

Application No: TVG19/1

IN THE MATTER OF:

**AN APPLICATION TO REGISTER LAND KNOWN AS WESTBROOK
WOODLAND, BATH, AS A NEW TOWN OR VILLAGE GREEN
PURSUANT TO SECTION 15 OF THE COMMONS ACT 2006**

REPORT

OF ROWENA MEAGER (INSPECTOR)

6 January 2021

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

INTRODUCTION

1. I have prepared this report in respect of an application received on 4 March 2019 (“the Application”) by Bath and North East Somerset Council (“the Council”), as Commons Registration Authority, to register land known as Westbrook Woodland, Bath (“the Application Land”) as a new town or village green (“TVG”) pursuant to section 15(3) of the Commons Act 2006 (“the 2006 Act”). The Application was made by Friends of the Orchard (“FOTO”) (“the Applicant”).
2. Notice of the Application was displayed and 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 23 May 2019. The Application was advertised in the public notices section of the Bath Chronicle on 23 May 2019.
3. The Application Land is registered at HM Land Registry under Title No AV55770 and is described therein as “*land lying to the south west of Broadmoor Lane, Bath*”. The registered freehold proprietors are Paul John Ealey and Donna Louise Ealey who acquired the Application Land on 13 July 2018. They fenced the Application Land on or around 2 November 2018, thus bringing any qualifying use of the land to an end.
4. In response to the Application Mr Ealey (“the Objector”) produced an objection statement setting out the reasons why he said the Application should fail. Broadly speaking, it was the Objector’s contention that the Applicant’s definition of a neighbourhood / locality was inadequate, the Applicant had failed to prove 20 years qualifying use and that the Applicant’s motive for making the Application was to stifle development.

5. As a result of the substantive objection submitted by the Objector the Council appointed me as an Inspector to convene a non-statutory public inquiry into the Application and, thereafter, to make a recommendation as to whether the Application should succeed or be rejected. I issued directions for the exchange of evidence and submissions. The inquiry was held on 3, 4, 7 and 10 September 2020 and I conducted an accompanied site visit on 8 September 2020. Due to the very unusual circumstances created by the Coronavirus pandemic the inquiry was held virtually, via 'Zoom', and was live streamed on 'YouTube' to enable public viewing and participation.

THE APPLICATION LAND AND ITS SURROUNDS

6. The Application Land is a long, relatively narrow strip of irregularly shaped but broadly rectangular 'woodland' that has a long, more or less straight boundary running roughly NW / SE bordering Osborne's Lane, the parallel (but less straight) boundary adjoining the playing field of Weston All Saints CE Primary School ("WASPS") and a housing development known as the Orchard Development. The short boundary to the south is adjacent to residential property at Symes Park and the short boundary to the north is adjacent to a public footpath that connects Osborne's Lane to the Orchard Development. A stream called the West Brook runs the full length of the site on the eastern side, close to the boundary with WASPS and the Orchard Development. Part way along its length, close to the boundary between WASPS and the Orchard Development there is a weir.
7. I visited the Application Land on 8 September 2020, almost two years after the site was fenced, preventing all but the most determined public access, and almost 22 years after the beginning of the period to which this Application relates. On either party's account the land has been

unused by the landowner and unmaintained for a significant number of years. There are some mature trees on the Application Land as well as a number of much more youthful examples. There were worn pathways visible on the ground.

8. The only intentional point of access to the site is in the south western corner of the Application Land where there is a metal vehicular gate opening from Osborne's Lane. Near to the entrance is a concrete pad that used to be the base for some stables that were removed some years ago. The boundary with Osborne's Lane is delineated by a distinct bank along most of its length and an established hedgerow. At the time of my site visit the remnants of an old post and wire fence were visible within the hedgerow but that fence is quite clearly derelict now. I was also able to see some points along that boundary where the bank appeared to have been worn down and gaps in the hedgerow existed.
9. The nature and use of the land adjoining the northern and north eastern boundaries has, in part, changed during the course of the period with which this Application is concerned. Until November 2003 there was no public footpath adjacent to the short northern boundary of the Application Land. That boundary adjoined land belonging to the neighbouring Lansdown Grange Farm. On 19 November 2003 a footpath diversion order was confirmed by the Council as Highways Authority that caused a diversion of FP AQ46 in Bath and an unrecorded footpath in the Parish of Charlcombe to its current route past the northern boundary of the Application Land over a footbridge constructed in March 2002.
10. Further, the northern part of the long north eastern boundary that adjoins the Orchard Development changed as a result of that Development. Prior to the completion of the Orchard Development in December 2004 there was a period during which the Orchard

Development site was under construction (according to the evidence of the developer, Redcliffe Homes Limited (“Redcliffe”)) from around October 2002 to December 2004, prior to which that section of the boundary with the Application Land was a boundary with privately owned land belonging to a Mr Chittem (now forming a part of the Orchard Development) (“the Chittem Land”).

11. Osborne’s Lane, running the full length of the south western boundary, is a narrow lane that provides vehicular access only to the Application Land and Lansdown Grange Farm. Until the footpath diversion order was confirmed there was no connection via any public route from the top of Osborne’s Lane to the then privately owned Chittem Land.

THE APPLICATION TO REGISTER A TVG

12. As noted in paragraph 1 above, the Application is made pursuant to section 15(3) of the 2006 Act which provides:

“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) ...”.

13. 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 statutory test is met.

THE COMPONENTS OF THE STATUTORY TEST

... a significant number ...

14. The “*significant number*” component has never been formally defined but in *R (McAlpine) v Staffordshire County Council* [2002] EWHC 76 (Admin) (“*McAlpine*”) Sullivan J said that “*significant*” did not mean a considerable or substantial number. He said “... ‘*significant*’, although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language ...”. What matters “... is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individual trespassers”, para [71].
15. Sullivan J also said in *McAlpine* that the Inspector in that case had been correct to conclude that “... whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression ...”. It is not a question that should be approached as some form of mathematical exercise.

16. More recently, in *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 (“*Redcar*”), at para [75] Lord Hope, very much echoing what Sullivan J said in *McAlpine*, said “... *The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right ...*”.
17. When considering whether the “*significant number*” test is met it is not necessary for the recreational users to come predominantly from the relevant locality or neighbourhood, *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxford County Council* [2010] EWHC 530 (“*Warneford Meadow*”). 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* [2011] EWHC 1606 (Ch), at para [106(i)], 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.
18. However, only recreational use by members of the public from the relevant locality or neighbourhood will contribute to the “*significant number*” test given that the test is “*a significant number of the inhabitants of any locality or neighbourhood within a locality*”. In other words, use by people that do not come from the claimed locality or neighbourhood will not contribute to the “*significant number*” test and to the extent that evidence of such use is adduced, it will be discounted for the purposes of determining an application to register land as a new TVG.

... of the inhabitants of any locality or of any neighbourhood within a locality ...

19. A “locality” must be an area known to the law such as a borough, parish or manor, *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 937. It is established, for example, that a parish, civil or ecclesiastical, is a qualifying locality, *Paddico Ltd v Kirklees MBC & Others* [2012] EWCA Civ 250.

20. In contrast, 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, *McAlpine*, as can a single road, *Warneford Meadow*. 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, *McAlpine*.

... have indulged as of right ...

21. For user to be “as of right” it must be user that has been without force, without secrecy and without permission (traditionally referred to by lawyers as *nec vi, nec clam, nec precario*). In *Redcar*, referring to the three criteria that must be met for user to be “as of right”, Lord Rodger said “... their sense might be best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land”, para [87].

22. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, at para [72], Lord Walker observed that “as of right” has sometimes been likened to “as if of right”. Since the House of Lords’ decision in *R v Oxfordshire County Council, ex parte Sunningwell* [2000] 1 AC 335 (“*Sunningwell*”) it

has been settled that the subjective belief of the users as to whether they were permitted to use the land in question is irrelevant.

23. The basis for the creation of rights through user "*as of right*" 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, *Dalton v Angus & Co* (1881) 6 App Cas 740, 773) and the user can rely upon their long use to support a claim to the right enjoyed.
24. 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, *Redcar*. If the user is by force, is secret, or is by permission of the landowner, (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.
25. "*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, *Smith v Brudenell-Bruce* [2002] 2 P & CR 4. However, 'perpetual warfare' between landowner and users is not necessary to prove contentiousness, *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] 1 EGLR 85. 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, *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250.
26. "*Stealth*" is user that is deliberately secret. Such use will not satisfy the "*as of right*" test 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.

27. “*Permissive*” use is use ‘by right’ and is, therefore, incapable of being use “*as of right*”, a point reinforced by the decision of the Supreme Court in *R (on the application of Barkas) v North Yorkshire County Council and Another* [2014] UKSC 31.

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

28. The term “*lawful sports and pastimes*” is a composite phrase that includes informal recreation such as walking, with or without dogs, and children playing 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 excluding any activity that would constitute a criminal offence.

... *on the land* ...

