

**IN THE MATTER OF:**

**AN APPLICATION TO REGISTER LAND KNOWN AS WITHY BED,  
BATHFORD, AS A NEW TOWN OR VILLAGE GREEN PURSUANT  
TO SECTION 15 OF THE COMMONS ACT 2006**

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**REPORT**

**OF ROWENA MEAGER (INSPECTOR)**

**6 February 2017**

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**Bath & North East Somerset Council  
Legal Division  
Lewis House  
Manvers Street  
Bath  
BA1 1JG**

1. I have prepared this report following an application (“the Application”) by Bathford Parish Council (“the Applicant”), received by Bath and North East Somerset Council (“the Council”) as Commons Registration Authority, on 26 November 2015, to register land known as Withy Bed, Bathford, (“the Application Land”) as a new town or village green pursuant to section 15(3) of the Commons Act 2006 (“the 2006 Act”). The period relied upon by the Applicant, according to the Application Form, is the twenty year period ending in March 2015 (“the Application Period”).
2. Notice of the Application was displayed and published / advertised in accordance with the procedure laid down by regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (“the 2007 Regulations”) by a notice dated 10 December 2015. The Application was advertised in the public notices section of the Bath Chronicle on 10 December 2015.
3. The Application was the subject of a public inquiry (“the Inquiry”) over which I presided from Monday 12 September 2016 to Thursday 15 September 2016, held at The Village Club, 58 High Street, Bathford, Bath. One objection was received dated 4 February 2016 on behalf of the owners of part of the Application Land, Mr Malcolm Waterman and Mrs Margaret Waterman (together, “the Objector”), whose land is registered at HM Land Registry under Title No ST140194.
4. At the Inquiry the Applicant was represented by Mr Peter Martin, a member of Bathford Parish Council. The Objector, Mr Waterman, represented himself. Owners of other parts of the Application Land (for detail of which, see below) did not appear at or participate in the Inquiry. However, correspondence was received from some of the other owners; Network Rail (dated 1 February 2016 indicating that no opposition would be advanced to registration), Wales & West Utilities

Ltd (dated 2 February 2016 referring to its easement), the Environment Agency (dated 27 January 2016 explaining that its land has been securely fenced, subsequently accepted by the Applicant) and the Highway Authority (dated 15 December 2015 explaining that any highway land is incapable of being registered). Further, one part of the Application Land is unregistered land and the identity of the owner is unknown. Attached to this Report at **Appendix A** is a plan that identifies, by reference to different coloured sections, the extent of the land under different ownership.

## **THE APPLICATION LAND**

5. As is clear from the foregoing paragraph the Application Land is not in sole ownership. Parts of the Application Land that formed part of the original Application were accepted by the Applicant to be incapable of registration as a new town or village green (“TVG”). In particular, that part of the land owned by the Environment Agency under Registered Title No ST236202, because it has been securely fenced and signs displayed identifying that part of the land as the Bathford Flow Measuring Station and telling people to keep out.
6. The Applicant has also accepted that the highway land (including the car park) is not capable of being registered as a new TVG because the public have the right to use such land in any event and their use of it cannot, therefore, be ‘as of right’ which is necessary for the statutory test for TVG registration to be met. There is attached to this report, at **Appendix B**, a plan depicting the extent of the land the Applicant seeks to have registered coloured green and the land that the Applicant accepts is incapable of registration coloured red. Whilst the Applicant has made no application to amend the Application to reduce the land the subject of it, such an application would be unnecessary given that it

is open to me to recommend registration of a smaller part of the land than was the subject of the original application in any event.

7. To all intents and purposes the land with which I am concerned is owned in three parts. Wales & West Utilities Ltd do have the benefit of an easement over the land owned by the Objector for the purposes of running and maintaining a gas pipe below the surface of the land. However, the three owners of the freehold title to the various parcels of land that make up the Application Land with which this Inquiry was concerned are the Objector, Network Rail and land in unknown ownership.
8. I will describe the physical features of the Application Land in more detail in the section of my report that records the detail of my site visit. For present purposes it suffices for me to record that the Application Land is very irregular in shape. It has the Great Western Mainline Railway along its Northern boundary, Bradford Road to the Eastern Boundary, its Southern Boundary is marked by the line of the bank of the By Brook and its Western boundary by the bank of the River Avon.
9. There is a well worn footpath across the land owned by Network Rail. It runs from Bradford Road to the path that continues alongside the railway line and continues thereafter in the direction of Bathampton. It is not a path that is recorded as a public right of way ("PROW") on the Definitive Map and Statement ("DMS") held by the Council. However, the Council recognises that it is an extension of a recorded PROW that likely carries with it public rights that have simply not been the subject of any determination. Attached to this report at **Appendix C** is a copy of the DMS together with better quality plans that identify the path to which I have referred above as an unrecorded path. For the purposes of this report I will refer to that path as the unrecorded PROW.

10. The main 'entrances' to the Application Land are at either end of the unrecorded PROW. However, the Bradford Road boundary is open and access can be gained at any point along that boundary save for a short stretch where there is a low wall and vegetation. The car park is also unfenced so access directly from the car park onto the Application Land is freely available. Similarly, the boundaries with the By Brook and the River Avon are unfenced and to the extent that it is physically possible to gain access to and from those watercourses those boundaries, too, are open. There is a particular point, however, at which access to and from the River Avon has been obtained (although not any longer) and that is at a point on the western extremity of the Application Land where there was a sloping section of land (quite possibly man made) that gave easy and safe access into the water.

11. Other than the recreational use to which I will refer in this report, together with very occasional rave parties that will also be referred to below, the Application Land has been unused for any formal purpose throughout the Application Period (ie it has not, by way of example, been used as agricultural land).

12. Topographically, the land to the North, by the railway, is much higher, and it slopes southward towards the banks of the By Brook and River Avon, flattening out as it reaches the Objector's land and that in unknown ownership. It does, of course, then slope into the water, quite steeply in places, along the banks of both the By Brook and the River Avon.

## **THE APPLICATION TO REGISTER A TVG**

13. As noted in the foregoing the Application is made pursuant to section 15(3) of the 2006 Act. The substance of the statutory provision, in so far as it applies to this Application, is as follows:

### *“15 Registration of greens*

*(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*

*(2) ...*

*(3) This subsection applies where –*

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

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

*(c) the application is made within the relevant period.*

*(3A) In subsection (3), ‘the relevant period’ means –*

*(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in (3)(b);*

*(b) ...*

*(4) ...”.*

14. In order for an applicant to succeed in an application to have land registered as a new TVG the Council must be satisfied that each and every part of the foregoing statutory test is met.

### **THE STATUTORY TEST**

#### **... a significant number ...**

15. “Significant” does not mean that a considerable or substantial number of people must have made TVG type use of the land. It simply means

that the number of people using the land in question in a qualifying manner has to have been sufficient to indicate to the landowner that the land has been in general use by the local community for informal recreation as distinct from occasional use by individuals as trespassers<sup>1</sup>. Whether or not the significant number test is satisfied is a matter of impression for an Inspector at an inquiry. It does not involve any kind of mathematical exercise.

16. It is not necessary for the recreational users to come predominantly from the relevant locality or neighbourhood<sup>2</sup>. Nor is it necessary for there to be a spread of users coming from across the entirety of the claimed locality or neighbourhood. Vos J in *Paddico (267) Limited v Kirklees Metropolitan Council & Others*<sup>3</sup> was unimpressed by, and rejected, a contention that an inadequate spread of users throughout a claimed locality would be fatal to an application for registration.

17. However, only recreational use by members of the public from the relevant locality or neighbourhood will contribute to the “significant number” test. In other words, use by people that do not come from within the claimed locality or neighbourhood does not support an application for registration of a new TVG and should be discounted to the extent that evidence of such use is adduced. The statutory test is clear that use must be by “a significant number of the inhabitants of any locality or of any neighbourhood within a locality”. Those components of the test must be read together.

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<sup>1</sup> *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin), para [77].

<sup>2</sup> *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530.

<sup>3</sup> [2011] EWHC 1606 (Ch), para [106(i)].

**... of the inhabitants of any locality ...**

18. A “locality” must be an area known to the law such as a borough, parish or manor<sup>4</sup>. It is established that a parish, civil or ecclesiastical, is a qualifying locality<sup>5</sup>. In this case the Applicant relies upon the Parish of Bathford.

**... or of any neighbourhood within a locality ...**

19. A “neighbourhood” need not be a recognised administrative unit or an area that is known to the law (in other words it does not have to meet the same stringent criteria that applies to establishing a locality). A housing estate can be a neighbourhood<sup>6</sup>, as can a single road<sup>7</sup>. However, a neighbourhood cannot be just any area drawn on a map. It has generally been accepted that it must have some degree of cohesiveness<sup>8</sup>. However, the “neighbourhood” test is not applicable in this case because the Applicant relies upon a locality.

**... have indulged as of right ...**

20. User “as of right” means user that has been without force, without secrecy and without permission (traditionally referred to by lawyers as *nec vi, nec clam, nec precario*). The basis for the creation of rights through such user is that the landowner has acquiesced in the exercise of the right claimed (in the case of applications to register a new TVG the period of user required is twenty years)<sup>9</sup> and the user can rely upon their long use to support a claim to the right enjoyed.

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<sup>4</sup> *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 937.

<sup>5</sup> *Paddico Ltd v Kirklees MBC & Others* [2012] EWCA Civ 250.

<sup>6</sup> *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin).

<sup>7</sup> *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530 (*Warneford Meadow*).

<sup>8</sup> *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin).

<sup>9</sup> *Dalton v Angus & Co* (1881) 6 App Cas 740, 773.



21. The landowner cannot, of course, be regarded as having acquiesced in user unless that user would appear to the reasonable landowner to be an assertion of the right claimed<sup>10</sup>. If the user is by force, is secret, or is by permission, (ie *vi, clam, or precario*) it will not have the appearance to the reasonable landowner of the assertion of a legal right to use the land.

### ***Force***

22. Force is not limited to physical force. User is by force not only if it involves the breaking down of fences or gates but also if it is user that is contentious or persisted in under protest (including in the face of prohibitory signage) from the landowner<sup>11</sup>. However, 'perpetual warfare' between landowner and users is not necessary<sup>12</sup> to prove contentiousness. More recently the court has asked itself the question whether the landowner has done enough, having regard to the extent of the problem of trespass, to bring it to the attention of the users that such use is not acquiesced in<sup>13</sup>

### ***Stealth***

23. User that is secret or by stealth will not constitute user as of right because such use would not come to the attention of the landowner and he could not, therefore, be said to have acquiesced in such use.

### ***Permission***

24. Use that is permissive is 'by right' and is, therefore, not capable of being 'as of right', a point reinforced by the recent decision of the Supreme Court in *R (on the application of Barkas) v North Yorkshire County Council and Another* [2014] UKSC 31. In *Barkas* lengthy

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<sup>10</sup> *R (Lewis) v Redcar & Cleveland Borough Council* [2009] 1 WLR 1461.

<sup>11</sup> *Smith v Brudenell-Bruce* [2002] 2 P & CR 4.

<sup>12</sup> *Cheltenham Builders*, at para [71].

<sup>13</sup> *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250.

consideration was given to the earlier decision of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 that appeared to accept that possibility that even use that on the face of it might appear to be permissive was also capable of constituting use 'as of right'.

### *Concurrent use by landowner*

25. In circumstances where there has been concurrent use by the landowner it is well established that use by the landowner alongside use by recreational users will not automatically prevent land qualifying for registration as a new TVG if the co-existing uses are not incompatible with each other<sup>14</sup>. It is accepted, for example, that low level agricultural use of application land is not *necessarily* inconsistent with use of the land for lawful sports and pastimes<sup>15</sup>.

