App Vol 3, p439/o. Mrs Oliver described in XIC seeing a boy (Max Ryder) sitting in the tree.
[240] Mrs Brewis claimed that games like tag, 1-2-3, and hide and seek would be played around the mound.
[241] App Vol 3, p339, para 10. Also described in Mrs Oliver's XIC.

258. In response to questions from the Inspector, Mrs Brewis said that the playing happened down in the south-east corner. Mr Knibbs said much the same in XIC.[242] Mrs Brewis said in XX that children tended to play in the southern corner, where the tree was, and that this was where dens were made. Mr Campbell said in XIC that he had seen children playing around where the mound was, in the southern tip,[243] but not up the top where the grass was longer (ie the northern part of the AS).[244] In IQs he described children playing and mucking around on the mound and south of the mound, because the grass tended to be shorter there.

259. That it was the northern half of the AS which was not used for recreation (other than walking) was a common theme of the evidence of the Applicant's witnesses. It was repeatedly described as having the longest grass which made it difficult to use. It was also described as being the most difficult topography. Mr Hasell indicated in XIC by reference to the map that the northern half of the field was uneven and rough. It was apparent from the site visit that, apart from the flatter area in the NE of the AS which Bina Ford described as using for training, the northern and central parts of the AS were on a slight slope, had dips in them, and were very rough under foot – both the ground and the clumpy grass. Mrs Brewis said in XX that the grass was clumpier and would grow longer in the middle of the AS.

260. Mrs Ditchfield agreed in IQs that the southern area was the main centre of action. Her description of the use of the northern and central parts of the land made it clear that, apart from on the worn paths, there was really no use of those parts of the land.

261. There was very little evidence of claimed playing other than in the southern tip and, where there was, it was where there was a particular reason[245] and in a location where a number of PROWs converged to create a spot where the PROWs were dense, eg next to UFC and TE.

[242] Not only as to football but also his own occasional kite flying.
[243] And next to Ranmore Cottage near TE.
[244] Mr Campbell confirmed in IQs that he had seen football being played south of the mound.
[245] For example, Mr Saddiq said in XIC that his children would play in the area closest to the access point they used to enter the field. He said in IQs that he had never seen anyone else playing in the field. Mr Campbell also said in XIC that as they came in from UFC his family might have used the north-western part of the AS.

262. As the only things of any interest on the AS were in the southern tip – the mound and the tree – and because the southern tip was the area where the grass was less long, it is perhaps credible that this area was used for some recreation. The southern tip of the AS would have been furthest away from the areas used by Bina Ford – both the north-eastern part of the AS and the teaching field – and therefore less likely to be seen and heard. It was also to an extent screened by the mound and the tree.

263. It is necessary, however, not to extrapolate any recreational use of the southern tip across the rest of the AS. As noted at eg [66]-[68] and [71]-[73], use has to be sufficient to have suggested to a landowner that the inhabitants were exercising a right to engage in lawful sports and pastimes across the whole of the application site. The southern tip is a distinct portion of the AS. It represents perhaps a tenth of the area of the AS. Use in this one place cannot be attributed to the whole of the AS. Indeed, there is no evidence of any material use of the northern half of the AS other than the linear use on the PROW and worn paths which would not count for TVG purposes, as explained above. The evidence of use has to demonstrate that for all practical purposes it could sensibly be said that the whole of the site has been used for 20 years. That cannot be done in this case.

OVERVIEW OF CLAIMED USE

264. It is important to bear in mind that the great majority of the claimed use for anything other than walking and related activities (eg dog walking, jogging, etc) was in the summer, especially summer school holidays, and some evenings and weekends. This is understandable as outdoor recreation, other than that which has to be done such as exercising either yourself or a dog, is highly seasonal and weather dependent. People usually have a choice about whether or not to go out, and where. The claimed recreational use would not be happening for much of the year. It would span at most the period from say Easter to the end of the summer. And the claimed recreational use would not be happening at any time when the weather was poor – when it was wet, or blustery or cold. For most people to use the land, there would have had to have been both good weather and the person having free time, outside school or work commitments. When asked in XIC about use by children playing, Mr Hasell said that

it did not happen in winter but when the weather improved.[246] It is clear that any claimed use for children's play was not all year round, only for part of the year. The evidence simply does not show significant use – other than walking (which was on paths) – in the period from say October through to March.