29. 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 County Council v Oxford City Council* [2004] Ch 253 (“*Trap Grounds*”), 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 ...

30. 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. In this case that period is from November 1998 to November 2018 (“the Application Period”). Use must be continuous throughout the whole of the relevant twenty year period, *Hollins v Verney* (1884) 13 QBD 304.

THE BURDEN AND STANDARD OF PROOF

31. The burden of proving that the statutory test is met lies firmly with the Applicant. It is no trivial matter for a landowner to have land registered as a TVG and all the statutory elements required to establish a new TVG must be “*properly and strictly proved*”, *R (v Suffolk County Council, ex parte Steed* (1996) 75 P & CR 102, 111, *per* Pill LJ, approved by Lord Bingham in *Beresford* at para [2]. 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, the balance of probabilities.

EVIDENCE FOR THE APPLICANT GIVEN ORALLY

32. Having set out the various components of the statutory test and how they are to be approached 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 subject 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 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.

Mrs Shahzia Lewis

33. Mrs Lewis provided two witness statements ("WS"), one dated 11 July 2020 and the other recording it having been received on 3 February 2019. She also produced an evidence questionnaire ("EQ") dated 7 January 2019. She is a member of FOTO. In her EQ Mrs Lewis indicated that she lives in the locality of the electoral ward of Weston.

34. In her EQ Mrs Lewis records that she used the Application Land between 2007 and 2018. The purpose of that use was said to be to walk her dog and to meditate and she said she used the Application Land 2 or 3 times a week in the summer and weekly in the winter. During her oral evidence it became apparent that the picture portrayed by the EQ was not entirely accurate. As is often the case with EQs the evidence given appears to speak to consistent use throughout the period referred to, 2007 to 2018 in this case, but in reality life events occur that cause patterns of use to change, as is the case in respect of Mrs Lewis' use, such as acquiring a dog and working from home.

35. According to her oral evidence Mrs Lewis discovered the Application Land during her first year residing locally, so some time between 2007 and 2008, and she used the land relatively infrequently, one or two weekends a month in the summer, usually when her nieces and

nephews visited. When she got a dog in 2013 she said she would visit at least once a week at the weekend and after she started working from home in 2015 it was her evidence that she used the Application Land more frequently, around 2 or 3 times a week during the summer and less frequently during the winter. Her evidence was of use that increased in 2013 and then again in 2015.

36. When asked about the way in which she accessed the Application Land Mrs Lewis confirmed the various points of entry illustrated on a diagram produced in support of the Application [AB/A/17]. However, her usual point of access was one of two gaps in the hedge line from Osborne's Lane. She described them as "*humps*", referring to the banked earth on which the hedgerow grew. She said the humps were well worn through use and could be slippery when wet. She said that one of these gaps was wide enough to accommodate two people side by side. When it was put to Mrs Lewis that fences around the Application Land were maintained until 2010 she disagreed and said that she had never seen signs of such maintenance or indeed barbed wire or fencing within the hedgerow.

37. When asked how Mrs Lewis would describe the Application Land she said it was woodland. When pressed about how it appeared during her early knowledge of the Application Land she said that it was an oblong piece of land with trees along the side, which she regards as woodland rather than a field. It was never clear to me whether Mrs Lewis accepted, as was suggested to her, that during her early use of the Application Land any trees in the centre of it were small self seeded trees. She certainly did not dispute that contention and she said that she could not recall how many trees there were and that her use had increased since 2015, suggesting that her memory of the Application Land prior to her increased use was perhaps less reliable.

38. Mrs Lewis was asked about a sign [OB/1/208] that said “*private no dogs*” and she said she had never seen that sign in the vicinity of the gate or in the woodland. She was also asked if she was aware of fly tipping, antisocial behaviour, drug use and dog mess on the Application Land. She said she was aware of none of those things except she recalled a mattress having been dumped in the West Brook on one occasion. Finally, when asked if Mrs Lewis saw other people on the Application Land she said that she did and she recognised them but could not say if they were ‘local’ as she does not know many people locally.

Mr Graham Thomas-Widger

39. Mr Thomas-Widger produced a WS dated 8 July 2020, a WS that records its receipt on 10 February 2019 and an EQ dated 13 December 2018. In his EQ he indicated that he lives in the locality of the electoral ward of Weston but in his first WS he says he is a resident of Weston Parish. He became Treasurer of the Broadmoor Lane Residents Association (“BLRA”) almost as soon as he moved in, the BLRA being a form of predecessor of FOTO. During the inquiry Mr Thomas-Widger put into evidence a video of his son’s seventh birthday party on 12 July 2009 during which they went onto the Application Land with a group of children.

40. Mr Thomas-Widger has known the Application Land since June 2003 when he and his family moved into a house in Broadmoor Lane, on the Orchard Development. Again, his EQ fails to really provide any detail about the different types of use that he and his family have made of the Application Land during the whole duration of their residence in Broadmoor Lane.

41. What emerged during his oral evidence was that use of the Application Land to entertain his children did not really begin until “*probably 2004 or 2005*” after which he would take them there probably once a fortnight. Mr Thomas-Widger said that he and his wife probably first went onto the Application Land towards the end of 2003 and for the first couple of years they probably went there every couple of months, out of curiosity.
42. Mr Thomas-Widger said that he would sometimes cut through the Application Land to go to the shops on the High Street. He also said that he would cut through the Application Land to access the station. Further, some of the use he made of the Application Land with his family was as part of a longer, circular route that would take them up “*Broadmoor Lane, join the Cotswold Way, down Deanhill Lane, Osborne’s Lane and through the woodland back home*” (WS, para 15). Whilst it is evident Mr Thomas-Widger and his family made use of the Application Land for recreation for its own sake I did not obtain a clear picture from his evidence just how frequent that particular type of use was and during exactly what period (as distinct from using it as a cut through or as part of a longer walk).
43. As for the condition of the Application Land Mr Thomas-Widger said that his first recollection is that the land was not as overgrown as it is now. He did maintain however that it was woodland although there were still some open spaces there. Regarding access he said there was a well-worn path from the balancing pond on the Orchard Development site to the weir within the Application Land, notwithstanding the Objector’s plan [OB/2/245] which suggests that the land beyond the balancing pond was retained scrub. Mr Thomas-Widger also made the point that in the video in 2009 the boys were able to cross the bridge and turn left into the Application Land which meant that the boundary in that location was not secure. He did accept that there was some

fencing there and he also recalled seeing some old barbed wire fencing along the Osborne's Lane boundary. He was unaware of any of the boundaries having been regularly maintained.

44. When asked about antisocial behaviour, drug use and fly tipping Mr Thomas-Widger did say that he knew that children had set fire to an old chestnut tree that had been struck by lightning. He was unaware of any fly tipping or paraphernalia associated with drug use being left on the site. As regards a mattress that had once been dumped on the land he said it may have been children playing but he did not know.

Mr Stephen Skinner

45. Mr Skinner produced a WS dated 5 July 2020, a WS dated 5 February 2019 and an EQ dated 15 December 2018. In his EQ he records that he lives within the locality of the electoral ward of Weston.

46. Mr Skinner and his family moved to Napier Road in 1996. His children were born in 1989, 1992 and 1995 so they were around 7, 4 and 1 at that time. In his WS dated 5 July 2020 Mr Skinner said that when he first moved to Napier Road he remembered using the original footpath along Osborne's Lane that went through the farmyard at Lansdown Grange Farm. He goes on to say that when his eldest daughter was born they would more often access the Application Land by crossing the stream in the area known as the Orchard in Broadmoor Lane, before the new houses were built. He went on to say that once the footpath was diverted, access to the Application Land became much easier.

47. The foregoing is a little confusing given that Mr Skinner's eldest daughter, as I understand it, was born in 1989, long before the family

moved to Napier Road, yet the aforementioned account creates the impression that she was born whilst they lived there and that their means of access changed from using the original public right of way ("PROW") to gaining access from the Orchard.

48. To add further confusion there was no direct access from the Orchard (as it was, pre development) directly onto the Application Land because the Chittem Land sat between the Orchard and the Application Land. The Orchard and the Application Land did not share a boundary. It was put to Mr Skinner that a hedgerow dividing the Orchard from the Chittem Land would have prevented access to the West Brook in the Application Land but he said he remembered being able to walk freely along the side of the stream to the weir. That evidence sits a little uncomfortably with information contained in a report into an application to register the Orchard as a new TVG dated 22 March 1999 wherein a statement of facts in support of that application recorded that "*... The site is separated from the adjoining fields by mature hedgerows and slopes in a southerly direction toward the West Brook which provides another natural and informal boundary ...*" [OB/2/420]. And at [OB/2/430] it is recorded that in 1973 money was spent securing the boundaries with the adjoining private land of two owners (one of which must have been the Chittem Land given that Mr Chittem was one of only two adjoining owners) to prevent trespassing which had been complained of.