### **... in lawful sports and pastimes ...**

26. The term "lawful sports and pastimes" is a composite phrase that includes informal recreation such as walking, with or without dogs, and children playing<sup>16</sup> and, indeed, any activity that can properly be called a sport or pastime. Lord Hoffmann in *Sunningwell* expressly agreed with what had been said in *R (Steed) v Suffolk County Council* (1995) 70 P & CR 487 about dog walking and playing with children being in modern life the kind of informal recreation which may be the main function of a village green. However, in *Warneford Meadow* the court interpreted the word lawful as meaning to exclude any activity that would constitute a criminal offence.

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<sup>14</sup> *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 70.

<sup>15</sup> *Oxfordshire*, per Lord Hoffmann at para 57; *Redcar*, per Lord Walker at para 28.

<sup>16</sup> *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 356F-357E.

**...on the land ...**

27. It is not necessary for the whole of the land to have been used for lawful sports and pastimes but only that the land has been used in the appropriate manner. There may be land, for example, that has a pond on it or, as in *Oxfordshire*, that is not wholly accessible for recreational use. The fact that some of the application land might have been inaccessible for use for lawful sports and pastimes does not preclude registration. It is not necessary for a registration authority to be satisfied that every square foot of a piece of land the subject of an application has been used.

**... for a period of at least twenty years ...**

28. In the case of an application under section 15(3) of the 2006 Act the relevant period is the twenty year period immediately preceding the date upon which the claimed qualifying use ceased. Use must be continuous throughout the whole of the twenty year period<sup>17</sup>. It is possible that works on the land the subject of any application might cause sufficient interruption to qualifying use such that the use could not be said to have been continuous throughout the whole of the relevant period<sup>18</sup>.

**PROCEDURAL MATTERS**

29. The burden of proof that the Application Land meets the statutory criteria for registration as a new TVG lies firmly with the Applicant. It is no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be

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<sup>17</sup> *Hollins v Verney* (1884) 13 QBD 304.

<sup>18</sup> *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250; *Naylor v Essex County Council* [2014] EWHC 2560 (Admin).

“properly and strictly proved”<sup>19</sup>. That means that if any part of the statutory test is not satisfied, an application must fail as a matter of law. The standard of proof is the usual civil standard of proof of the balance of probabilities.

30. For completeness, in this case it makes no difference that some of the landowners have not participated in the Inquiry process or, in the case of Network Rail, has indicated that it does not intend to oppose the Application. In order to be registered as a new TVG the statutory test must be met in respect of those parts of the Application Land too.

31. An application will not be defeated by drafting errors or defects in the application form<sup>20</sup>. It is the substance of an application, supported by evidence, that dictates whether an application is successful or not. The issue for the Commons Registration Authority is whether or not the Application Land has become a new TVG by virtue of all the components of the statutory test being met

## **EVIDENCE FOR THE APPLICANT GIVEN ORALLY**

32. Having set out briefly the generality of the substance of the law as it relates to the test for registration of a new TVG I now turn to consider the witness evidence produced on behalf of the Applicant. I will deal first with the witness evidence given orally to the public inquiry and which was subjected to cross examination by the Objector. I will summarise the evidence that I heard in the order in which the Applicant’s witnesses gave their evidence. However, what follows is not intended to be a *verbatim* account, or even necessarily a complete account of the evidence given to the Inquiry. It is simply a précis of some of the more salient issues dealt with in evidence, particularly

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<sup>19</sup> *R v Suffolk County Council, ex parte Steed* (1996) 75 P & CR 102, 111, *per* Pill LJ, approved by Lord Bingham in *R (Beresford) v Sunderland City Council*, para [2].

<sup>20</sup> *Oxfordshire County Council v Oxford City Council & Another* [2006] 2 AC 674.

those that form the basis of my findings of fact. The précis is simply intended to be a sufficient account of the evidence for the Council to understand the reasons and reasoning behind my conclusions.

### **Martin Veal**

33. Mr Veal has been a ward councillor for Bathavon North since 2000. He lives in Batheaston where he has lived all his life. He told the Inquiry that he has spent a lot of time in Bathford, however, as that is where his cousins live. He produced a letter to the Clerk to Bathford Parish Council (the Applicant) dated 13 November 2015. In that letter he talked mainly about his use of the Application Land in his youth, along with friends from Bathford.

34. He expanded on his use in his oral evidence and described larking about, climbing trees and later fishing and swimming in the brook. It was clear that much of his use of the Application Land occurred during his childhood and teenage years. However, he did give evidence of more recent use, during the Application Period, which he described as occasional, not often. That use has been for walking, strolling and reminiscing. Mr Veal told the Inquiry that he had been on the Application Land about 5 or 6 times over the last 20 years.

35. I asked Mr Veal to indicate on a plan where he went on the Application Land when he used it during the Application Period. He indicated a route that emerged onto the Application Land by the route of the unrecorded PROW in the direction of and to the Bradford Road entrance, then along the road frontage and across the car park, crossing the grassy area behind the car park and down to the brook.

36. A number of points are worthy of note in respect of Mr Veal's evidence. The unrecorded PROW crosses the land owned by Network

Rail and the land surrounding the car park is the land in respect of which ownership is unknown. However, as a non-resident of Bathford his personal use must be disregarded for the purposes of assessing whether the statutory test is met.

### **Simon Tapscott**

37. Mr Tapscott lives at 69 Dovers Park, Bathford. His written evidence says he moved there in 2001 but in his oral evidence he said 2002. Mr Tapscott produced an evidence questionnaire ("EQ") dated 16 June 2016 and a letter addressed to the Clerk to Bathford Parish Council, but which internally refers to itself as a witness statement ("WS"), of the same date.

38. Mr Tapscott's written evidence says that he has used the Application Land since 2001 for fishing, kayaking and family pastimes. In his oral evidence he first said he had used the Application Land since he moved to Bathford in 2002 but later, when I asked him how long after he first moved to Bathford did he start to use the Application Land, he said he discovered it in 2004 when he found that he could walk into town along the PROW by the railway. He said he then walked in once a week on a Friday.

39. Mr Tapscott's children were born in 2004 and 2006 and he first took his children to the Application Land when the eldest was about 3 years old (around 2007). He said that he had increasingly used the Application Land for recreational activity, particularly over the last 5 or 6 years. On average (bearing in mind that summer use is more regular than winter use) he said he used the Application Land around 10 to 12 times per year. Mr Tapscott also said that he walked his dog along the PROW over the railway bridge.

40. Of other people's use Mr Tapscott said that he had seen other people on the Application Land undertaking such activities as fishing or using it as a safe means of entry for canoes and kayaks. He referred to the keen canoeing community in and around Bathford that would congregate at the local pub, The Crown, and launch their canoes and kayaks from the Application Land and he specifically mentioned the nearby communities of Warleigh, Kingsdown and Batheaston. He said that he probably recognised 75% of the people he saw using the Application Land and of those he thought around 50% came from Bathford.

41. It was suggested to Mr Tapscott that when he went to the Application Land for the purposes of canoeing he would simply cross the land carrying his canoe until he reached the water. He agreed with that but said that he went there at other times to watch wildlife or sit and have picnics. He thought that about 75% of his more recent use was for canoeing. He explained that when describing his use (for canoeing and with family) he was trying to give a "blended average" picture of his and his family's use. Mr Tapscott was taken to a map that subdivides parts of the Application Land by reference to numbers (attached to this Report at **Appendix D**) and he said that he had used areas 5, 2 and 9 and he said he was not sure about 8. He agreed that number 9 relates to the PROW. When I asked him if he stayed on the path to the river or deviated from it, he said he always stayed on it. Area 2 was the section of the Application Land he used most as it is from that part of the Application Land that he would launch and recover his canoe where there was a man made slope designed for just such a purpose. He would park his car in the car park and take his canoe directly to that launch point.

42. Mr Tapscott was asked about signage and when he first became aware of the fencing of part of the Application Land. He recalled having seen

white paint marks on trees and he was aware of the fencing being erected on the land at quite an early stage. He said there is a 'private land' sign there now but I am not sure when he first saw that sign on the Application Land. He thought the activity that eventually resulted in the erection of the fence had probably started about 12 to 24 months before.

43. Mr Tapscott's approach to his evidence, particularly his attempts to provide a précis of his use that constituted what he described as a "blended average", made it difficult to get any clear and detailed picture of exactly what use he had in fact made of the Application Land or over exactly what period given that he said he had used the land variously from 2001, 2002 and 2004.

44. When walking his dog Mr Tapscott said he kept to the PROW so I am simply discounting that use as being use that does not contribute to the qualifying use necessary to satisfy the statutory criteria. About 75% of his more recent use (until access was prevented following the erection a fence) has been for the purpose of launching his canoe from the Application Land (he acquired his canoe in around 2009). That use took the form of taking his canoe from his car, walking a direct route from the car park and along a path to the launch point, and then returning by the same route.

45. From about 2007 he took his young children to the Application Land so for a couple of years until he bought a canoe he would only go there with his children. I got no clear impression of exactly where Mr Tapscott went on the land with his children as he said he would enter by the PROW by the stone wall and when I asked what he would do with his children there he said they would sit and marvel at the wonders of the world. He did then say he would stay on the path until he reached the river and that he had caught crayfish and even 3 eels



there. However, it was not clear to me whether that was with or without his children or when it was.

46. What is clear is that Mr Tapscott's answer to question 38 of his EQ is not accurate. His pattern of use of the Application Land has not remained the same, as he said it had, because he did not use it with his children until around 2007 and since 2009 he has used it predominantly for launching his canoe which he did not own during the earlier years of his residence in Bathford or his earlier period of use of the Application Land.

### **John Lloyd**

47. Mr Lloyd is a member of Bathford Parish Council and has held that position since the mid to late 1990s. He lives at 55 Dovers Park, Bathford, and has lived in the Parish since 1965. Mr Lloyd produced an EQ dated 19 November 2015 and a letter to the Clerk of Bathford Parish Council dated 10 June 2016. Save for the observations I shall make below, he described his use as being from 1966 to 1974, during his childhood years, when he would go to the Application Land with friends to fish, launch canoes, build dens and play.

48. During his oral evidence Mr Lloyd was asked if he had used the Application Land in the last 20 years. He replied not at all. He said that between 1978 and 1999 he had rented part of Bath Demolition Yard and during that period when there had been heavy rain he would very occasionally go to the Application Land to see if it had flooded because that provided him with a fair indication as to whether his business premises would flood which it had a tendency to do. That was his only purpose for visiting the Application Land during that period.

49. Mr Lloyd was asked if he saw works to install a gas pipe taking place on the Application Land in 2010 and he replied that he had not. He was also asked if he had seen signs on the Application Land and he said not until the ones that are there now. Mr Lloyd was asked if he was aware of any raves having occurred on the Application Land and he said that he recalled two. He was on the Parish Council and he remembered there being issues about noise pollution.

50. I was concerned about Mr Lloyd's evidence because in his EQ he had answered "yes" to question 38 which asked if his pattern of use of the land had remained the same, having previously said in answer to question 35 that he had used the land from 1966 to present (ie 2015 when he completed the EQ). In light of the evidence he gave to the Inquiry, that he had not used the Application Land for the preceding 20 years or indeed, it seems, since 1974, those answers are clearly inaccurate. I asked Mr Lloyd why he had answered question 38 as he had and he said that he probably did not read the question properly. Nevertheless, Mr Lloyd offered no evidence of personal use throughout the Application Period in any event.

### **Vanessa Letort**

51. Ms Letort lives at and is the proprietor of The Crown Inn, 2 Bathford Hill, Bathford, which is situated in very close proximity to the Application Land (approximately 100 metres away). She moved there in 2010. She produced an EQ dated 6 June 2016 and a letter to the Clerk to Bathford Parish Council dated 13 June 2016. In her written evidence Ms Letort described her use of the Application Land as daily, to walk dogs, swim and kayak. She also produced information and a photograph as evidence of a canoe store at The Crown Inn where anyone is welcome to store their canoe subject to it being made available for others in the community to borrow.