265. It is also important to remember that the clear balance of the evidence was that the grass was usually growing long until at least mid to late August. For most of the time in the summer period, including most of the school summer holidays, the grass would be long. The evidence shows how the grass growing long limited the use. It not only meant people kept to the paths but it was also made clear by witness after witness that it was not possible to play things like ball games when the grass was long.[247] Mrs Oliver said in XIC that the activities changed depending on the state of the land.

266. It is also notable that the evidence shows a major predominance of use by people who lived both on the south/eastern side of the village and close to the AS, and had a small garden, and either had a dog or small children. At any one point in time of the 20 year period, there would not be many people falling into this category.

267. The evidence also does not show the use of the whole of the AS for LSP. Many of the claimed uses took place on the PROW or the other worn paths around the edge of the AS. Hardly anyone claimed LSP use in the middle or northern parts of the AS. The claimed use for playing was almost entirely in the southern tip. It is clear that the whole of the AS has not been used for the claimed activities, only distinct parts, ie the southern tip and the circumference.

268. The presence of animals, including large horses, in the AS did affect the use, but reinforced the pattern of people keeping to the footpaths and to the edge of the field, as well as in the southern tip, furthest away from where the horses and cattle were said to congregate in the northern part of the field.

[246] Mr Saddiq said that his family would only use the AS in fair weather.
[247] For example, Mrs Brewis and Mr Kay in IQs, and Mr Knibbs in XIC – who also said that there were some activities that could only be done on the land when the grass was short.

269. Any significant recreational use would have presented risks to the horses kept and ridden in the AS. Walking or running through or around the AS would have been transient and short-lived, and also confined to the PROWs or other worn paths. If anything more than that, including kite flying and ball games, had happened on anything more than a de minimis scale on the AS it would not only have been inconsistent with Bina Ford's use of the AS, it would have been seen by her and it would have left traces which could be seen and which would have posed risks for the horses (eg lost balls, broken kites, bits of wood used as makeshift rounders bats, etc).

270. It is clear that, during the time she was operating the stables at the AS, Mrs Ford would have challenged any significant recreational use away from the PROWs, especially one that would have presented any sort of risk to the horses at her stables. There is evidence that on some, albeit not many, occasions during the 20 year period, Bina Ford did challenge people – as Mr Knibbs described in XIC had happened to his wife.[248] He described it as a polite but meaningful request, made when Mrs Ford was on horseback. That she hardly ever had to make such challenges, shows that trespassory use was not happening on any scale or with any significant frequency.

271. It is apparent that not only would any significant recreational use of the AS beyond walking on the paths have been apparent, it would have been incompatible with the use made of the AS, especially by those riding horses on the AS. The claimed use for LSP (excluding of course walking etc on footpaths) simply could not have happened on any significant scale from 1993 to 2008. It is apparent from the evidence that, certainly prior to 2008, any use by local inhabitants, other than that referable to the footpaths, would have been very limited in scale.

272. The AS was in active use and under frequent observation from 1993 to 2008, less so from 2008 to 2011, and very much less so from 2011 to 2013 after Bina Ford moved away. The AS was used and observed by Mrs Ford, those who lived with her, and those who worked with her at the stables, especially in the period prior to 2008 when she began to wind down her teaching. It is clear that the claimed use of the land has

[248] See also App Vol 3, p325, Q29.

increased over time.[249] But it does appear to have increased considerably towards the end of the 20 year period. The aerial photos show increasingly worn paths towards the end, for example in 2010 and 2013, showing increased intensity of use by people coinciding with use by Bina Ford and Terry Mills reducing and then ceasing.

273. It is quite likely that those giving evidence for the Applicant have been focussing on more recent memories since 2008 or 2011 even; certainly some witnesses only arrived around this time. It is important to bear in mind changes of circumstances such as those in 2008 and 2011, as they would have affected what could have been done on the AS, by reason of both actual use of the land and the degree of observation of the land. It would be unsafe to draw inferences about use before 2008 from evidence after 2008, and all the more so from evidence after 2011.