49. During his oral evidence Mr Skinner, trying to explain the means of access from the Orchard, said that in the bottom corner, where the footbridge is now, one could walk along by the side of the stream and cross the weir. Of course the location of the footbridge was not in the corner of the Orchard. It is part way along the southern boundary of what was the Chittem Land.

50. Leaving aside the confusion that is borne out of the foregoing, Mr Skinner said that in the period during which the Orchard Development was being constructed his children's use of the Application Land was much less. More generally he said that his eldest daughter's use of the Application Land ceased when she was around 14 or 15 (2003/4) and that his son's use of the Application Land was more limited due to his interest in playing football, for which the Application Land is unsuitable. Of his own use Mr Skinner said he would walk from 2002 to around 2013/4 along the path as part of a longer walk.

51. Mr Skinner was asked if he recalled there being horses on the land or a stable and tack room building. He was clear that he remembered neither. He was asked about the nature of the land and he maintained that his recollection was that it had always been woodland, not grazing land. He was taken to a series of aerial photographs [OB/2/391-5] but Mr Skinner was still resolute in his recollection that the land had always been woodland. He had no recollection of any stock fencing or any barbed wire across the gaps in the hedge along Osborne's Lane. Nor did he recall antisocial behaviour, paraphernalia associated with drug taking, dog mess or fly tipping although he referred to a sofa once having been pushed onto the land.

Mr Gordon Beavis

52. Mr Beavis produced a WS dated 7 July 2020, a WS dated 18 March 2020 and an EQ dated 10 December 2018. In his EQ he identified the locality within which he lives as Charlcombe Parish but in his WS dated 7 July 2020 he says he and his family moved to 'Weston Village'.

53. In his EQ Mr Beavis stated that he / his family used the Application Land to walk the dog and children playing. His EQ gives the clear impression that he used the land, as stated, between 1994 and 2017. In his oral evidence a very different picture emerged, Mr Beavis describing his history of use being split. He only, in fact, said he used the Application Land for dog walking between 1994 and 1996, which is when his dog died. He told the inquiry that after his dog walking ended he ceased to really be involved with the Application Land until around 2008/9 when 5 grandchildren had arrived. Despite his Ws saying that his children used to play in the Application Land he made no reference at all to that in his oral evidence. He does say in one WS that his children used to love running through the woods and across the bridge, watching the brook flow. However, that cannot be right because the bridge was only constructed during the Orchard Development in or around 2002/3 (and there is no other bridge on the Application Land) and given that 5 grandchildren arrived in 2008/9 Mr Beavis' own children were clearly too old to have ever enjoyed running over the bridge as children in the way he described during the Application Period.

54. In his oral evidence as Mr Beavis was describing the way that he accessed the West Brook with his grandchildren, in a gap by the footbridge, he was challenged on the most natural route and he agreed that the suggested route though gaps by the gate would be the obvious way *"if you are only going to the land but we were going to the playground. The children were more interested in the brook than the wood"*. There was then an exchange about going over the bridge and as well as the play area there is also access to the stream on the left. I am not satisfied from the evidence I heard that Mr Beavis was claiming to have made any great use of the Application Land at all during his period of use with his grandchildren. It certainly did not sound as if he was.

55. Mr Beavis was certain that he had never encountered horses on the Application Land nor seen any stable or tack room. He said that in 2009 there was a well trodden path into the Application Land from Osborne's Lane and he said there was a gap right by the bridge. He had never seen any sign saying "no dogs" or any other sign. He also said he had seen no signs of antisocial behaviour or drug use, no damage to trees, no dog mess or fly tipping. His use of the Application Land ceased in 2016.

Mrs Gaynor Williams

56. Mrs Williams produced a WS dated 27 June 2020 and an EQ dated 27 December 2018. In her EQ she identified her locality as the electoral ward of Weston but describes herself in her WS as having moved into "the village" in 1992.

57. Mrs Williams' use can be divided broadly into three types of use. Her use from 1992 when she would walk with her husband around once a week. Her use with her children from around 2005 onwards. And finally, her use of the Application Land for running as part of a longer route. The first two can be said to be use of the Application Land as a destination whereas the last appears to be essentially 'thoroughfare' type use.

58. Taking Mrs Williams' use from 1992 it was her evidence that around once a week she and her husband would go to the Application Land for a stroll. She said that they would go in, walk around and come back out. She said that it was possible to cross the stream to the other side over some stepping stones to the Orchard but when it was pointed out that she could not have done so because she would have emerged on

the other side onto the Chittem Land which was separated from the Orchard by a hedgerow Mrs Williams said *"I just don't remember that. I wouldn't have gone if I wasn't supposed to go there"*.

59. When asked about horses on the Application Land Mrs Williams was very certain that she had never seen horses there and she said *"it's a strange place for horses, a little wood with no grass"*. When taken to aerial photographs that show the Application Land with less canopy cover she was firm in her view that to her it was a wood, not a field. Mrs Williams was sure that she had never seen barbed wire fencing and that she was not aware of fences being maintained. She was also certain that the Application Land had not been cleared in 2004. She had no recollection of the five bar gate onto Osborne's Lane at all. She had never seen signage indicating that the Application Land was private land.

60. Mrs Williams' use with her children, as noted above, began in around 2005. She talked of regular visits to the Application Land, playing in the stream and gaining access in much the same way as she had always done, through gaps in the hedge along Osborne's Lane. She also talked about meeting with other parents at the play park in the Orchard Development and allowing the children to go off into the woods on their own.

Mrs Lisa Pritchard

61. Mrs Pritchard produced a WS dated 3 June 2020 to which she exhibited 4 photographs taken between June 2014 and December 2015 and an EQ dated 20 June 2020. In her EQ Mrs Pritchard identified her locality as

the electoral ward of Weston but refers in her witness statement to her place of residence as 'Weston Village'.

62. Mrs Pritchard's EQ carefully identifies two specific periods during which she used the Application Land. The first was between 1983 and 1999. The second was from 2004 to 2018. Whilst she was using the Application Land from 2004, she did not resume residence in the claimed locality until 2007 and was visiting from outside the locality, Wick in South Gloucestershire, from 2004 until 2007.

63. During the early period Mrs Pritchard said she recalled seeing one or two ponies on the Application Land whilst she was at primary school. That was prior to 1989. She says that while she was at primary school she would meet friends at the Orchard. She remembered the Chitem Land because she was good friends with Mr Chitem's daughter. Mrs Pritchard said she remembered the enclosed hedge line of the Orchard but that the boundary to the West Brook was accessible. She described sliding down the bank into the brook and walking about. When asked if she would get into the brook and go along to the Application Land she said that she would although her WS simply says she would walk along the stream *towards* the woods.

64. During the period that Mrs Pritchard was at secondary school, from 1990 to 1999, she says she does not recall horses on the Application Land. She was unable to confirm if a picture with horses [OB/2/284] was a picture of the Application Land although she was doubtful that it was. Her memory of the Application Land was that it was woodland, not open pasture. She recalled the land being more than 50% covered in trees.

65. Mrs Pritchard did recall the metal gate and said it was open some of the time. She also remembered gaps in the hedge along Osborne's Lane

and does not have any recollection of barbed wire fencing. She had no recollection of signs.

66. In respect of the later period Mrs Pritchard said she spent a lot of time in the Application Land. From 2007, when Mrs Pritchard returned to live in the claimed locality, she used the Application Land for dog walking, stating that they would then continue their walks to the open fields beyond Broadmoor Lane. That use of the Application Land appears to have been for the purposes of passing through as part of a longer route. It also appears from her WS that they would go into the Application Land to follow their dog, suggesting that if the dog did not disappear into the land they would not then enter. Mrs Pritchard said they would use a variety of gaps or the metal gate to gain access to the Application Land. Once Mrs Pritchard started using the Application Land with her children who were born in 2010, 2011 and 2013, she said they would enter over the humps although she does recall that the gate was open at times.

Mr Humphrey Pain

67. Mr Pain produced a WS dated 4 July 2020 to which he exhibited 4 photographs taken in May 2016 and another WS recorded as having been received on 2 February 2019. He also produced an EQ dated 3 January 2019. In his EQ Mr Pain identified his locality as the electoral ward of Weston and during his oral evidence he simply described his local neighbourhood as 'Weston'.

68. Mr Pain and his family moved to the area in 2004 and in his evidence he said that he had used the Application Land daily since that time for walking the dog and playing with his children, although he said his

children played there unaccompanied as they got older. His main point of access appears to have been either across the bridge from the Orchard Development and in through a gap between some conifer trees or across the brook from the Orchard Development / WASPS side.

69. Mr Pain was questioned about the character of the Application Land at the beginning of his period of use. He maintained that it was always woodland with open access. He was taken to aerial photographs dating back to 2000 and it was suggested to him that the photographs showed a piece of land bordered by trees and relatively clear in the middle that became progressively more akin to woodland as trees self seeded over the years. Mr Pain was adamant that the Application Land had always been woodland throughout the time of his use.