52. In her oral evidence Ms Letort expanded upon her use of the Application Land. She said that she went onto the Application Land 2 or 3 times per day for the purposes described in her written evidence. When questioned further, however, she did name other places where she also walks her dogs. She also said that she launched and landed canoes on the Application Land at least once a week during the summer months (usually from May to October unless the weather was unusually kind outside that period), but not in the winter. Sometimes it would be her and her partner and at other times it might be a big group of people. The Application Land was used by people from the local area, which she regarded as being more expansive than just Bathford. Ms Letort said she thought around 70% of the people she saw came from Bathford.

53. Having stated during cross examination that there were parts of the Application Land that she did not use Ms Letort did identify those parts that she did use on a plan provided to her by me. She either entered the land from the PROW or from the car park, along a route following, but set back from, the line of the river and she identified two places where she would launch or land canoes. The first was the man made slope into the River Avon which Mr Tapscott had also identified as a launching place, and the second was from the bank into the By Brook but relatively close to the point where the By Brook runs into the River Avon. There is a point between the car park and the second launch area where Ms Letort said her dogs would go into the By Brook to swim.

54. She did not recall seeing any signs prohibiting use and had thought the Application Land was common land. There was some confusion over Ms Letort's understanding of the extent of the Application Land and it transpired that she did not regard the part of the Application Land to

the south west and south east of the car park as being part of the Withy Bed (that being the land in unknown ownership). She also accepted that not the whole of the area she knows as the Withy Bed has been fenced off.

### **Geoff Ward**

55. Mr Ward has been the Ward Councillor for Bathavon North, within which the Application Land is situated, since 2011. He lives at Elmhurst, Upper Swainswick, Bath, and has done so since 1990 (since before the beginning of the Application Period). He therefore lives outside the locality being relied upon for the purposes of this Application. He produced a letter to the Environmental Services Department at Bath and North East Somerset Council dated 19 November 2015 together with some copy photographs taken in 2004 and 2014.

56. In his written evidence Mr Ward gave details of his use of the Application Land. Most particularly he owned and ran a business which operated out of premises in Batheaston (not Bathford) from 1992 and which was close to the Application Land. Whilst he still owns those premises it is apparently let to commercial tenants now. Mr Ward wrote of his use of the Application Land, at least a few times a month and possibly more often in the summer, he would go there to fish and to walk his dog, which he took to work with him. He also stated that on a few occasions he found other local people fishing on his usual fishing spot and on a couple of occasions he saw canoeists launch from or land on the Application Land from the River Avon.

57. In his oral evidence Mr Ward expanded upon the period and nature of his use. He sold his business in 2007 and his old company moved out of the premises in 2008. Thereafter the premises were let to tenants but

Mr Ward continues to manage the property and attends regularly. He also continued to use the Application Land. He walked his dog there on most days until 2010 when it passed away, although he has two dogs now. As a keen angler he used the Application Land for fishing. He would pre-bait the river 3 or 4 nights before he intended to fish. When he fished there he would sometimes see others doing the same, or launching a canoe or occasionally walking a dog. He said he did not know who they were so could not say if they were from Bathford or not.

58. Mr Ward said he did not recall seeing any signs on the Application Land or any string demarcating certain areas or paint marks on trees. He did not recall the laying of a gas pipe in 2010. Nor did he know of any raves held on the Application Land although he did make reference to the remains of some sort of hut back in the early to mid 00's and someone then apparently told him of the activities on the Application Land later on.

### **Philip Harris**

59. Mr Harris is the Clerk to Bathford Parish Council (he had served as a member from 1976 to 2003). He lives at 50 Church Street, Bathford, and has lived in Bathford for 60 years. He produced a letter dated 16 November 2015 in which he referred to his own use of the Application Land (or possibly the 'area' more generally) and use he had witnessed by other members of the public. His use was described as walking along the footpath over the River Avon adjacent to the railway and onto the meadows beyond. He also wrote about an adjoining area known as "Withyford", which includes the old Parish Pound, that has been maintained by the Parish Council since the 1980's, such maintenance having involved the laying of paths and grass cutting along side the road.

60. In his oral evidence little clarity was elicited about Mr Harris' use of the Application Land save that his use (during the Application Period at least) was largely related to dog walking between 1995 and 2003. Later in his evidence he said that excepting a visit he made to the site 3 weeks prior to the Inquiry to look at it, he had not used the Application Land since 2003. His normal route appears to have been through the gap from the road frontage (which I took to mean the entry point of the unrecorded PROW) and then up the slope towards the railway line. Consistent with what Mr Harris had written in his letter I formed the view that his use of the Application Land was largely use of the PROW. He said that he generally went to the Application Land once a fortnight to walk his dog.

61. Of other people's use Mr Harris said that there have been other people there; it is not deserted. He said he saw people in the summer time occasionally enjoying the spot, having a picnic or maybe a swim. Despite having said that he saw people occasionally in the summer time, when he was asked how often he met someone he knew he said most times that he went there. Rather inconsistently, however, he later accepted that the majority of people he saw were ones that he did not know. What I do not know is whether those people that he knew were residents of Bathford or from elsewhere. I also do not know where on the Application Land he saw them or, indeed, those that he did not know.

62. Mr Harris said he had not seen signs on the Application Land, nor had he seen works associated with the installation of the gas pipe in 2010. He was asked about raves and said he recalled two in particular. He thought they were probably in around 2000 or 2002. He said there was a great deal of upset regarding the noise.

63. Despite having referred in his letter to the Parish Council's maintenance activities associated with the Application Land Mr Harris was taken, during cross examination, to a document produced by the Applicant; the Bathford Village Design Statement, December 2005 ("VDS"). In particular his attention was drawn to an extract that referred to outdoor raves and the fact that the area is overgrown, suffers from debris and litter and has an air of neglect. It was put to Mr Harris that the area to which the VDS referred was not one that had been maintained by the Parish Council. He accepted that appeared to be the case although expressed the view that the matter ought to be addressed by a member of the Parish Council.

### **Brian Anger**

64. Mr Anger lives at 42 Box Road, Bathford. He has lived in Bathford continuously since 1969 although he had previously lived in Bathford until 1961. He produced an EQ dated 12 November 2015 and a letter to the Clerk to Bathford Parish Council dated June 2016. In his written evidence Mr Anger said that he used the Application Land for access to the river, for fishing, bird watching and cycling. He also said that in the 1970s to 1980s he cut some of the dead elms for firewood. He also said that his use of the Application Land was weekly until access was prevented in early 2015 due to the erection of a fence. In answer to question 35 of the EQ Mr Anger said he had used the Application Land from 1960 to 2015. In answer to question 38 which asks if during the time a witness has used the land their pattern of use has remained the same, Mr Anger wrote 'yes'.

65. During his oral evidence it became apparent that the activities Mr Anger referred to in his written evidence were not ones that he had engaged in on the Application Land during the Application Period and his answer to question 38 was therefore inaccurate. I asked him what

he would have done on the Application Land during the relevant period. He said he had not fished there in the last 20 years; he had fished there during the summer holidays when he was at school. More recently it was a place to go and look around. He showed the Inquiry on a map where he would go on the Application Land and he indicated a route that entered the Application Land from the highway and then followed a line along the curve of the By Brook to the corner where the By Brook meets the River Avon, the spot from which he said he used to fish. He said there was a proper path.

66. Mr Anger was asked about the raves the Inquiry had heard about. He said he had attended the first one and stayed for about an hour and a half. He said there were a lot of people there, maybe 50 or 100, and he described it as a racket. He did not say when that rave took place and he did not say whether he knew the other people that were in attendance. Mr Anger said he had not seen any signs on the Application Land and he recalled little of the gas pipe being installed save that as a result of those works he said part of the wall was demolished. I interpreted this as being reference to the old Pound Wall.

### **Emma Jackson**

67. Mrs Jackson lives at 65 Dovers Park, Bathford. She moved to Bathford in 2001 where her husband had lived since 1996 (at 7 Prospect Place). She has known the Application Land since 1999 but used it since 2001. She produced an EQ (jointly with her husband, Jason) dated 24 November 2015 and a joint letter to the Clerk to Bathford Parish Council dated 7 June 2016.

68. Of hers and her family's use Mrs Jackson's written evidence says that they have walked on it to admire the stream and river, cycled at the side of the railway to get to the fields to access the Bathampton



towpath and, since 2001, have used the area to launch a canoe. Frequency of use she said was about 10 times per year. Mrs Jackson made reference to others using the Application Land for the purposes of launching canoes into the river and in answer to question 10 on the EQ Mrs Jackson said other users come from Bathford and other places.

69. In her oral evidence Mrs Jackson expanded on her written evidence. The majority of her use (and that of her family) has been in the summer months. She repeated the purposes for which they have used the Application Land but added that it was principally for canoeing. When Mrs Jackson was asked during cross examination whether she had been there frequently between June 2013 and January 2015 she said they went there 2 to 3 times per year to canoe. Given that she had told the Inquiry that their principal use of the Application Land was for canoeing, that answer does not sit very happily with Mrs Jackson's evidence that she and her family have used the Application Land about 10 times per year.

70. Mrs Jackson was asked about use of the Application Land by other people. She said that she had seen people having picnics on the opposite bank (outside the Application Land) and she said that she knew people from Bath and Batheaston that used the Application Land to launch and land canoes, as well as local people from Bathford. She referred to having seen a fisherman but said she did not know who he was. The route she and her family would take when launching a canoe from the Application Land was from the car park and directly along a path to the man made slope into the River Avon that other witnesses had referred to. Mrs Jackson did say that she had gone all over the Application Land but I got no sense of where exactly, or when, or how often. She said she collected other people's litter occasionally but later added that such activity tended to be around the car park area. She had made reference to gaining access to the towpath via the Application

Land which she said meant that people would go through the Application Land on their way to Bathampton where the towpath is. That appears to me to be reference to use of the unrecorded PROW.

71. Mrs Jackson has no recollection of any signs until the fence was erected. She did remember the installation of the gas pipe. She said there was a bit of a mess but did not think that people were excluded from the Application Land during the works. She recalled what she thinks were the raves. She said they were able to hear them at night and they believed they were on the Application Land. She also referred to there having been structures in the trees and mattresses on the land at some point but that was possibly after the raves she thought.

### **Malcolm Austin**

72. Mr Austin lives at Fieldgate, Box Road, Bathford and has lived in Bathford since 1946, for seventy years. He produced an EQ dated 14 November 2015 and a letter dated 13 June 2016. His written evidence state that as a schoolboy he used the land to play with his friends and as he got older to meet them in the evenings with their motorbikes. He said that he would occasionally fish there or go canoeing on the River Avon. In answer to question 38 of the EQ Mr Austin said that his use of the land had remained the same during the time he had used the land.

73. However, and in contrast to his answer to question 38, in his oral evidence Mr Austin said that as a teenager he would use the Application Land 2 to 3 times per week but less today. He said that he has been to the Application Land maybe 3 or 4 times a year for the last 40 years. Mr Austin was asked if there has been any change in his pattern of use over the last forty years and he said that he had retired 4 years ago and so he and his wife have walked into Bath more often and would go and have a look on the Application Land.

74. I asked Mr Austin to indicate on a plan where he would go on the Application Land and he identified a route from the highway directly to the corner where the By Brook meets the River Avon. He said that he would go there for 10 minutes to take in the view and then turn around and go back again. In cross examination Mr Austin was asked when he last went to the corner of the By Brook and the River Avon to take in the view and he said it was probably 3 years ago (so around 2013). He was then asked if he had gone to the Application Land in 2014 and he replied that he probably had not. Mr Austin also said he did not use other parts of the Application Land although he had done so when he was a teenager. In his evidence questionnaire Mr Austin had indicated, in reply to question 34, that he had seen people picking blackberries on the Application Land. In cross examination he was asked where. He said he could not specifically remember but that it is the sort of thing people would do in the country. He was pressed and asked if he could specifically recall blackberry picking and he said no.