274. Unusually perhaps for a field of this size, there were four PROWs on the AS, criss-crossing it, with two corners (UFC and TE) where more than one PROW converged in the same spot. A great deal could have been done on the AS which would have been reasonably explicable as referable to the existence of the PROWs, including the occasional excessive use of the PROWs. None of this would count towards TVG use. So, a great deal of the claimed TVG use would have to be discounted from consideration, namely almost all of that which was on or near the PROWs.

275. Almost all of the rest of the walking, both with and without dogs, and some of the other claimed uses, would have been on the established worn paths. This most certainly would not have appeared unambiguously to show that the use in question represented the assertion of a right to indulge in LSP across the whole of the AS. All this use should also be discounted from consideration for TVG purposes.

276. Overall, almost all – the very great majority – of the claimed use would not count as LSP for TVG purposes and must be discounted from consideration pursuant to Lightman J's approach. There would be very little of the claimed use left to consider. And what there was would be exceptionally limited in its character, frequency, intensity and duration. When the use that must be discounted is left out of account,

[249] Mrs Brewis, for example, said in XIC that as the number of houses built in NSP increased more people started to use the field.

including that reasonably explicable by reference to actual and potential PROWs, there would be almost no use left to consider at any particular point in the 20 year period.

277. The use clearly would not have been enough to have suggested to a reasonable landowner that the inhabitants were exercising a right to engage in lawful sports and pastimes across the whole of the application site. The use would not have been of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. It would have been nowhere near enough to bring home to the landowner that a general right for the community to use the whole of the land for recreation was being asserted.

278. Any use of the AS that there was for properly qualifying lawful sports and pastimes was infrequent and sporadic, limited in scope and duration, only by people who lived very close to the AS, and largely confined to a particular part of the AS (the southern tip). The use has been no where near enough use, or use of such a character, reasonably to be regarded as the assertion of a public right against the Objector. The character, degree and frequency falls far short of what is required to establish a right to use the land on behalf of the community.

279. As it was put by Lord Walker in *Lewis* at paragraph 36, the law "is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot)". In this case there was not an absentee landowner for most of the relevant 20 year period. We know how the matter appeared to the landowner, as Bina Ford explained in her evidence, including in XX. We also know how the matter appeared to those, such as Claire Newport and Gail Baker, who lived or worked there, because they also explained in their evidence, including in XX. In short, they had seen no recreational use of the AS – save for Mrs Ford seeing it on just a handful of occasions which she did something about – and had seen only walking, with and without dogs on the footpaths. The claims of recreational use genuinely were a surprise to those who lived or worked there.

280. It could not rationally be concluded in this case that the whole of the AS had been used so as to signify to a landowner that the land was in general use by the local

community for informal recreation to an extent sufficient to be regarded as the assertion of a public right.

CONCLUSION

281. It is clear from the evidence that the AS has not been used in a way that would satisfy the requirements of s15(2) of the 2006 Act. Even taken at face value (which it should not be), the Applicant's evidence is not enough to discharge the burden of proof on the Applicant properly and strictly to prove that all the elements of the statutory definition are met.

282. Moreover, during the F&M outbreak it is apparent that no inhabitants of the locality would have indulged in lawful sports and pastimes on the AS. Use would not have been lawful and use, if it occurred (which it would not have done), would not have been by a significant number of the inhabitants of the locality.

283. There are also a number of in-principle reasons why the Applicant's attempts to register the land as a village green must fail, any one of which would provide a complete answer to the Applicant's claim, namely:

(1) there were effective trigger events in May and/or August 2013 which mean that, pursuant to s15C of the 2006 Act, the ability to make an application to register the land as a village green had ceased to apply at the time any application could have been made in August or September 2013;

(2) the Applicant's last attempt to put its purported application in order was in February 2016, which would be too late to put any application made in 2013 in order, so that it would be ineffective to do so and therefore no application to register the land as a green would have been made before either of the two effective trigger events; and/or

(3) no effective or valid TVG application has ever been made in this case, as all attempts by the Applicant to produce an application which complies with the basic rules have failed.

284. For any or all of the reasons given in the Objector's submissions, this application is bound to fail. It must be rejected. The Inspector is invited to make his recommendation accordingly.

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