70. Mr Pain had no recollection of secure fencing or signage. He also had no recollection of nitrus oxide canisters being left on the Application Land or any particular problem with dog mess. Whilst he had never actually witnessed fly tipping he had assisted other local people in clearing up items dumped on the Application Land some years ago.

Miss Sarah Chappell

71. Miss Chappell produced two WSs, one dated 27 April 2020 and the other recorded as having been received on 9 February 2019. She also produced a video of a child playing with a battery-powered car in June 2018. She describes the place where she lives as 'Weston' or 'Weston Village'. During her oral evidence she confirmed that she regarded Weston Village as including Upper Weston and Lower Weston (which

appears to be outside the claimed locality [AB/F/17]) but she did not consider that it included Charlcombe.

72. Miss Chappell has lived in Weston during two distinct periods. The first was between 1999 and 2001 and the most recent from 2010 to date. In the earlier period she said she would take her young son to the Application Land. I do not know with what frequency. She said that she would access the Application Land through gaps in the hedge along Osborne's Lane. She had no recollection of a gate during that early period although she said she was aware of a gate being there now. She was very clear that she had always regarded the Application Land as woodland and could not remember horses being there which, as a horse rider, she said she would have remembered.

73. During the later period from 2010 to 2018, when the Application Land was fenced off, Miss Chappell said she would go there with her children and sometimes to walk on her own. With her children when they were younger it was part of a regular "*round the block walk*" and an opportunity for her children to play in the stream. In more recent years Miss Chappell said she would let her children go to the Application Land by themselves. In respect of gaining access she said there were at least three points of access; the gaps in the hedge along Osborne's Lane, from the bridge connecting Osborne's Lane to the Orchard Development and from the Orchard Development side, down the bank and across the stream.

74. Miss Chappell was unable to draw comparisons in respect of fencing and changes to the Application Land between the two periods as she said she did not have sufficient recall of the detail. She said she had never seen signage or any hard standing inside the gateway. She had also not seen nitrous oxide canisters or noticed any dog mess (although

she had seen the odd bag hung on a tree). She had not seen fly tipping but did recall that there was once a mattress in the stream.

Mr James Shiels

75. Mr Shiels produced a WS dated 18 March 2020 and an EQ dated 16 December 2018. He recorded in his EQ that the locality in which he lives is Charlcombe Parish although he refers to the area from which people come who use the Application Land as Weston Village.

76. Mr Shiels' evidence related to the period from 1996 to 2018. He told the inquiry that he was an infrequent user of the Application Land, probably around once a month. He would go through it as part of a longer walk sometimes venturing to Lansdown Racecourse, Kelston Roundhill or Beckford's Tower. I asked him if he ever went to the Application Land for its own sake, as a destination. He said he did but that it would be less than monthly although he could not be more precise than that. Later, in answer to a question in re-examination, Mr Shiels said he used the Application Land more frequently *en route* to a longer walk but occasionally for its own sake.

77. Mr Shiels was asked about the condition of the Application Land during the earlier part of the period of his use. It was suggested to him that when he first started going to the Application Land it could not properly be described as woodland and was simply lines of trees along the boundaries. Mr Shiels said he thought that was correct and that the Application Land was much more open in the early days. He said he could not recall horses or any livestock. When it was put to him that witness evidence on behalf of the Objector says there were horses on the Application Land until 2002 Mr Shiels replied that there could have

been but that he did not recall that. He did say that he could not remember the Application Land having been adequately fenced so as to keep horses in.

78. Mr Shiels had no recollection of the Application Land having been stock fenced in 2004 and was fairly clear that he had never seen signs saying keep out or private or no dogs. He said he probably wouldn't have ventured into the Application Land had such signs been present. He did recall old barbed wire fencing, sometimes attached to old rotten fence posts. When asked about the diversion of the public footpath following the Orchard Development Mr Shiels said he was not aware of the precise rights of way at that time but he did recall using both the old and new right of way.

GENERAL OBSERVATIONS ABOUT THE APPLICANT'S WITNESSES

79. My general impression of the Applicant's live witnesses was that they were being straightforward and honest and doing their best to assist the inquiry. However, what emerges from the foregoing account of the oral evidence is that there is sometimes, and unsurprisingly given the timeframe with which the inquiry was concerned, a tension between witnesses being very certain on some points such as there being no horses during the early part of the Application Period, for example, but having no recollection at all of matters such as the presence of a gate into the Application Land and having insufficient recall of the state of the Application Land throughout the whole period so as to be able to make any comparison (Chappell). Absolute certainty on some matters in the face of clear uncertainty on others, especially where the issue on which certainty is expressed is more historic, colours the whole of a witness's evidence. Furthermore, it also became clear that the written

evidence sometimes painted a very different picture of overall use from that which was portrayed in oral evidence (Lewis, Beavis).

80. It also emerged during oral evidence that not all of the claimed use was use of the Application Land for its own sake. This will have some relevance later in this report when I make findings of fact and apply the law to those findings. But it is worth noting at this juncture that there is a material difference between use of the Application Land for recreation and use as a through route, going from one place to another. By way of example, some used the Application Land regularly (although not exclusively) as a cut through to get to work (Skinner) or to the shops or the station (Thomas-Widger).

81. All of the Applicant's witnesses were asked about the contrast between the nature of the Application Land during their earlier use and in the later period from around 2010 onwards. Almost all of the witnesses were adamant that it was woodland throughout. I do not attach any real significance to the descriptive labels that people gave to the Application Land, people's perceptions being different, but there were witnesses who accepted that some years ago the Application Land was more open and less overgrown than in the latter part of the Application Period (Thomas-Widger, Shiels). That, it seems to me, is in accord with the aerial photographs produced by the Objector [OB/2/391-5].

82. It will also be clear from the foregoing account of the oral evidence that even after a witness had given their evidence I was sometimes still unsure about the exact nature and frequency of their relevant use of the Application Land (Thomas-Widger, Chappell). That presents a difficulty when trying to assess whether I have heard evidence of sufficient qualifying use over the full twenty year period.

83. Also, as is probably inevitable when giving evidence relating to a period that stretches back more than twenty years, I formed the impression that witnesses had a tendency to project backwards their use or recollection of the land, particularly in relation to the condition of the Application Land and to a lesser degree (simply because I heard less evidence on this point) accessing the Application Land from the Orchard Development side prior to that development taking place.

WRITTEN EVIDENCE FOR THE APPLICANT

84. In addition to the witnesses from whom I heard oral evidence the Applicant produced a very substantial body of further written evidence. There were Ws from two further witnesses that had been intending to give oral evidence; Peter Donaghy and Paul White. They did not in fact give their evidence to the inquiry in person and I do not know why. However, I have read their evidence (Ws and EQs) and in each case the evidence raises questions of accuracy. By way of example, in his EQ Peter Donaghy says that access to the Application Land was gained through the bottom of the Orchard when he was a child. The Orchard, of course, as it was pre-development, did not share a boundary with the Application Land so I cannot simply accept that Mr Donaghy was accessing the Application Land rather than some other stretch of land along the West Brook. He could not have gone directly from the Orchard onto the Application Land so his evidence, as it stands, raises some very obvious questions. And Paul White, in his EQ referring to his use of the Application Land over a period stretching back to 1993, claims to have gained access to the Application Land by the bridge. That is referable to a bridge that was not constructed until 2002. Against that background I must treat their evidence with real caution. Whilst I have no doubt at all that nothing

was written with the intention of providing misinformation, it is clear that I simply cannot just accept everything that they have each put in evidence without question.

85. I was also provided with two lever arch files containing 171 personal statements and / or EQs extending to some 1033 pages (Applicant's Bundles D and E). Whilst I can confirm that I have of course read all of that evidence and taken account of it in drawing my conclusions and making my recommendation, it is beyond the scope of this report for me to summarise and analyse in great detail the full content of those documents.

86. I should, however, say a few words about the nature of that evidence which will hopefully assist those reading this report in understanding why I attribute limited weight to it. The EQs elicit evidence that is general in the extreme, particularly when one considers that some are dealing with a period in excess of twenty years but even when the evidence simply covers a few years. The issues I have identified in respect of the witnesses who did give oral evidence illustrate that such general evidence can often be wholly misleading. I refer to the written evidence of Mrs Lewis and Mr Beavis above as portraying use of the Application Land that after hearing their oral evidence turned out to be very different from the impression their written evidence created. And the EQs of Mr Donaghy and Mr White, as also noted above, give rise to issues that cannot be reconciled without hearing from those witnesses.

87. Furthermore, and as is entirely normal in applications such as this, much of the evidence contained in the EQs relates only to part of the Application Period and is not evidence relating to the full twenty years during which qualifying use must be proved. However, I have to be satisfied of sufficient qualifying use for the whole of the twenty year

period which many of the EQs and personal statements do not speak to.