75. Mr Austin was asked about use of the Application Land by other people. He said there had been fishermen and signs of campfires. When asked if that was recent or when he was a child he said probably both. His answer was vague in the extreme. He had seen no signs on the land until the recent appearance of fencing. He was not aware of the installation of the gas pipe until after the event. In reply to a question about raves Mr Austin said that he could hear music from his home but only later became aware that there had been raves.

76. I find that I must approach Mr Austin's evidence with caution. He had, in his EQ, clearly indicated consistent use of the Application Land throughout the period he had used it and that turned out to be inaccurate. He then told the Inquiry he had visited the Application Land 3 to 4 times a year for the past 40 years, but more in the last four

years since he had retired. He later said he had not been to the Application Land since 2013, which is completely inconsistent with his evidence of increased use over the last four years. Mr Austin also gave an answer in his EQ about an activity he had witnessed that turned out to be nothing more than an assumption on his part.

### **Teresa Cunningham**

77. Ms Cunningham lives at 28 Box Road, Bathford, and has done so since 1988. She provided an EQ dated 12 November 2015. Her EQ appeared in the Applicant's Bundle within the evidence that was not going to be the subject of oral evidence at the Inquiry. However, at the beginning of the second day of the Inquiry I was informed that Ms Cunningham had expressed a strong wish to give her evidence in person and she was, accordingly, invited to do so. In her written evidence Ms Cunningham said she used the Application Land daily for pleasure and dog walking and in answer to question 38 of the EQ she said her pattern of use of the Application Land had remained the same throughout the time she had used it.

78. In her oral evidence Ms Cunningham said that as well as walking her dog on the Application Land she had also used it with her nephews and nieces. She then said that there had been occasions when a group of around 10 or 12 people from the community plus a few children had gone to the Application Land with disposable BBQs. That happened once or twice a year according to Ms Cunningham's evidence. However, she then said that it had not occurred between June 2013 and January 2015 and when pressed she said she thought the last time was probably 2012. I asked if the BBQs happened every year and I was told they happened just when the participants knew the weather was good. When I pressed Ms Cunningham and asked her if it happened every

year she said she could not remember. This aspect of her evidence was vague and unsatisfactory.

79. I asked Ms Cunningham to indicate on a plan the route she would take with her dog. She pointed out a route that entered the Application Land at around the point where the unrecorded PROW enters the land. She would then follow a path to the far side of the land, closest to the River Avon and near to the fenced off land owned by the Environment Agency, do a circuit at that end of the land and then follow a different path back, adjacent to the By Brook, emerging onto the car park.

80. Of other people's use Ms Cunningham said she saw other people on the land, BBQing, fishing and camping. She could not say where they were from. She said her own partner, Geoffrey Gay, went fishing there probably 2 or 3 times per year. She had also watched people boating. Other than her reference to Mr Gay's fishing activities I got no sense of how often Ms Cunningham witnessed activity by other people.

81. Ms Cunningham had no recollection of seeing signs on the land. She said that in 2015 she was informed by her partner that something was going on on the Application Land and he indicated that he did not want her to go there any more. She recalls that the laying of the gas pipe created a bit of a mess but it did not prevent her from going onto the Application Land. She also recalls the raves and says she was invited to the first one but did not attend. She thought there were two or three in total.

### **Geoffrey Gay**

82. Mr Gay lives at 28 Box Road, Bathford. He has lived in Bathford since 1955. He produced an EQ dated 21 November 2015 and a letter to the Clerk to Bathford Parish Council dated 8 June 2016. In his written

evidence he said that he has used the Application Land every day since 1955 until it was fenced off in 2015. He has used it for pleasure, dog walking, fishing and boating. His use, according to his answer to question 38 of the EQ, has remained the same throughout his period of use. He said he saw others using the Application Land too for the same sorts of activities. They came from Bathford, Batheaston and the surrounding area. He mentioned that there were community activities as well that included BBQs, boating and fishing.

83. During his oral evidence when he was asked whether he had used the Application Land he said frequently. He was asked over the last 20 years how often and he said virtually every day. I asked him if he had fished there in the last 20 years and he said no, only as a teenager (which is not what Mr Gay's partner, Ms Cunningham, said whose evidence was that he went 2 or 3 times a year to fish there). In the last 20 years he told me that he used the Application Land for dog walking, tranquil peace and quiet, and bird watching.

84. Mr Gay was asked about his answer to question 10 of the EQ where he said that people from Bathford, Batheaston and the surrounding area used the Application Land. He was asked how far the surrounding area extended. He said that he could not say but that people arrived to use the land by car. Other than people that he knows from Batheaston he said users could come from Timbuktu. I got no sense of how often, particularly over the Application Period, Mr Gay saw anyone else on the Application Land that came from Bathford.

85. Mr Gay said that he had met the previous owner, Mr Fawcett, on the Application Land but he could not recall when that was. He said that Mr Fawcett introduced himself as the owner and told Mr Gay that he was welcome to use the Application Land whenever he wanted to. Mr Gay said he had never seen any signs on the land. He said he recalled

two raves, the first of which he was invited to but did not attend. He said that the morning after the first rave he went to the Application Land with his dog and there was still music playing, there were people there asleep under trees and there were beer cans and bottles. The next time he visited it had all been cleared up and was back to normal.

86. Mr Gay recalled that when the gas pipe was installed there was rubble and mess where a kissing gate used to be. He also recalled there being fencing stored on the land at a later time. He had assumed, he said, that it was associated with the electrification of the railway line and that Network Rail was using the land for the storage of equipment as they had done previously at Bathampton. He had seen Mr Waterman on the land but had not spoken to him as he says he did not want any confrontation.

### **David Howells**

87. Mr Howells lives at Tamarisk, Ostlings Lane, Bathford, and has done so since 1999. He produced an EQ dated 17 November 2015, a letter to the Clerk to Bathford Parish Council dated 8 June 2016 (which contains photographs) and a photograph illustrating the new fencing erected by Mr Waterman. Mr Howells is not only a resident of Bathford but is also a historian and part of the purpose of his evidence was to set out the history of the site in question.

88. In his written evidence of his own use he said that he used the Application Land a few times a year throughout his residence in Bathford as part of a walk and to view the river and the historic bridge built by I S Brunel when building the railway. Mr Howells' letter charted the history of the site, referring back to its early history as illustrated by the Tithe map for Bathford published in 1839 and bringing the history of the site up to date, including the effect of more

recent changes in ownership. The letter also makes reference to a prize that was won by a group of residents in 1987 for their efforts to improve the Application Land as part of an environmental improvement competition run by the CPRE.

89. One of the local residents responsible for the works that led to the CPRE prize was a Commander Alan Craig who also compiled an album that recorded information about the Application Land and what was regarded a conservation project. The album, entitled "Bathford Conservation Project, Vol 1, 1986 - 1988", was too delicate to photocopy in its entirety but Mr Howells very kindly allowed me to take the album away for an evening so that I might read it, which I did. Interestingly, it explained why some residents said that they knew the Application Land as Paradise, a name by which the Application Land (or at least a part of it) had been known historically. So too was the Application Land sometime known historically as Purdy's Piece.

90. In his oral evidence Mr Howells confirmed that he went onto the Application Land about 3 or 4 times a year. Despite this, which gives the clear impression of consistent use throughout the whole of the time that Mr Howells has used the Application Land (and is also consistent with his answer to question 38 on the EQ), when asked in cross examination whether he had visited the Application Land between June 2013 and January 2015, Mr Howells said that he had not. I then asked Mr Howells how long it was since he had been to the Application Land and he said he knows that he went there when there were raves because he took a photo in October 2001. He also said that he had taken a photo in January 2008 when the land had flooded. I asked him if he had visited the Application Land since January 2008 and he said he would think so. I formed the impression that I could not rely upon Mr Howells' evidence that he had visited the Application



Land 3 or 4 times a year in light of his answers to the foregoing questions.

91. Mr Howells indicated on a plan the route he would normally take when he did visit the Application Land (the frequency of which I cannot be certain) which consisted of walking a straight line from the entry point of the unrecorded PROW on Bradford Road to the end of the Application Land at around the point where the Environment Agency land is fenced off. From there he would follow the bank of the River Avon to the corner where the River Avon meets the By Brook. He would then turn around and walk back the same way. Mr Howells told the Inquiry he would sometimes do this when out for a longer walk to Bath or Batheaston, which walks he did relatively regularly, about once a month.

92. Mr Howells was asked during evidence in chief whether he had seen other people using the Application Land and he said not that he could recall. However, he answered question 10 of the EQ, which asks where the people who use the land come from, that he assumed they came from Bathford or Batheaston. Mr Howells was challenged about this answer during cross examination and it was put to him that the users of the land could have been anyone from anywhere, a proposition with which he agreed. I struggle to see how Mr Howells could give any reliable evidence about other users of the Application Land when his own evidence was that he could not recall seeing anyone there himself.

### **Mary George**

93. Mrs George lives at 21 Ashley Road, Bathford. She has lived in Bathford all of her life, save for 13 years when she lived elsewhere, returning 35 years ago. She produced an EQ dated 16 November 2015 and a letter to the Clerk to Bathford Parish Council dated 9 June 2016.

In her EQ Mrs George's evidence is that she uses the Application Land for recreation and that she uses it a lot. She also said in answer to question 36 that she used the land from 1955 to 2015 very often and in answer to question 38 Mrs George said that until recently her pattern of use of the land has remained the same. In her letter Mrs George said that she was born in Bathford 66 years ago and that part of growing up was playing on the Application Land. She said it was a lovely place to explore and let the imagination run wild, especially in the summer holidays but also to have picnics. She said she went there with the Brownies too.

94. In her oral evidence Mrs George provided more detail of her use of the Application Land, which had clearly changed over the years, her answer to question 38 therefore being inaccurate. She said her use of the Application Land over the last 20 years had been for dog walking and photography. She said she used to go to the Application Land quite regularly when she had a dog but then told the Inquiry that she had not had a dog for quite a while, 10 or more years but she could not recall precisely. She said she went to the Application Land 2 or 3 times per week when she had a dog. Since she has been without a dog Mrs George told me, in answer to my question, that she went there once a fortnight. I asked her to indicate on a plan where she went on the Application Land. She indicated an entry point in the corner of the land, from the highway, close to the railway embankment. She said she then went all over the land. I asked if that was on paths and she said there were paths worn everywhere and if the dog went off it she would follow. Mrs George then identified the area where she went to take photos as being at the southernmost corner of the Application Land, south of the car park and around the area where the By Brook turns a corner having come under the Bathford Bridge.

95. Mrs George said she saw other people on the Application Land walking dogs but she was unable to say where they came from and I do not know what part of the Application Land they were on. She said a few she recognised but they could be from other places although she said most from Bathford. She drew this conclusion because she said there were 5 or 10 people that she bumps into regularly in all sorts of places in the village. In her EQ Mrs George said she had seen locals using the land. When pressed on what she thought constituted a local during cross examination she said people that came from Bathford, Batheaston, Bathampton, Kingsdown or Warleigh. She was then asked if she would recognise people from Batheaston, for example, and she replied she would because she used to work in the doctor's surgery there.

96. Mrs George did not recall signs referring to the land as private. She did not have first hand experience of the gas pipe being laid. She was aware of it because other people had told her about it. She was aware of there having been only 1 rave. She heard it and was told later what it was. She had not seen any orange string on the Application Land or any fencing materials being stored there.

### **Peter Martin**

97. Mr Martin lives at 26 Box Road, Bathford, and has done so since 2004. As well as being a resident of Bathford he also became a Parish Councillor about 5 years ago. Mr Martin produced an EQ dated 9 November 2015, a statutory declaration dated 17 November 2015 and an email exchange between himself and Graeme Stark of the Council dating back to June 2016. In his written evidence, of his own use, Mr Martin said he used the Application Land to walk down to the river every couple of weeks. He said that his pattern of use throughout the period he had used the land had remained the same. He also said other

people from Bathford and the surrounding area used the Application Land. Those people used the land for walking, with and without dogs, picnicking, playing and fishing.