88. By way of further random examples of the limitation of evidence contained in EQs, for illustrative purposes, Mr Graham Bebbington [AB/D/57] says in his EQ that he used the Application Land from 2004 until fences were put up in 2018. When asked how often he says “*2 times a month approx. Mainly while child was younger and attending local school. Then later with her friends and picking blackberries*”. Nothing is said about when the period was during which his child was attending the local school or the frequency of use by his child with her friends or for blackberry picking. Whilst his wife’s EQ [AB/D/63] provides some further detail, namely that their child was regarded as “*younger*” between 2004 and 2012, it still does not answer any question about frequency of use thereafter.

89. Hope Bennett [AB/D/97] describes the frequency of her use as “*every now and then*” which is far too vague to draw any positive conclusions as to actual frequency of use and its contribution to meeting the statutory test. Andrew Biggs [AB/D/125] says his family has used the Application Land since 1979 but it is not clear to me if that use spans the entire Application Period. He says he played with his children there but given that he has used the Application Land with his grandchildren since 2003 it seems likely to me that any use with his children was likely to have been prior to the beginning of the Application Period. Dog walking appears to have started in 2010. So whilst on the face of it Andrew Biggs appears to be providing evidence of use during the whole of the Application Period, including the early years, reading the detail it appears that he was probably not using it (or at least such evidence is not apparent) between 1998 and 2003. Sally Biggs’ evidence [AB/D/13] adds nothing to the question of use during the early part of the Application Period but does suggest that their dog

walking use is part of a longer route that passes through the Application Land.

90. François Chaté [AB/D/165] claims to have used the Application Land only once. Justine Goldstraw's EQ [AB/D/411] gives the impression that she has been using the Application Land since 2010 as a resident of Charlcombe Parish but correspondence dated 11 December 2018 [AB/D/417] discloses that she had only just moved to Bath from London and it appears that her prior knowledge and use of the Application Land was by virtue of her visiting her partner's parents living on Deanhill Lane, rather than as an inhabitant of the claimed locality or neighbourhood.

91. Fina Hughes [AB/E/505] claims to have used the Application Land from 1998 but says she accessed it via the "little bridge" which was not built until 2002. She also records that she has used the Application Land "intermittently over the years" which provides no clear indication of her frequency of use save that it appears to be rather limited. This cannot be a complete and accurate record of her use unless it did not, in fact, begin until the bridge was constructed in 2002. Otherwise, she must have had a different means of access between 1998 and 2003 that she has not provided any detail of.

92. Again, Emma Jacobs [AB/E/523] records her use from 1996 but claims to have gained access to the Application Land by the bridge. Richard and Jennifer McMullen [AB/E/659] provide evidence of claimed use dating back to 1987 but state they use the land "intermittently on our way into and from Weston". Intermittently suggests infrequently and their use appears to be limited to journeys to and from Weston so it is not clear if they have been using the Application Land as a destination or a through route. Mark Payne [AB/E/797] claims to have used the Application Land between 1997 and 2018 and says he used it

“frequently when the children were younger”. I do not know how old his children are or during what period he says he used it frequently but I cannot accept this EQ as evidence of consistent qualifying use throughout the period 1997 to 2018.

93. Martin Rust [AB/E/841] says he has used the Application Land between 1992 and 2018, a period of some 26 years, and says he has used it *“principally for children’s play”*. I cannot determine from his EQ responses during what years he had children that he was taking to play on the Application Land but, as with the evidence of Mark Payne referred to above, I cannot accept Mr Rust’s EQ as evidence of consistent use throughout the whole period he claims to have used the Application Land or indeed, without more information, as clear positive evidence of use during any part of the Application Period.

94. Brian and Lesley Weaver have produced EQs [AB/E/965 & 979] referring to their use of the Application Land since 1966, both of whom say they have used the Application Land a lot for walks with children and their children. As with other evidence mentioned above I do not know during what periods they have entertained children or grandchildren on the Application Land and I cannot simply accept their evidence as cogent evidence of continuous qualifying use from 1966 to 2018.

95. The foregoing examples are intended to illustrate why it is often impossible to draw positive and clear conclusions as to use from such general evidence, particularly where that evidence covers a lengthy period. I remind myself, as I consider the quality of the evidence I have heard and seen, that the burden of proving the requisite qualifying use lies with the Applicant.

96. I should also say a word about the large volume of evidence that refers to the value of the Application Land as a nature corridor, a place of tranquillity and pleasure and a natural resource that is a wonderful destination for adults and children alike. I have no doubt at all that people feel very strongly about the potential loss of the Application Land for general public use but that is not a matter that is relevant to the assessment that I have to undertake. I am concerned solely with evidence that is directed to the statutory test for the registration of new TVGs.

97. In addition to the evidence referred to above the Applicant has also submitted additional documents in support of the Application which might more properly be described, at least in part, as submission rather than evidence. In particular I am referring to the 'Supporting Documentation' submitted with the Application [AB/A/12]-24] and the 'Pre-Inquiry Report' [AB/F/1-53]. For the avoidance of any doubt, I can confirm that I have read and had regard to all documents that have been put before me.

EVIDENCE FOR THE OBJECTOR GIVEN ORALLY

98. 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 of the evidence presented for the Objector, 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.

Mr Matthew Davies

99. Mr Davies produced a WS dated 23 March 2020. He lives in Weston Park which is about 10 minutes from the Application Land. In his evidence he states that he has been very familiar with the Application Land for most of his life. He was a councillor for the Weston electoral ward between 2015 and 2019.

100. Mr Davies' written evidence can be summarised as saying that he has always considered the Application Land to be private, it having been used as a horse paddock until the early 2000s, that until 2003 the only means of access was a five bar gate off Osborne's Lane, it was only after 2003 that people started to trample down the fences to gain access and that it has only been over the last 10 years that he has witnessed members of the public on the Application Land walking their dogs.

101. In his oral evidence Mr Davies described in much more detail his familiarity with the area. He first moved to Lansdown in 1977 when he was 9 years old. His father was a farmer and he and his sister had ponies that they would ride in the area, sometimes with friends who had ponies at The Blathwayt Arms. He said they had *carte blanche* to ride wherever they liked, permitted by local farmers to roam around. He said that during the summer months he would ride past the Application Land certainly once a week. This activity continued until around 1984, well before the beginning of the Application Period.

102. In 1995 Mr Davies moved to Lansdown Place from where he regularly walked various routes, including what he described as the 'skyline walk', which would occasionally take him either side of the Application Land. He agreed that he might have walked past the

Application Land around 6 times a year. He continued those walks until March 2003, by which time he had moved to Richmond Place, when his second child was born (he said it became too difficult to take 2 children on those walks for a period). It was his evidence that until then there were often two ponies on the Application Land that he said would sometimes stand at the gate or run down the hedge to greet passers by. His last recollection of ponies on the Application Land was when he walked past with his daughter, born in 2001, in a rucksack.

103. When asked about stables on the Application Land Mr Davies said he recalled there being a wooden stable just beyond the gate. He was taken to a photograph [OB/2/233] which he said he recognised. He said that is exactly how the Application Land looked around 1995/7 to 2001 "*for definite*". It was put to Mr Davies that the trees on the Application Land now bear no resemblance to the photograph and he responded that the picture was definitely of the same place.

104. Mr Davies was then taken to an aerial photograph from June 2000 [OB/2/391] and was referred to the brown area. He was asked if that was the area where he would expect the horses to be. Mr Davies replied that there was a clearing, an area that the ponies walked up and down.

105. Mr Davies moved again to his present home in November 2004. He continued to use the general area and by around 2009, when his children were old enough to manage the walks that Mr Davies used to undertake, the public footpath that had previously gone through Lansdown Grange Farm had been rerouted to its current route, across the bridge and into the Orchard Development. It was during that period that Mr Davies said he first noticed that there were no ponies on the Application Land. I do not have any sense of how often, if at all, he went near to or observed the Application Land between 2003 and 2009.

106. Mr Davies was then asked about his recollection that he had only seen people using the Application Land for about 10 years. He said that the only way he can relate to that timeframe is because that was when he and his family were able to walk that route again (as noted above, he said that was in around 2009). He went on that he could see people with dogs there, more so in the winter when the vegetation was less dense, and he noted there were gaps in the hedge.
107. Asked if he was aware of access points to the Application Land from the Orchard prior to 2003 Mr Davies replied that he had not been there but that his understanding was that the land was privately owned. He said he had not been across to the Orchard site until the public footpath was diverted in 2003 but he had not noticed access to the Application Land from there or the weir.
108. Mr Davies also gave evidence about his involvement with the play park on the Orchard Development site and local organisations such as FOTO and the Bath Recreation Trust, a charity that looks after public spaces in the Bath and North East Somerset area. That was during his tenure as a councillor. He said that the Application Land was never mentioned when discussions were held regarding the maintenance of local public spaces. He also gave evidence that during his time as a councillor he was contacted by Dr Bull, the head teacher at WASPS, who expressed concern about the Application Land being used as a gathering point for anti-social behaviour and from where entry could be gained to the WASPS site which was undergoing building works at that time. Mr Davies said he reported the matter to the local police officer.

Mr Paul Ealey

109. Mr Ealey produced a WS dated 9 July 2020. He is a joint owner of the Application Land and the Objector in these proceedings. As noted above, Mr Ealey and his wife purchased the Application Land on 13 July 2018 although he has lived within a mile of the Application Land for the majority of his life.

110. It is Mr Ealey's contention that the Application is essentially a means by which the Applicant is attempting to thwart the prospect of any development on the Application Land. That is as may be but the motivation for the Application is irrelevant (unless it has caused witnesses to embellish or falsify their evidence, which I have not found). All that matters is whether or not the statutory test is met. Mr Ealey has exhibited to his WS a significant chain of social media interaction that he says proves the Application is an attempt to stifle development. Whilst that point is not material to my consideration of the Application, I have identified one post that bears repeating given its direct relevance to use and experience of the Application Land, by Julia Brigden [OB/1/199], who says "*... When I first started walking my dog through the little wooded area about 12 years ago, the only way through was to jump over the stream using the big stones. You couldn't get through the fir trees near the bridge by the farm. As the years went by and more people used it a path started to form there. There was also a fence there at one time with barbed wire on it. I never used to go that way. I used to jump over the stream and come out behind the houses near the culvert ... As the years have gone by it's become a popular route ...*". Twelve years ago at the time of that post would have been in around 2006. Julia Brigden has not provided any evidence in this Application for me to cross check that post against.

111. For completeness there are also posts from Suzanne Donaghy [OB/1/181-3] about accessing the Application Land from the Orchard which, for the reasons I have explored above, cannot be right because the Orchard (pre-development) did not share a boundary with the Application Land. She also talks about tree climbing to get the apples. I am not aware that there are any apple trees on the Application Land and consider it much more likely that this was a reference to use of the Orchard.

112. Mr Ealey makes reference to the fact that a tree preservation order (“TPO”) was made on 6 November 2018 in respect of the whole of the Application Land. That, he said, has made him and his wife as owners responsible for thousands of pounds worth of tree surgery. It appears that in response to the TPO Mr Ealey commissioned an Arboricultural Assessment & Recommendations Report [AB/F/32]. Unfortunately, from my perspective, that report only covers “*key trees*”, all of which fall into the “*mature*” age class and are located on the periphery of the Application Land, along the hedge line bordering Osborne’s Lane and the West Brook. The report provides no assistance in establishing the age of the trees in the centre of the Application Land although that, of course, was not its purpose.

113. Turning back from tangential points arising out of Mr Ealey’s evidence to the direct evidence that he has given, it is Mr Ealey’s evidence that for the majority of the time he has known the Application Land people have not been able to use it in the way described in the Applicant’s evidence. Such use, he says, has only been regularly made in recent years. He refers to the fact that the only reason to use Osborne’s Lane originally was to gain access to Lansdown Grange Farm and that the public footpath prior to the 2003 diversion was rarely used. He also refers to signage warning people to keep out of the Application Land and threatening prosecution as well

as a sign stating that the Application Land was private. He was taken during cross examination to pictures of signs. One [OB/2/233] he did not recall but said he could remember there being a different one on the main gate and he also recalled one up in a tree. He was taken to another picture [OB/1/208] that he said he discovered when clearing undergrowth near to where the stables had been located.

114. In oral evidence Mr Ealey said he had known the Application Land for most of his life, having attended WASPS and being "*Weston born and bred*". He described the Orchard as it was prior to development. Mr Ealey said that in the 1970s he and his friends played there a lot with bikes, motorbikes and having bonfires. He described the Orchard site as secure, being bordered on one side by the Chittem Land and on the other by land belonging to a Mr Cross. He said there was no means of access from the Orchard to the Chittem Land.

115. Mr Ealey was asked about his familiarity with the Application Land between 1998 and 2003. He said he had little reason to go along Osborne's Lane during that period. His boys, 6 and 8 in 1998, attended WASPS and were friends with Kenny Richards' (the caretaker of WASPS) grandchildren with whom they played on the WASPS playing field in the evenings and at weekends. From 1 November 1998 Mr Ealey and his family lived on Broadmoor Lane, later moving about a mile away 3 or 4 months prior to the footbridge being opened.

116. Mr Ealey gave evidence of his walking dogs during the period 1998 to 2003, describing the routes he would take, sometimes along the Cotswold Way. He said he would not have gone along Osborne's Lane during that period.

117. In his evidence Mr Ealey makes reference to the development of the Orchard between 2002 to 2004, access he said between the Orchard

Development site and the Application Land being impossible during that period due to fencing by the developer, Redcliffe Homes Limited. Prior to that he said that access to the Application Land was prevented by a combination of vegetation and fencing.

118. It is Mr Ealey's recollection that the Application Site was used as a horse paddock throughout the 1970s until the early 2000s. He refers to the previous owners, Mr and Mrs Hook, having had stables there until the late 1990s but that horses remained on site until early 2002. It is only in recent years he says since the Application Land has been left unattended that brambles and saplings have established themselves and issues have arisen with fly tipping, antisocial behaviour and children setting fire to an old horse chestnut tree.

Mr Darren Hook

119. Mr Hook produced a WS dated 11 June 2020. He says his parents owned the Application Land prior to Mr and Mrs Ealey acquiring it. In his evidence he explains that the Application Land was first purchased by his grandmother, Bett Quintin, in 1988. On 24 August 1994 it was transferred to Susan Hook, Tyron Quintin, Morley Quintin and Nick Quintin by their mother, Bett Quintin. Susan Hook and her husband Gerald Hook owned and looked after the Application Land from 24 August 1994 until it was sold to Mr and Mrs Ealey (I am not sure if there was a further transfer from the four siblings to Mr and Mrs Hook but that is not material for the purposes of this report). Mr Hook's evidence is that he was very familiar with the Application Land during that period.

120. Mr Hook says that until the early 1990s his parents kept horses stabled on the Application Land. He describes a building on site that comprised two stables and a tack room that was removed to his parents' new home at Aldermead, Broadmoor Lane. That building was described as made with a 4 x 2 frame, thick shiplap and lined inside with a hay feeder in the corner. It was his father, brother and workers that removed it and he helped re-erect it at Aldermead. He says that was in the 1990s and he remembers the period because he broke his leg in the 1990s and he was in plaster when the stables were moved, he thought probably around 1991 or 1992. I am not sure that I can accept that date as being accurate given that the Application Land was not transferred to his mother and others until 1994. It seems far more likely to me that it was later in the 1990s. He said the concrete pad upon which that building stood is still visible today. Mr Hook says that during his parents' ownership of the Application Land they rented the horse stables to Cecile Pitman, Linda Coles and Jo Grimes. According to him there were horses on the Application Land until 2003.

121. It was suggested to Mr Hook that after the stables and tack room had been removed from the Application Land it would no longer have been suitable for keeping horses on. He explained that whilst it might not have been suitable for keeping thoroughbreds it would have been perfectly suitable for a Welsh Mountain pony that could stay out all winter with a rug. Mr Hook was asked whether there was sufficient grass in the Application Land to sustain horses to which he replied that he would have thought the horses would have received supplementary feed.

122. Mr Hook said that from 24 August 1994 until the public footpath was diverted in 2003 the only means of access to the Application Land was the gate located to the south of the site opening onto Osborne's Lane. He said it was only after the footpath was

diverted in 2003 that people started to gain access to the Application Land from the north, across the West Brook. He referred to a line of bramble bushes and a fence preventing access prior to 2001 after which the Orchard Development land was securely fenced until the development was complete.

123. Mr Hook said that during his parents' ownership of the Application Land its use was solely as a horse paddock until the horses were removed after which he says he helped his father to maintain boundary fences until around 2010, when he moved away, after which access by members of the public became possible due to the vandalism of the perimeter fences. When asked about his maintenance of the boundaries Mr Hook explained that it might involve cutting back the hedgerow or replacing wire and fence stakes. He said that people would make gaps that he would then have to fill in. It is clear, therefore, that members of the public had been gaining access to the Application Land prior to 2010 when Mr Hook stopped maintaining the boundaries. When asked if the Application Land was secure for horses Mr Hook maintained that the barbed wire, timber fences and natural hedgerow did maintain a secure site along with the repairs that he undertook.

124. Mr Hook was cross examined at some length about signage. He recalled the "*private no dogs*" sign [OB/1/208] which he said his father had erected but that which he had had to replace on average twice a year. Asked where signs were Mr Hook said one near to the gate, one on the hedge and one right by the new footbridge which said "*private property no trespassing*". Replacing signs was one of the tasks that Mr Hook says he undertook until 2010.

125. Mr Hook was taken to a photograph [OB/2/233] showing ponies behind a gate. He said he thought that the object to the right

was a horse trailer. He said he recognised the photograph as being of the Application Land and he thought it was probably taken about a year or so after his grandmother had purchased the site, which would put its date at around 1989.