98. In his oral evidence Mr Martin was asked a number of questions about the application form, Parish Council matters and ownership issues. I will not repeat that exchange here as it does not assist in my determination of whether the statutory test is met. Of his own use Mr Martin said that he would use the land mainly because he likes water and he would go and stand and look at the birds and the water. He said he would go onto the Application Land for that purpose about once a fortnight. He drew on a plan that I provided to him the route that he would ordinarily follow. That involved entering from the highway at the point where the unrecorded PROW enters the land, walking to the far side where the Application Land meets the River Avon, circling round to follow a route back along the bank adjacent to the By Brook and then south onto the land in unknown ownership to the west and south of the car park. He said that he sometimes strode through the undergrowth but mostly followed the paths as that was the easy thing to do. He said that he would generally spend around 10 to 15 minutes on the Application Land at any one time.

99. Of other people's use Mr Martin said that he would see others fishing sometimes, launching canoes and dog walking. He agreed that the fishing and launching of canoes occurred at the point where there was a man made slope into the River Avon that other witnesses had previously mentioned as being the point from which they would launch or land their canoes. In his oral evidence he said nothing more about where those people came from but in his EQ he said they came from Bathford and the surrounding area. In what proportions I do not know.

## GENERAL OBSERVATIONS ABOUT THE APPLICANT'S WITNESSES

100. I should begin by saying that I have no doubt at all that all of the witnesses who gave their evidence in person were trying their very best to assist the Inquiry. However, as will be apparent from my review of the evidence in the foregoing section of this report, I have concerns about the accuracy of much of what was contained in the written evidence generally, but particularly the EQs. Mr Tapscott's description of the way he had approached the presentation of his evidence hit the nail on the head when he used the phrase "blended average" which illustrates the inevitable difficulties that arise out of trying to condense years, or sometimes decades, worth of use into the limited format of an EQ. Unfortunately, such generalised and imprecise evidence does little to assist me in determining whether each and every component of the statutory test has been met throughout the whole of the period.

101. Whilst the Applicant has to demonstrate use over the whole of a twenty year period it is still necessary for me to be able to accurately assess exactly what use (nature, frequency, location) has been made by individual witnesses and when within the Application Period that use has taken place. That allows me to then determine whether I have, in fact, seen and heard sufficient evidence of relevant use throughout the whole of the twenty year period when I then piece all of that evidence together.

102. It is perhaps helpful for me to summarise what I have been able to take from the evidence that I have seen and heard. I do so, however, with the same "health warning" that I issued at the beginning of my précis of the oral evidence. This summary is not intended to be a complete record of the evidence that I heard. Rather, it is intended to inform those reading and being asked to rely upon this report so that

my reasoning and the conclusions that follow from it can be properly understood.

103. I heard from 14 witnesses on behalf of the Applicant. Of those witnesses 2 (Veal, Ward) have lived outside the claimed locality for the whole of the Application Period so any evidence of their own personal use of the Application Land does not contribute to the meeting of the statutory test. Further, one of the witnesses (Lloyd) said that he had made no personal recreational use of the Application Land throughout the Application Period from which it must follow that is unable to give direct evidence of use that others have made because he has not been there to witness it. Mr Harris' use ceased in 2003 (12 years before the end of the Application Period) and Mrs George's use has been much more limited since she lost her dog more than 10 years ago (although she could not recall exactly when).

104. Mr Howells appears to have made extremely limited use of the Application Land and Mr Martin's use has been relatively limited (fortnightly to view the river) and only dates back to 2004 (beginning 9 years into the Application Period). Mr Austin has not visited the Application Land since 2013 and his use over the last 40 years has also been limited, his main use having been as a child. Again, Mr Anger's use during the Application Period has been very limited and his main use was as a child, before the Application Period.

105. I found it difficult to pin Mr Tapscott and Mrs Jackson down regarding the precise extent of their use at different points during the Application Period, noting of course that their use dates back to the early 00s and does not cover the whole Application Period. The only witnesses who gave clear evidence of their use which I can accept as being sufficient to paint an accurate picture of use were Ms Letort (use dating back to 2010) and Ms Cunningham and Mr Gay (use throughout

the whole of the Application Period) although Mr Gay did say that he was given express permission by the landowner at some point to use the Application Land.

106. In terms of evidence of other people's use, whilst one or two of the witnesses named other users by name (and this seemed to me to be largely restricted to fellow canoeists), it was clear that those witnesses who did see other people there could not, for the most part, say whether they came from Bathford or further afield. I cannot, of course, have regard to use by people outside Bathford for the purposes of assessing whether the statutory test is met.

#### **WRITTEN EVIDENCE ON BEHALF OF THE APPLICANT**

107. In addition to the witnesses from whom I heard oral evidence the Applicant also produced further written evidence in support of the Application. That consists of a number of additional EQ's, photographs, a valuation report in respect of part of the Application Land, extracts from various Parish Council meeting minutes, the Bathford Village Design Statement, supplementary information provided by Mr Howells from the Bathford Society archive, a letter of support from the Chair of Batheaston Parish Council and the Office Copy of the Registered Title to the land owned by Mr Waterman (ie part of the Application Land).

108. It is beyond the scope of this report for me to produce a full analysis of every bit of additional evidence upon which the Applicant relies although I have of course read all of it and taken account of it in drawing my conclusions and making my recommendation, subject to the following comments which relate specifically to the EQ evidence.

109. I make the following observations regarding the evidence contained in the EQs in the hope that it will assist those reading this report in understanding why I attribute very limited weight to it. For reasons that ought to be readily apparent from reading my assessment of the evidence that I heard orally, I cannot simply take it as read that information contained in EQs is accurate. In fact, in many instances that I have recorded above it became apparent that evidence contained within the EQs was fundamentally inaccurate in some respects, particularly the tendency for witnesses to state that their pattern of use of the Application Land had remained consistent throughout the full period of their use. That inaccuracy was only discovered through the process of those witnesses giving live evidence. The additional evidence contained in the EQs upon which the Applicant seeks to rely has not been subjected to challenge or scrutiny and I cannot therefore be wholly satisfied that it is accurate, particularly in light of the many inaccuracies exposed during oral evidence.

110. To further illustrate the reasons why I can only give limited weight to the EQ evidence that has not been subjected to examination in person I have randomly selected a few examples of the further EQs to consider. In the EQ produced by Fl Lt Tristan Le Lohe he says in answer to question 24 that he goes onto the Application Land to access the river for canoeing, to cross to Bathampton Meadows and *previously* to play. That answer tells me that he did once play there but not any more. I do not know when the nature of his use changed. However, it is clear to me that his answer to question 38 where he says his pattern of use has remained the same throughout the time he has used the land cannot, in light of his answer to question 24, be accurate.

111. An EQ was produced by Shirley Beazer that recorded her use of the Application Land as having followed a consistent pattern from 1948 to 2015 (a period of 67 years). She says her use has been regular (I



have no idea if regular means daily, weekly, monthly, annually) and that she uses the land for fishing, swimming, canoeing, walking and playing. Whether or not it is correct that she has consistently used the Application Land for all of those purposes (although swimming and canoeing are clearly water based activities) consistently for the last 67 years, I have no idea which parts of the Application Land she actually used.

112. An EQ was produced by Mr Derek Brown who also used the Application Land from 1948 to 2015. He, very properly, says his pattern of use throughout the time he has used the land has not remained the same. In answer to question 24 he records his purpose for using the land as fishing, boating, swimming, cycling and playing. He says that he used the land twice a week as a child. In answer to question 37 he says he now uses the land occasionally. The inference I draw from his answers is that the list of activities relates to his use as a child. I do not know what he used the land for during the Application Period. Nor do I know where he went on the land or what 'occasionally' means in terms of the frequency of his use.

113. Further, some of the EQs do not produce any evidence that is relevant to whether this Application should succeed. Mr Philip Smart produced an EQ dated 17 November 2015. In that EQ he says in answer to question 35 that he used the Application Land between 1952 and 1976. When asked in question 37 if he still uses the land he replied 'never'. Clearly, this is not evidence that contributes to qualifying use for the purposes of this Application. Similarly, Mr Roger Millbank produced an EQ in which he said in answer to question 35 that he used the land between 1944 and 1956.

114. Other EQ authors had a tendency to prefix answers with words such as "probably" or "possibly" (see, for example, Le Lohe questions

25, 33 and 36; Tait, questions 25, 33 and 36). One cannot accept as clear factual evidence something that is presented only as a possibility or a probability.

115. A final point, in two parts, relating to the extent of the Application Land that is worthy of note is that a number of the witnesses have identified an area that is smaller than the actual Application Land on plans attached to their EQs. Clearly, whatever the accuracy of the evidence of use contained therein, it is sometimes referable to an area that is less than the actual Application Land as identified by its author. Further, in many EQs the author has said that access to the Application Land has been prevented since the fencing was erected by the Objector. That is clearly not correct because much of the land that comes within the definition of the Application Land is still accessible. The Objector has analysed the percentage of land that is now currently fenced and he concludes that it is just shy of 40% of the whole of the Application Land. Whilst I do not have the means by which to verify his calculation with any precision it certainly appears to me from a cursory look at the extent of the Application Land and a comparison with the registered title plan of the land owned by the Objector that the fenced land is in the region of 40% of the Application Land and certainly a long way short of half of it.

116. As I have indicated above, I can give only very limited weight to the additional EQ evidence because it is so superficial and generalised that it is wholly inadequate for creating any clear and detailed picture of the use that has been made of the Application Land by the inhabitants of the claimed locality throughout the whole of the relevant twenty year period with which the Application is concerned. As has been illustrated through the process of the Applicant's witnesses giving their oral evidence, what is written in EQs can often give a very inaccurate and, therefore, (no doubt unintentionally) misleading

impression, either because there has been an error in what has been written without there being any opportunity for it to be corrected / challenged during oral evidence, or because the impression portrayed by the written evidence is more often than not of consistent use throughout the whole of the period of residence / use whereas the reality is usually that different uses occur at different times within the relevant period, using different parts of the land with differing regularity. This is hardly surprising given that people acquire and lose dogs, they have families, their children go to school, they take up work, they retire, they suffer ill health, and so on, all of which events impact on the use that they might make of the Application Land over a twenty year period. It is very rare for individual use over a full twenty year period to remain constant and consistent, as is clear from the evidence I heard from the majority of the witnesses at the Inquiry. The relevance of this will become clear when I turn to make my findings of fact and then apply the statutory test to those findings.

## **EVIDENCE FOR THE OBJECTOR GIVEN ORALLY**

117. I will deal with the Objector's evidence in the same way that I have dealt with the Applicant's evidence above. As with the foregoing, my review of the Objector's evidence is intended to be nothing more than a précis, not a complete transcript of everything that was said by each witness. I will address the Objector's evidence in the order in which it was presented to the Inquiry.

### **Garth Waterman**

118. Mr Waterman produced a witness statement ("WS") dated 31 January 2016 wherein he explains his involvement with and experience of the Application Land following his parents' purchase of the same in June 2013. In his WS he described the visits he made and his

contribution to erecting the fencing that now surrounds his parents' land. He also said that whilst he saw people using the unrecorded PROW he did not see people walking their dogs on his parents' land. He did on one occasion see a couple of men fishing but they left soon after Mr Waterman and his father arrived. Mr Waterman also gave his account of a visit to the Application Land by Mr Martin on 9 December 2015.

119. In cross examination Mr Waterman confirmed that he did not always visit the Application Land at the same time as his parents. His cross examination was very brief and nothing else of any note was elicited.

### **Margaret Waterman**

120. Mrs Waterman produced a WS dated 30 January 2016 and a later WS dated 23 June 2016. The first WS sets out the people that Mrs Waterman had witnessed on or around their newly purchased land. It also details the frequency of the family's visits to the land and their interactions with passers by. Her second WS was produced for the purpose of recording the detail of her attendance at a Bathford Parish Council meeting on 18 January 2016 and subsequent Parish Council meetings in February, March, April, May and June 2016, together with the Annual Parish Meeting in April 2016.