Mr Michael Osborne

126. Mr Osborne produced a WS dated 6 March 2020. He is the owner of and resides at Lansdown Grange Farm off Osborne's Lane where he has lived his whole life since 1964. He generally passes the Application Land every day as Osborne's Lane is the only means of access to Lansdown Grange Farm. That can be on foot, in a car or in a farm vehicle, as many as twenty times a day.

127. Mr Osborne's evidence is that the Application Land was not widely accessible or used by members of the public until after 2003 when the footbridge made the site more obvious and accessible. He said that he noticed the boundary fences being broken down from around 2006 onwards.

128. Mr Osborne's recollection of the use of the Application Land was for keeping horses throughout the 1970s, 1980s and 1990s. As well as keeping cattle he also has a livery yard and in the early 2000s when there was a very wet winter Mr Osborne, with Mr Hook's permission, kept some horses on the Application Land for a couple of months to give his own paddock a rest. He said the boundaries were secure otherwise he wouldn't have turned horses out there. It was his belief that the stables and tack room, which he described as a "*major stable block, 30 feet by 10 feet of wood construction*", were removed around 3 or 4

years after Mrs Hook took ownership of the Application Land, which would make that the late 1990s (1997 or 1998 or thereabouts).

129. Until the public footpath was diverted in 2003 Lansdown Grange Farm shared a boundary with the Application Land that Mr Osborne said was securely fenced, otherwise his cattle would have escaped. He said that he has always maintained the roadside face of the hedgerow along Osborne's Lane for as long as he could remember using the tractor hedge trimmer. He said that because he is driving at low speed he knows every inch of that hedge. He described a "*natural gap*" in the hedgerow that was always fenced with post and rail, 3 by 2 rails, and barbed wire. Otherwise he said to the corner of the entrance to the farm there was a substantial hedge of thick vegetation that was impenetrable. It is only since around 2006 that Mr Osborne said the fence was really broken down prior to which he had witnessed people getting under the fence rails to gain access to the Application Land. Even so, his evidence states that prior to the Application Land being fenced in 2018 he saw very few people on the Application Land and those were usually dog walkers passing through.

130. Until 2010 there was a wooden gate in the gateway onto the Application Land from Osborne's Lane. Mr Osborne said that a vehicle tried to turn in the gateway and reversed into the gate, breaking it. Mr Osborne informed Mr Hook, the then owner, who had the gate replaced with a metal gate.

131. It was suggested to Mr Osborne that if he was travelling along Osborne's Lane in a vehicle he would not have heard people in the Application Land playing by the stream. Mr Osborne's response was that one would notice them. He said that he would have seen over the hedge. He said that it is only in recent years that the Application Land has become overgrown and that he thought a lot of people were

remembering the site as it is today. He said that it was vastly different in the 1970s, 1980s and 1990s. He described the growth of self propagating trees to be quite vigorous and drew comparisons with trees that were planted on the old Orchard site in 2004 as part of the landscaping of the new development that are 60 feet tall today. He said that from his farm behind the farm buildings when the trees are in leaf he can no longer see the houses on the Orchard Development.

132. Mr Osborne was asked if he recalled signage on the Application Land. He said he could. As one entered Osborne's Lane on the right hand side there was a wooden gate into the Application Land and there was a sign to the side on the fence. He did not say what the sign said.

133. On the topic of antisocial behaviour Mr Osborne said that on two occasions the fire brigade had been called when teenagers had tried to set fire to the base of a horse chestnut tree about 10 years ago. He also said there was evidence at that time of drug use. His son had found a syringe and he had found a plastic home made bong. When asked why he would pay attention to antisocial behaviour he explained that as the closest resident to the Application Land he takes great interest in what goes on there. He said that as a result he has become very familiar with people who walk in the lane.

134. Finally, having heard from a member of the public, Mr Andrew Bennett, whose evidence I shall deal with later, Mr Osborne referred to the fact that Mr Bennett had told the inquiry that his children had probably played with Mr Osborne's children on the Application Land. Mr Osborne said that his son played at the farm with Finn Bennett but he did not recall them going into the Application Land to play.

GENERAL OBSERVATIONS ABOUT THE OBJECTOR'S WITNESSES

135. As with the Applicant's witnesses I found the Objector's witnesses to be straightforward and honest and doing their best to assist the inquiry. The witness that I found most helpful was Mr Osborne who as a neighbouring landowner has clearly had an obvious interest in the Application Land and, as he said, passes it daily as Osborne's Lane is the only point of access to his farm.
136. Mr Hook's evidence was helpful in respect of his involvement with maintaining boundaries and replacing signage. I suspect he may have got his dates wrong as regards the movement of the stable block and I am inclined to think that Mr Osborne's recollection that it was moved some years after Mrs Hook took ownership rather than prior to her ownership of the Application Land is more likely.
137. Mr Ealey's evidence was directed less at activity on the Application Land and more to the state of boundaries and the possibility of gaining access at various times. It is hardly surprising that he had little in the way of direct evidence to give about activities on the Application Land because he had no particular interest in it until he and his wife acquired it just months before the end of the Application Period.
138. Mr Davies' evidence was, again, not extensive in so far as the use of the Application Land was concerned or the state of boundaries as he had no reason to take any particular interest in it. It was helpful, however, that he could recall the time that he says he last saw a pony on the land by reference to his daughter's age.

WRITTEN EVIDENCE FOR THE OBJECTOR

139. The Objector relies upon a further 11 WSs, including WSs from Gerald Hook and Susan Hook, past owners of the Application Land, and Linda Cole and Joanne Grimes who give evidence of having kept horses on the Application Land. Those WSs are in narrative form (in other words they are not in questionnaire form) and are supported by a statement of truth. That said, regrettably those witnesses did not attend the inquiry to give their evidence and I do not know why that is. Inevitably I must give their evidence less weight than I would have done had they attended to give their evidence and be cross examined. I should, however, say that the additional written evidence for the Objector does not suffer from the same deficiency as that relied upon by the Applicant which, as I have already stated, is very general and imprecise. The Objector's further written evidence is generally much more targeted and intended to deal with certain points that arise out of the Application.

140. I will briefly review those further WSs but will not repeat verbatim everything that is contained therein. The Objector can be certain, as with the Applicant's further evidence, that I have reviewed them carefully and taken account of them all.

141. Mr Colin Barrett produced a WS dated 17 February 2020. He was previously the Chairman of the Broadmoor Lane Residents' Association from approximately 1998 to 2003 and a councillor for the Weston electoral ward from 2003 to 2019. His evidence relates to two specific topics. The first was the ability to access the Application Land or the West Brook from the Orchard (pre-development). He said that prior to the development access was prevented by thick bramble bushes and a chain linked fence that were removed when Redcliffe

Homes Limited cleared the boundaries to the Orchard and constructed the footbridge along the line of the re-routed public right of way. The second was his involvement with an application in 1999 to register the Orchard as a new TVG. Mr Barrett says that no discussions were ever had about including the Application Land within the Orchard TVG application because people could not and did not use the Application Land prior to the construction of the footbridge in 2003.

142. Ms Kaye Brown produced a WS dated 6 March 2020. She has lived in Weston all her life and has kept horses at Lansdown Grange Farm from 1988 to date. As a result she has had to travel past the Application Land to gain access to Lansdown Grange Farm. She says that the Application Land was used as a horse paddock from 1988 (when she started keeping horses at Lansdown Grange Farm) to the early 2000s. She recalls that the last person to occupy the Application Land with horses was Linda Coles, less than 20 years ago. It is Ms Brown who produced the frequently scrutinised photograph [OB/2/23] of horses behind a gate although she is unable to date the photograph.

143. Ms Linda Cole produced a WS dated 9 July 2020. She lived in Weston Village between 1971 and 2002 during which time she has used the Application Land to stable and graze horses. She says that for most of that time there were stables on the Application Land. The WS is a little lacking in detail. For example it is not clear if Ms Cole used the land to keep horses continuously (presumably along with other horse owners) or if it was during different parts of that full period. However, her evidence does appear clear that she kept horses there until 2002.

144. Mr Joss Ealey produced a WS dated 12 June 2020. He is one of the sons of the Objector, Mr Paul Ealey, and was born in 1990. He says he has known the Application Land from 1990 to June 2003 during

which time he lived on Broadmoor Lane and then until 2009 when he lived at Kelston Road, approximately 15 minutes from the Application Land. Between 1994 and 2001 he attended WASPS and from 2001 he has often walked dogs along Osborne's Lane. He says that before 2003 one could not access the Application Land from the northwest because of vegetation and a wire fence. He recalls horses being kept on the Application Land throughout the 1990s. He makes reference to evidence of Alan Leakey which I will deal with separately and says having walked dogs by the boundary of the Application Land from 2002 to present he has regarded the Application Land as being secure.

145. Ms Joanne Grimes produced a WS dated 20 February 2020. She says that she rented the Application Land from Susan and Gerald Hook in the late 1990s for the purpose of grazing horses. She says that the Application Land was rented to others for the same purpose before and after her occupation. During the time that she occupied the Application Land it was securely fenced, the only access point being a five bar gate on the south west boundary. She also says there was a sign that she believes said "*keep out private property*".