121. In her oral evidence Mrs Waterman was asked whether she was able to substantiate her evidence about people she had met on the land and she replied that she could not. She was also asked about email correspondence between the Watermans and the Parish Council and she replied that the correspondence was between her husband and the Parish Council. Mrs Waterman was asked no further questions.

## Malcolm Waterman

122. Mr Waterman produced two WSs, the first dated 2 February 2016 and the second dated 25 June 2016. The first WS deals with the purchase of the land, Mr Waterman's experience of other people on the land, the chronology of works that included marking out the site, erecting signs and, ultimately, erecting the fencing that is there today, which was, according to Mr Waterman's evidence, finally complete and secure between mid December 2015 and early January 2015. Mr Waterman also records the detail of his meeting with Mr Martin on 14 January 2015.

123. Mr Waterman's second WS was designed largely to exhibit and comment upon minutes of Parish Council Meetings for the purposes of demonstrating a lack of public interest in Mr and Mrs Waterman's ownership of and activities on that part of the Application Land acquired by them. Mr Waterman also sets out the result of his review of the Bathford Bulletin and the Bath Chronicle. The purpose of that research was to find evidence of the claimed public anger in respect of the fencing of the land, of which Mr Waterman was able to find no evidence.

124. In cross examination there was an exchange about why Mr Waterman did not notify the Parish Council of his intentions for the land. There was also a review of many of the photographs that had been produced by Mr Waterman and he explained, in response to the charge that they did not, for example, show signs in them, that he had not realised there would be a need for him to take pictures for evidential purposes but once he had become aware of that need he took some.

## **GENERAL OBSERVATIONS ABOUT THE OBJECTOR'S WITNESSES**

125. I found all of the witnesses to be very straightforward. Not surprisingly, given that they had only acquired the land in June 2013, they were unable to offer very much evidence in respect of other people's use of it.

## **WRITTEN EVIDENCE FOR THE OBJECTOR**

126. In addition to the foregoing evidence that was presented to the Inquiry orally, the Objector produced witness evidence from one further person, Mr Brian Fawcett, the former owner of the land acquired by Mr and Mrs Waterman in June 2013. It had been intended that Mr Fawcett would attend the Inquiry and speak to his evidence in person. However, he did not. He sent an email to Mr Waterman on 6 September 2016 (6 days before the start of the Inquiry) explaining that he had broken down in France. Nothing further was heard from him. I will précis the evidence contained in his written statements. Naturally, because Mr Fawcett did not attend the Inquiry and did not therefore submit himself for cross examination, to the extent that his evidence is relevant to the matters I need to consider I attribute it less weight than I would had I heard from him in person.

### **Brian Fawcett**

127. Mr Fawcett lives in Snow Hill, Bath, and he produced a WS dated 21 February 2016 and a statutory declaration dated 22 June 2016. Mr Fawcett acquired title to the land that he sold to Mr and Mrs Waterman in 2005. He lived 10 minutes away from the land and he said he visited regularly, especially in the summer. At the time Mr Fawcett acquired the land he said it included the land now owned by the Environment Agency where the gauging station is now situated

and enclosed. Mr Fawcett also entered into a Deed of Grant with Wales and West Utilities Limited permitting them to lay a gas pipe across the land, which process required a working width of 6 metres for installation. Mr Fawcett's evidence says that during the works to install the gas pipe there was a lot of mess and that the land would have been inaccessible for walking for about 3 months and it was very muddy for a long time thereafter.

128. Mr Fawcett's evidence also states that he put signs up in around 2005/2006 and then again in 2008/2009. Those signs said "Private: Keep Out". He said that one was at the entrance to the land on a tree trunk near the highway and the other on a hut that he built and fenced on what is now the Environment Agency's land. He said that from time to time the signs were taken down but that he would replace them. I have seen the Office Copy of the registered Title to the Environment Agency land that was acquired by the Environment Agency on 13 April 2005. I do question whether it is correct that Mr Fawcett acquired the land now owned by the Objector in 2005, as he states, given that he has gone to the trouble and expense of erecting a hut on land that by the spring he has sold to the Environment Agency.

129. Mr Fawcett's evidence also speaks to use of his land by other people. He referred to the footpath to the north of his land that was used by walkers. Otherwise he said that he had children come onto the land from time to time and he would tell them it was private and to keep out. He also said he had seen an occasional person fishing on the bank but that there were very few occasions when he was aware of people being on the land. He said he would sometimes see members of the public approach the entrance to the land and upon seeing Mr Fawcett they walked away.

130. In large part Mr Fawcett's statutory declaration was a repetition of the evidence he provided in his WS. However, he had added a paragraph to deal with the rave parties he used to hold on the land. He said that for a period of about 6 years he held two long weekend rave parties, usually on the May bank holiday weekend and the August bank holiday weekend. He said that the parties would last for the whole weekend, day and night, and that entry was by invitation from him.

131. Clearly there is a stark contrast between Mr Fawcett's evidence and that of the Applicant's witnesses in some key respects. Most particularly, the Applicant's witnesses say they saw no signs until the Objector's fence was erected. Further, the Applicant's witnesses said the installation of the gas pipe did not hinder access to the land whereas Mr Fawcett said it would have done. Finally, Mr Fawcett's account of the raves, especially the number of them, is at odds with the Applicant's witnesses.

132. I note that Mr Fawcett has produced very little in the way of documentary or photographic evidence to support his own evidence. It may be that very little exists. However, what he has provided is 4 photographs, two of which are of raves, one of the hut erected by Mr Fawcett on what is not the Environment Agency's land (with an arrow pointing to a sign that is not capable of being read on the photograph) and one that illustrates a tree house for the sound system, that are said to have been taken between 2003 and 2013. Given that Mr Fawcett says he acquired the land in 2005 it is not clear how he could produce photographs that might date back to 2003.



## **Additional Written Evidence**

133. The Objector produced numerous documents that are identified in the Index to Appendices produced by Mr Waterman. Many are documents produced by Mr Waterman for the purposes of analysing the Applicant's evidence and to illustrate certain points relating to the Application Land. There are also a selection of Bathford Parish Council minutes and correspondence with Bathford Parish Council, some Bathford village website pages, extracts from the Bathford Bulletin, extracts from the DEFRA guidance notes and a number of photographs, some of which I have already referred to as having been provided by Mr Fawcett and others that have been taken by Mr Waterman, either in the latter part of the Application Period or after it. I have, of course, read all of that additional material, some of which was referred to during the course of the Inquiry.

## **MEMBERS OF THE PUBLIC**

134. As is common at public inquiries of this nature, members of the public that are not formally giving evidence on behalf of any of the parties are given an opportunity to address the Inquiry. What follows is a précis of what those members of the public said.

### **Henry Rogers**

135. Mr Rogers lives at 9 Westwoods, Box Road, Bathford, where he has lived for the last 37 years, having returned to the area after 16 years away in London. He took early retirement in 1990 and he and his wife, being great walkers, aimed to walk 1000 miles per year. When going to the village Mr Rogers said that they would pop to the Withy Bed to see swans nesting and first daffodils. He would walk along the lower stretches of the By Brook. In 2014 Mr Rogers' mobility became poorer

and he said that the Withy Bed was just within his range and it became a very important place for him. Mr Rogers made reference to the fact that the 350 year anniversary of Bathford Bridge (built in 1667) was approaching and that he considered it would be appropriate to have the Withy Bed back for public use. Mr Rogers did in fact produce an EQ dated 13 November 2015. Like many other people in answer to question 38 he said that his pattern of use had remained the same throughout the time he has used the land.

### **Jane Weeks**

136. Mrs Weeks lives at 5 Chapel Row, Bathford. I am not sure exactly how long Mrs Weeks has lived in Bathford but she told the Inquiry that her husband was born in Bathford (and his father and his grandmother) and her children have grown up in Bathford, one of whom is in his early 30s now and who played on the Application Land as a child. She said that she would not always go to the Application Land as a destination but would pause there when walking to or from Batheaston or Bathampton. She said it was a beautiful place and she used to go there just to be there. I do not know where on the Application Land she would go. She told the Inquiry she used to use the Application Land 2 or 3 times a week but less so lately. I do not know when her pattern of use changed. Mrs Weeks said she used to take photographs there. I do not know where, when or how frequently. Mrs Weeks also talked about the Parish Council's suggestion that it buy the Application Land and the horror people feel at the loss of access to the Application Land.

### **Shirley Beazer**

137. Mrs Beazer lives at Belgrave House, Pleasant Place, Bathford, where she has lived for 58 years. She has lived in Bathford for 80 years

(her whole life) save for 6 years that she was away during the war. I note that Mrs Beazer was at one time Chair of Bathford Parish Council according to some of Parish Council minutes dating back to 2005, produced by the Applicant. She appears to have stood down as Chair at a meeting on 21 May 2012.

138. As I have noted above in relation to the additional written evidence produced by the Applicant, Mrs Beazer produced an EQ which was dated 19 November 2015. She talked to the Inquiry about the use she and other children made of the Application Land during her childhood, from the age of 11. She talked of swimming, fishing, boating (in a 'borrowed' boat) and playing generally. She then spoke about the gradual deterioration of the Application Land although she mentioned that mowing is undertaken by the Parish Council to this day. She also talked about unsavoury characters that left behind unpleasant things. Having already made the observation above that Mrs Beazer's EQ says her pattern of use of the Application Land has remained the same for the time that she has used it, the information that she gave to the Inquiry rather suggested that her use as a child was the main use that she made of the land and I formed the impression that the information given in her EQ was not accurate in so far as the consistency of her use was concerned.

## **SITE VISIT**

139. On 14 September 2016 I conducted an accompanied site visit in two parts. It is a normal part of any public inquiry to visit the site to which the application relates and any other areas that any of the parties considers will be of assistance. I first visited The Crown Inn. The purpose of that visit was to be shown the cellar type area where numerous boats were stored. They were the boats that Ms Letort referred to in her evidence that were made available for anyone to

borrow. She showed us the side door out of the storage facility that is in close proximity to the Application Land. I was accompanied on this part of my site visit by Mr Graeme Stark (of Bath and North East Somerset Council), Mr Martin (for the Applicant) and Mrs Waterman (for the Objector).

140. Later that day I attended the Application Land and its surrounds with the same 3 people that had accompanied me to The Crown Inn and 2 members of the public. I walked the whole of the site in so far as I was able to gain access to it (the impediment being thick undergrowth in parts) together with the unrecorded PROW that leads up to the boundary with the railway.

141. I made the following observations but I do bear in mind that at the time of my site visit potential access by the public to that part of the Application Land owned by Mr and Mrs Waterman had been prevented for the previous 1 year and 8 months. I also recognise that at the date of my site visit the Application Period had ceased some 1 year and 8 months previously so its condition at that time may not have been indicative of its condition throughout or at any point during the Application Period.

142. The car parking area is large enough to accommodate around 4 vehicles comfortably. Emergence from the car park onto the Bradford Road is not easy. There is a blind bend to the right. The land around the car park is that in respect of which ownership is unknown. The road boundary is open to the highway save for some wooden posts installed to prevent cars parking on the grassed area. That part of the Application Land is relatively level at the roadside edge and continuing on a line backwards from the car park. However, to the By Brook boundary it slopes quite steeply and the land there is uneven as a result. Along part of the Application Land boundary with the By

Brook is an old wooden bridge that was built over a culvert that was, at the time of my site visit, in a very dilapidated state.

143. To the right of the car park as one views the Application Land from the road, there are two old stone gate posts and to the right of them are the remnants of an old stone wall; the Pound Wall. There is no space in that area of any obvious recreational value save that the land is flat. There is a pile of old stones behind the old Pound Wall on the road boundary and just a few feet from the pavement.

144. The Environment Agency's land is entirely enclosed by fencing and is inaccessible from the Application Land. On the Network Rail land there is a well worn path from the highway, up the hill, to the edge of the railway, which is where that path, the unrecorded PROW, leaves the Application Land and continues alongside the railway boundary, over the bridge that crosses the River Avon and away in the direction of Bathampton.

145. The whole of the Network Rail land, apart from the PROW, is quite overgrown. It is also steeply sloping land that did not appear to me to be at all hospitable and not somewhere I could envisage people recreating. From a point on the unrecorded PROW, outside the Application Land boundary, at the end towards the river, there are some stone steps on the Application Land that lead one down to a secured gate to the Environment Agency's flow station. A hand rail to the side of the steps prevents any kind of easy access from the steps onto the remainder of the Application Land which is sloping and overgrown in any event, as already noted.

146. The land owned by the Objector was, at the time of my visit, securely fenced making free access impossible. There are signs too that tell people the enclosed land is privately owned and that there is no

public right of access of any type. As one enters the enclosed land belonging to the Objector there is a wide path that slopes gently downward. On the left of the path, within a few feet of the entrance, there are some steps that appeared to have been quite recently constructed that lead to a lower path. That lower path follows the boundary of the By Brook back towards the road but it goes nowhere now as the Objector's fence bisects that path and prevents access back to the road. However, it would have originally connected with the now dilapidated wooden bridge over the culvert.

147. Going further into the Objector's land, within a few feet the lower path merges with the main pathway which continues for a short distance to what was, at the time of my visit, a circular(ish) enclosed area in the middle of the land that I understand to have been installed by the Objector. The path that goes to the left of the enclosure simply petered out within a few feet and to the left of that area was an area that was covered with heavy plastic sheeting, the purpose of which is, I understand, to kill off Himalayan Balsam that is growing on the land. A path to the right of the enclosure continues past the enclosure but, again, a few feet later, simply came to an end in relatively dense undergrowth.

148. It was impossible to get down to the bank of the River Avon or most of the bank of the By Brook, except at the bank on the left as one entered the enclosed part of the Application Land belonging to the Objector. The area was well covered by trees, nettles, brambles and Himalayan Balsam. It was impossible to see, let alone visit, the launch site that had been referred to during the Inquiry or any other part of the river bank. I do, however, note that the Objector had produced photographs of the bank emerging into the By Brook, illustrating that the land had been less overgrown during the early part of the Objector's ownership of the same.

149. To the north of the main path, even within the land owned by the Objector, the land was not only overgrown but sloped steeply upwards towards the railway and did not have the appearance of land upon which many people would choose to recreate.

## **THE PARTIES' SUBMISSIONS**

150. In addition to the evidence that was presented to the Inquiry I have also received and had full regard to extensive submissions produced by both the Applicant and the Objector. The Objection Statement was detailed and in reply the Applicant produced an equally detailed submission prepared by Paul Wilmshurst of Counsel. At the start of the Inquiry each of the parties produced skeleton arguments to which they spoke orally. At the end of the Inquiry I received very detailed closing submissions from both parties (in writing and orally) as well as further written submissions after the close of the Inquiry from each party (with my permission).

151. It would unnecessarily lengthen this report to repeat the parties' submissions herein. Naturally each of the parties produced submissions that highlighted what they perceived to be the relevant issues for me to consider and provided their own assessment of the evidence presented at the Inquiry. I have, of course, already set out my own assessment of the evidence above and I will now go on to make findings and apply the statutory test.

152. I can, however, for completeness, confirm that I have listened carefully to the submissions made orally, and I have read all of the written submissions produced before, during and after the Inquiry, all of which I have taken account of, in so far as the contents are relevant, in drawing the conclusions that I have.

## FINDINGS OF FACT

153. I will separate my findings of fact by reference to issues that have been 'live' at this Inquiry. Broadly I regard those issues to have been the time of cessation of use, interruption of use, use of the application land by or on behalf of the owner(s) that might have been inconsistent with use by the public for lawful sports and pastimes ("LSPs") and use of the application land by inhabitants of the claimed locality for LSPs.

### Cessation of use

154. There has been some dispute about when any potentially qualifying use of the Objector's land ceased. It is the Objector's case that there had been signage on the land that would have rendered user thereafter *vi* (by force). According to the evidence of Mr Fawcett he had put signs on a tree close to the highway saying that the land was private and that people should keep out. Mr Fawcett's evidence also says there was a similar sign on a wooden hut that he constructed on what is now the Environment Agency's land. A photograph has also been produced with an arrow that is pointing to a sign that purportedly indicates that the land is private property.

155. The Applicant's witnesses all said that they saw no signage on the land until the signs more recently erected by the Objector. It may be, of course, that signs were not seen because use of the Application Land was, in fact, less extensive than that which has been alluded to in the Application. However, I find that in respect of the signs referred to in the evidence of Mr Fawcett, I am unable to make a positive finding that he had put signs on the land, particularly given the contrasting evidence of the Applicant's witnesses and Mr Fawcett's failure to attend the Inquiry and speak to his own evidence. Further, whilst Mr



Fawcett has produced a photograph of a hut purporting to have a sign saying that the property was private, I cannot see any of the wording on that sign in that photograph and it is on a hut that is no longer there and on land that the Applicant accepts is now owned by the Environment Agency and in respect of which the Applicant accepts ought not to form part of the Application Land.

156. The Objector has also made reference to more recent measures that he has taken to exclude the public during his period of ownership. He has produced evidence (including dated photographs) of paint marks made on features on the land (dating back to December 2013), the marking of boundaries by spray paint and orange string (dating back to June 2014) and the erection of gate posts (December 2014). The Objector has also produced photographs of signage indicating that the land is private dating back to May 2016 although according to his personal evidence he says he erected four “private land” signs in around mid 2014. I have seen no clear evidence of that (ie dated photographs) and there is a clear dispute of fact in this regard because the Applicant’s witnesses say they had seen no signage on the land until the fencing was erected and the public excluded. In light of the clear conflict of evidence and with nothing further to assist me I find myself unable to positively conclude on the balance of probabilities that Mr Waterman did erect signs on the land in 2014.

157. In respect of Mr Fawcett’s signage, I am unable to make a positive finding of fact that there was signage telling people to keep out from around 2005 / 2006. I have not heard from Mr Fawcett and the only sign that is referred to in any photograph is that which was placed on the wooden hut structure which was not on what the Applicant now defines as the Application Land and which is completely illegible in any event.

158. I find that the Objector did put paint marks and string on his land as set out above. I also find that he did secure that land by fencing. That was certainly largely completed by 14 January 2015 when Mr Martin went and spoke with Mr Waterman on the Application Land. Whether it was secured at that date or in March 2015, as originally advanced in the Application Form, or indeed between mid December 2014 and early January 2015 as averred by the Objector, is largely immaterial given that the Application was duly made on 26 November 2015 which is within 12 months of any of those dates. However, for completeness I find that there is evidence that the land was securely fenced and the gates locked, preventing public access, at some time between 14 January 2015 and March 2015. I cannot be any more precise than that. That is the time at which cessation of use occurred.

### **Interruption of use**

159. It is clear that in or around 2010 a gas pipe was installed on the land now owned by the Objector. It was suggested in the Objector's objection statement that the installation of the gas pipe was sufficiently intrusive and obstructive, by virtue of the large hole that had to be excavated and the spoil that was removed, to have caused the Application Land to be inaccessible for recreational use for a period of around 3 months.

160. Other than what Mr Fawcett says in his written evidence that consists of statements such as "it would have been impossible" and "this difficulty would have continued" rather than statements to the effect that it *was* impossible or the difficulty *did* continue, I have no other independent evidence of the level of disruption to use of the Application Land that was caused by the installation of the gas pipe, save for what the Applicant's witnesses told the Inquiry.

161. I have already identified some difficulties with the accuracy of Mr Fawcett's evidence (ie dates he gave for rave parties compared with possible date of photographs of rave parties and signage on a hut built on land that was sold to the Environment Agency by April of the year in which Mr Fawcett said he acquired the land) and I am not satisfied that I can rely upon the accuracy of what he says in his written evidence in the face of contrary evidence from the Applicant's live witnesses who gave evidence to the Inquiry in person. I find that the installation of the gas pipe did cause some disruption to the land, especially around the area where the bore hole was dug, and I find that there was some mess in the way of spoil that had been extracted from the bore hole. However, I find that it was not sufficient to prevent access to and use of the Application Land.

#### **Concurrent use of the Application Land by the Owner(s)**

162. The only concurrent use of the Application Land, or any part of it, that is averred in this case are the rave parties held by Mr Fawcett. According to the Applicant's witnesses there were around 2 such raves (one witness said there may have been 3) in the early 00s. In contrast, Mr Fawcett said in his written statement that he held 2 weekend long rave parties per year for around 6 years after he acquired the land in 2005. Once again, having not heard from Mr Fawcett in person and in light of the very stark contrast between his evidence and that of the witnesses who did attend and said that they had only been aware of 1 or 2 raves, which evidence was not challenged, I can only conclude that there were less raves held on the Application Land than Mr Fawcett has said.

163. I find that there were at least 2 raves held on the Application Land by Mr Fawcett. There is also clearly a dispute about dates. The

Applicant's witnesses seemed to think they occurred in around the early 00s. Mr Fawcett says they occurred after he acquired the land in 2005. I have seen no documents relating to Mr Fawcett's acquisition of the land but I note that his own photographs of the rave parties purportedly date back possibly to 2003, suggesting that his written evidence is inaccurate. I conclude that there were at least 2 raves at some time in the early to mid 00s.

164. I now need to consider to what extent those raves interfered with the public's use of the Application Land. It is clear that some members of the Bathford community were actually invited to the raves. I am only aware of one resident of Bathford who attended although it is possible that there were more. The following day people were able to gain access to the land owned by Mr Fawcett (evidence of Guy) notwithstanding that there were still people on the land and according to the evidence a certain amount of mess too that appears to have then been cleared away relatively quickly. Whilst people might have chosen not to go to the Application Land during the course of the raves I do not consider they were excluded from the land and the duration of the raves appears to have been no more than one night and perhaps part of the next day.

### **Use of the Application Land for LSPs**

165. I find that there has been use of the Application Land during the Application Period. People have walked their dogs there. Some on the unrecorded PROW and some on the paths that were visible on the Application Land, away from the unrecorded PROW. In particular, I accept there was a worn path from the entry point from the highway to the end of the Application Land where people launched their canoes and, at times at least during the Application Period, a less well worn path along the line of the By Brook bank. Whether those two paths

always connected I cannot be certain. I also accept that there was a route used (although whether it was visible on the ground I do not know) from the car park to the path that led to the launch point onto the River Avon.

166. I only heard very limited evidence, however, of dog walking activity off the unrecorded PROW from Ms Letort (since 2010), Ms Cunningham and Mr Gay (whole period, although according to Mr Gay's own evidence he was given permission by Mr Fawcett to use the Objector's land) and Mrs George (such use dating back more than 10 years with no accurate indication of timeframe). As a proportion of the activities engaged in upon the Application Land, dog walking does not appear to me to have been a predominant one.

167. I find that people did go onto the Application Land to stroll and take in a view of the watercourses (both the By Brook and the River Avon) and also to take photographs. That use appears to me to have been irregular and sporadic and I did not hear evidence of such use spanning the entire Application Period.

168. I also find that there was some sporadic use of the Application Land for family outings including taking in the attractive surroundings, walking, fishing and having a picnic / BBQ. However, again, from the evidence that I have before me I conclude that such use has not been particularly regular, I have not heard evidence of it having occurred throughout the whole of the Application Period and it appears to me to have been both seasonal and sporadic use.

169. The main use that I find has been indulged in on the Application Land is to launch and land canoes and kayaks. That occurred from a point at the western extremity of the land where there was a convenient and safe place for that very purpose. Those that did

launch canoes from there (and return to the same place) generally walked their vessels down from the Crown Inn or drove to the car park. From there they would take the most direct route to the launch point and then head off on the river, doing the same in reverse on the way back.

170. I heard evidence of fishing too but I heard little evidence of fishing having occurred during the Application Period save for what Mr Ward told the Inquiry about his own fishing activities and those of others (not necessarily from the locality) that might have beaten him to the ready baited river. Much of the fishing activity that was referred to in the evidence appears, in fact, to have occurred before the start of the Application Period.

171. Whilst I heard about use of the Application Land by others it was not at all clear to me that such use was by inhabitants of Bathford. No doubt some of it almost certainly would have been. But it is also clear that users came from further afield, particularly canoeists. I cannot quantify the proportion of users that came from the claimed locality as distinct from those that came from elsewhere.

172. My overarching impression when reviewing the whole body of evidence is that historically the Application Land, or at least parts of it, were undoubtedly used by the local community (from Bathford and beyond) as a place for recreation. Children, in particular, played there, either with each other or sometimes with family members. However, what is also clear is that the Application Land became neglected over time, so much so that it became the focus of a project to clear and improve it (the Bathford Conservation Project from 1986 - 1988), the land in its pre-improvement state being described as a patch of ugly wasteland. Notwithstanding the commendable efforts associated with the Conservation Project which were rewarded with a CPRE prize, the

land once again fell into a state of neglect (save for that part that has since been maintained / mown around the car park) as is evident from the VDS published in 2005 and the valuation report produced in 2010, both of which refer to the land being overgrown.

173. I find that there has been some use of the Application Land during the Application Period as a destination for its own sake. I find that there has been some use for dog walking, daily by some, and for simply taking a stroll and appreciating the view of the river or taking children to appreciate the surroundings. I heard evidence from some who said they had gone all over the Application Land (eg Jackson, George). I find that evidence difficult to accept given the topography of the land and the extent to which it has been overgrown for significant parts of the Application Period according to the evidence presented by the parties, in particular that adduced by the Applicant (eg VDS, valuation). I find that much of the aforementioned use was of the worn paths rather than generally wandering all over the place.

174. The evidence I have heard directly from witnesses about their personal use of the Application Land does not support a picture of regular, general use of the whole of the Application Land for informal recreation throughout the whole of the Application Period.

## **APPLYING THE LAW TO THE FACTS**

175. I turn now to the legal test that I sketched out at the beginning of this report and apply that test to the evidence I have heard and read and the facts I have found, with reference to further and more detailed authority as necessary. I will approach this task, for simplicity, by reference to the various components of the legal test set out in section 15(3) of the 2006 Act. It is to be remembered that each and every part of the statutory test must be properly and strictly proved on the balance

of probabilities and that the onus or burden of proof rests firmly with the Applicant.

**... a significant number of the inhabitants of any locality or of any neighbourhood within a locality ...**

176. There can be no doubt that the Parish of Bathford is a locality for the purposes of the statutory test. The question that remains is whether or not there has been qualifying use of the Application Land by a significant number of the inhabitants of Bathford throughout the whole of the Application Period. I cannot have any regard to use by members of the public that did not reside in Bathford at the time of their use.

177. Of course, what I have not yet addressed, but will do so shortly, is whether the use I have heard and seen evidence of is “qualifying use” for the purposes of the statutory test. It is only those who have indulged in qualifying use that contribute to the “significant number” requirement. For reasons that will soon become apparent, if they have not already been made clear in the foregoing, I have discounted use of the unrecorded PROW and I have also discounted use by canoeists who have simply walked from one end of the Application Land to the other with their vessels for the purposes of going to and from the launch / landing point. Those people have used the Application Land as a thoroughfare rather than as land upon which they have indulged in the sort of informal recreation that contributes to establishing the existence of a TVG.

178. Once I have stripped away that use, on the strength of the evidence I have seen and heard of both personal use and use made by others (to the extent that I can be satisfied that evidence of such use relates to inhabitants of Bathford), I am unable to conclude that on the balance of probabilities there has been qualifying use of the



Application Land throughout the whole of the Application Period (or indeed any part of it) by a significant number of the inhabitants of Bathford. That, alone, is an end to this Application. However, for completeness, I will go on to apply the remainder of the statutory test to my other findings of fact.

**... have indulged as of right ...**

179. As noted in the foregoing, the “as of right” test requires use to have been *nec vi, nec clam, nec precario*. The Objector’s closing submission says that without exception all users stayed away whilst the owner was on site (para 305). This is said to make their use of the Application Land contentious (*vi*, presumably). However, use away from the gaze of the landowner might be more accurately be regarded as *clam* (by stealth). If that is what is said by the Objector I heard no evidence to suggest that people would turn away if the Objector was on the land (although this is a suggestion made in Mr Fawcett’s evidence but not one that I can simply accept). It may be that there was simply a lack of use but I saw and heard no evidence to suggest that people would deliberately keep away from the land when Mr Waterman was on it but not otherwise. I do not therefore find that user was *clam*.

180. The Objector submits that user was *vi*; that is contentious. That submission is made because the Objector says that use was made in the face of things done by the landowner to make it clear that recreational use was objected to, such objection being persisted in by the landowner. I do not consider that sprayed paint marks or even string would tell recreational users that they were not welcome on the land and were to keep off. I have been unable to make a positive finding of fact that there were signs on the land in 2014. I have, however, found that the boundary of the Objector’s land was secured against the public

by fencing and locked gates between 14 January 2015 and March 2015. That is when, in my view, the Application Period came to an end.

181. Save for the single limited example of Mr Gay having said that at some imprecise point in time Mr Fawcett gave him permission to use the Objector's land, I heard and saw no evidence that would suggest to me that use by the public was permissive or *precario*.

182. Generally, I find that there has been some use of the Application Land as of right until the time when the Objector made any further use of his part of the Application Land contentious by securing its boundaries against the public. Of course, any qualifying use of the remainder of the Application Land would not be contentious as it has not been fenced and no signage has been installed. Time, therefore, continues to run in respect of such use of the remainder of the Application Land. However, in my view, the extent of that use is not sufficient to support an application for registration of the Application Land as a TVG in any event.

183. As already noted above, any use of the unrecorded PROW has been discounted from my consideration of qualifying use (although the evidence I heard of that type of use was relatively limited in any event) because it is use pursuant to an existing right. Further, use of informal paths on the land is use that might appear to the reasonable landowner to be footpath type use. Whilst modern case law makes it clear that recreational walking (including along informal paths) is one of the activities that is capable of falling squarely within the class of LSPs that can contribute to use supportive of a TVG application, such use has to be considered in light of the other relevant authorities and in particular the relevance of how such use would have appeared to the reasonable landowner.

184. Sullivan J in *R (on the application of Laing Homes Limited) v Buckinghamshire County Council & SOS for the Environment and Rural Affairs* [2004] 1 P & CR 36 at para 102 said “...it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to a landowner that the users believed they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields”.

185. Further, in *Oxfordshire County Council v Oxford City Council & Another* [2004] Ch 253, at para 102, Lightman J said “The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful sport or pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks ... may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land ... if the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green)”.

186. It is my view that whilst use of paths for walking dogs, in a circuit say, is capable of giving the impression of footpath type use, it is equally capable of giving the impression of recreational use in some circumstances. I accept that the little evidence I have heard of dog

walking in that way and indeed general walking without dogs can be construed as recreational use that can contribute to qualifying use for TVG registration purposes and that is the way I have regarded it in this case.

187. However, the use of a route for the purposes of getting directly from one end of the Application Land to the other to launch and land canoes is in my view likely to have created the impression to a landowner of footpath type use. As stated by Lightman J, in those circumstances the inference drawn should be of the less onerous right which is that of footpath type use. That sentiment can be found too in *Barkas* where, at paragraph [65] Lord Carnwath said that in cases of possible ambiguity the conduct must bring home to the owner not merely that a right is being asserted but that it is a village green right. Therefore, any use that is footpath type use or that is not clearly the assertion of a village green right does not contribute to the qualifying use and must be discounted from the evidence base upon which the Application is to be decided. I have therefore discounted any use of the land for passing through for the purposes of getting to the River or By Brook for canoeing purposes.

188. Once the PROW use and footpath type use is discounted in this case, which in my view it should be, I am not satisfied that the Applicant has discharged the burden of proof upon it to establish that there has been sufficient use for LSPs on the Application Land throughout the whole Application Period. The use I have heard evidence of, minus the footpath type use, is not use that I am satisfied on the balance of probabilities has continued throughout the whole of the Application Period with sufficient frequency or has been use of the Application Land as a whole. Even without discounting the footpath use, which I consider should be discounted as explained above, I still do not consider that I have heard evidence that can satisfy me on the

balance of probabilities that there has been sufficient qualifying use of the Application Land throughout the whole of the Application Period to support registration of the Application Land as a new TVG.

**... on the land ...**

189. Reference to the land is reference to the whole of the Application Land. Of course, it is not necessary for each and every part of the land to have been subject to qualifying use. Indeed, in some circumstances it may be impossible to use the whole of the land due to its topography and nature, as was the case in *Oxfordshire County Council v Oxford City Council*.

190. In the present case I accept that there are parts of the Application Land that, like in *Oxfordshire*, are unlikely to be usable for recreational purposes due, primarily, to its topography. However, much of the land, if clear, is usable but the fact of its overgrown nature suggests to me that it has become overgrown through neglect and lack of use, save for the limited amount of usable area on the worn paths and the area by the car park that is maintained by the Parish Council.

**... for a period of at least twenty years ...**

191. The first point I need to deal with is the relevant twenty year period. As will be evident from my findings of fact I do not accept that any qualifying use was brought to an end as a result of signage either in around 2005 / 2006 or 2014 or any point in between. I was unable to make any positive finding of fact about such signs having been placed on the land.

192. In my view any qualifying use of the Objector's land came to an end when the Objector erected a secure boundary around his land that

had the effect of excluding the public. I have found that the final securing of the boundary occurred between 14 January 2015 and March 2015. I do not need to go any further than that because any date within that period would mean that the Application was brought within the statutory time frame of one year after cessation of use, the Application having been duly made on 26 November 2015.

193. I should add, at this stage, that there has been nothing to cause use of any other part of the Application Land to come to an end. In respect of the land owned by Network Rail and the land in unknown ownership there has been no activity or steps taken by those landowners to bring to an end any qualifying use that might contribute to a TVG Application.

194. As is also apparent, I hope, from my findings of fact, I do not consider that the period of twenty years up to the date of cessation of use was interrupted so as to bring any prior period of use to an end and causing time to start running again. The installation of the gas pipe in 2010 and any use of the land for raves during Mr Fawcett's ownership of the land were not sufficient interruptions, in my view, to stop the qualifying period from running.

195. Of course, I have already concluded that even during the Application Period I have not heard sufficient evidence of use to satisfy me that the statutory test is met in that I consider use was not by a significant number of the inhabitants of the Parish of Bathford and there was insufficient qualifying use of the whole of the Application Land (as that phrase has been interpreted by the court) continuously throughout the whole of the Application Period. For the avoidance of any doubt I make those findings in respect of the whole of the Application Land as depicted on the plan at Appendix B and not just the land that is owned by the Objector.

## ACKNOWLEDGEMENTS

196. Before I set out my final conclusion which by now will have become apparent, I would like to express my thanks to the Commons Registration Authority for their efficient organisation of the Inquiry and the assistance that was provided to me. In particular I would like to express my gratitude to Graeme Stark who dealt with all matters arising prior to and throughout the Inquiry process in a very helpful and highly efficient manner. I would also like to express my thanks to the witnesses and members of the public who attended and spoke to the Inquiry. Finally, I was greatly assisted by Mr Martin and Mr Waterman, representing the parties, who presented their respective cases in a professional and organised manner, which I appreciate is a particularly daunting, difficult and time consuming task for any unrepresented party. I am also grateful to them for their thoughtful analyses and submissions on the issues before the Inquiry.

## FINAL CONCLUSION AND RECOMMENDATION

197. I conclude that the Application fails. I recommend that the Application to register the Application Land as a new TVG should be rejected. The reasons for rejection, subject to the relevant Committee following my recommendation, can simply be stated to be those set out in this report.

ROWENA MEAGER

No 5 Chambers

6 February 2017