146. Mr Gerald Hook produced a WS dated 18 February 2020. He is a previous co-owner of the Application Land and says that until the early 2000s the Application Land was used as an area for stabling horses although he confirms that the stables were removed before the end of that period. He says that they stopped renting the Application Land for horses when a local resident, Alan Leakey, expressed a wish to rent the site for livestock. Mr Hook says that Mr Leakey carried out some preparatory clearance and fence strengthening but then decided not to rent the Application Land after all. Mr Hook then talks about accessibility, says that prior to the footpath diversion the only point of access was the five bar gate from Osborne's Lane and that only after the footpath was diverted in 2003 did people start to access the

Application Land from the north, by the West Brook, prior to which he said access there was physically impossible. He also went on that access only became easier after 2010 once boundary maintenance ceased and stated that there was signage on the five bar gate saying the site was private and to keep off.

147. Mrs Susan Hook produced a WS dated 18 February 2020. Whilst adding a little more detail about historical uses of the Application Land Mrs Hook's statement more or less echoes what is said in Mr Hook's WS save that she pinpoints the time when the Application Land was no longer rented for horses more specifically as 2004. I will not repeat what simply mirrors Mr Hook's WS.

148. Mr Alan Leakey produced a WS dated 20 February 2020. He says he has known the Application Land all his life, since 1978. Until 1995 he lived on Broadmoor Land and he attended WASPS. In around 2004 he says he was going to rent the Application Land from Mr and Mrs Hook to keep livestock there. Having cleared the site for livestock and strengthened fencing Mr Leakey had a change of heart and did not proceed. He gives no detail about exactly what works he undertook save for describing it in very general terms.

149. Mr Fraser Osborne produced a WS dated 14 March 2020. He is the son of Michael Osborne and has lived at Lansdown Grange Farm all his life, from 1997. He says that it is only since the diversion of the public footpath in around 2003 / 2004 that he has noticed people using the Application Land prior to which he regarded the site as secure. He mentions the fact that Alan Leakey cleared and securely fenced the land around 15 years ago. He also mentions the fact and evidence of antisocial behaviour.

150. Mr Paul Robinson produced a WS dated 15 February 2020. He is a farmer, born in 1961, and has lived on Broadmoor Lane his whole life. He says he has walked past the Application Land regularly over the years and that it has always appeared relatively inaccessible. He says prior to the footbridge being installed access to the Application Land from the north was not possible. He also recalls horses there during the 1980s and 1990s. Even after the footpath was diverted Mr Robinson said that whilst the footpath bordered the northern boundary of the Application Land a number of fir trees protected the site. He says it is only in recent years that points have begun to open up in the boundary.

151. Mr Tom O'Connor produced a WS dated 3 March 2020. He is the managing director of Redcliffe Homes Limited, the developer responsible for the Orchard Development. He confirms the history regarding acquisition of the Orchard Development site and the planning history leading to the permission to develop. He confirms that between around October 2002 and December 2004 during the course of development there was no access into the development. He also confirms that vegetation and scrub would have prevented any access between the Orchard Development site and the Application Land. He says that the footbridge was constructed in March 2002, the footpath diverted in November 2003 but that access into the development (or out of that site) would not have been possible until December 2004.

152. In addition to those further WSs the Objector has produced a number of other documents, all contained within section 4 of the Objector's bundles if not already exhibited to WSs. I will not list those documents here but I have carefully reviewed them all, some have already been referred to in the précis of the evidence above and will be referred to, as necessary, in the remainder of this report.

MEMBERS OF THE PUBLIC

153. As is usual at public inquiries, members of the public that wish to address the inquiry are permitted to do so. Prior to the start of the inquiry two individuals submitted written representations. The first was produced under cover of an email dated 3 July 2019 from Dr Jane Fitzpatrick who has lived in Symes Park, Weston, since April 1991 and her garden shares a boundary with the southern boundary of the Application Land. Dr Fitzpatrick states that there were horses kept on the Application Land, which she describes as a field, between approximately 2001 and 2004. She also refers to signage on the gate onto Osborne's Lane stating that the land was private. She mentions the Orchard Development and the lack of access from there to Osborne's Lane until the diversion of the public right of way. Dr Fitzpatrick records a number of instances of antisocial or inappropriate behaviour on the Application Land but does not mention dates of such occurrences. She does, however, refer to a flash flood in 2009 that caused a breach of the hedge and created what has become an informal pathway into the Application Land. She does not identify the location of that breach but presumably it is referable to the boundary with Osborne's Lane where the only hedged boundary is.

154. The second written submission was produced by email dated 30 June 2020 from Marie John. She says that she is 50 years old and has lived her whole life in Weston Village. Other than expressing her disquiet at people trying to spoil Mr Ealey's use and enjoyment of his own land she does also refer to horses having been kept on the Application Land (but no dates) and even pigs during the period when she attended WASPS. During the course of the inquiry Ms John sent a second written submission by email dated 3 September 2020 in which

she expressed further dismay at the Application to register the Application Land as a new TVG.

155. During the inquiry further written submissions were received. By an email dated 7 September 2020 Chris Nicholson wrote to confirm that a mown path that Mr Ealey had suggested had been created to give the impression of an established path (and route of entry into the Application Land) had in fact been in existence for some time but confirmed that it had been cleared again on 6 September 2020 to ensure that I had access to the area during my site visit. Two photographs taken in 2015 and 2017 were provided to illustrate that the path had existed for some time prior to the clearance on 6 September 2020.

156. Fraser Osborne, one of the Objector's witnesses, emailed the inquiry on 6 September 2020 for the purposes of producing a tweet from an account he says is run and managed by FOTO, the Applicant. The tweet, on an account called "Broadmoor Lane" dated 5 September 2020, says that *"sometimes children would find whole horseshoes in the water, from a time when horseshoes were made by blacksmiths, not machines. These horseshoes were so old they were brittle, and the children would think about the horses from so long ago that came to the Brook to drink"*. The point being made was that the tweet suggested horses were present on the Application Land before the site was neglected and became overgrown.

157. By an email dated 8 September 2020 Mrs Carla Barber produced a written submission (we had met her during my accompanied site visit but I explained that I could not hear from her then). She has lived in Westmead Gardens for 27 years. She wrote that in September 1994 her eldest son started school at WASPS and she remembers seeing ponies in what she describes as *"the pasture"* from the infants' school playground. Mrs Barber got her first dog in 2004 which is when she

started to regularly walk along Osborne's Lane. She says she remembers that in 2004 the pasture was fenced off and there were sheep kept there for a few weeks. She has had a dog consistently since 2004 and she says she still walks along Osborne's Lane at least three times a day.

158. Mrs Barber recalls a sign in red lettering saying 'Private' that was nailed high on a tree where it remained for many years. It is only in recent years that she says it has disappeared. She says that the reason people have been able to gain access to the pasture (ie the Application Land) from Osborne's Lane is because people have repeatedly broken fences, trodden down barbed wire and beaten back hedges. She also wrote about numerous items having been dumped on the Application Land including mattresses, settees, green plastic garden chairs, a TV and a public bench that had been unbolted from the ground at the roundabout at the bottom of Lansdown Lane. Furthermore, she wrote about antisocial behaviour, rowdy teenagers, shouting and swearing and playing loud music and smoking. She also mentioned the bags of dog mess that were thrown into the trees and left hanging there for months.

159. I also heard personally from two members of the public, both of whom were cross-examined by the Objector's counsel. The first was Mrs Jacqui Jones. She originally sent an email on 3 September 2020 together with photographs from 2008 and she appeared in person to speak to the inquiry on 4 September 2020. She and her husband, Michael Jones, moved into Westmead Gardens in Charlcombe Parish in 2002. Both had in fact submitted EQs dated 10 and 6 December 2018 respectively, each of which exhibited further photos. Mrs Jones said at the time they moved into Westmead Gardens they had a dog and a pony. She says she went along Osborne Lane towards the farm hoping to find somewhere to keep her pony. She saw the Application Land

and said it was definitely not a field and not suitable for keeping a horse or pony. She said there was no sign of any tack room or stable. That is perhaps not surprising because even on the Objector's evidence it had long since been removed by 2002.

160. Mrs Jones then says in her email that she walked her dog in the Application Land after moving in and entered through one of the several gaps in the hedge along Osborne's Lane. She says she walked on the well worn paths in the woodland and exited via the weir across the stream. She saw no evidence of fences being maintained or signage stating the land was private and that no dogs were allowed. She also said that they had spent many happy hours in the Application Land with their grandchildren (17, 8 and 5) who loved to explore and play there. Mrs Jones refers to the 2008 photos and says they demonstrate the extent of the growth and the well worn paths. Mr and Mrs Jones' EQs echo what is said in the email.

161. Mrs Jones was then cross-examined. The gist of her evidence was that the Application Land had always looked much as it does now except she accepted that the trees are now bigger and there is more foliage. Nevertheless, she maintained that she had never seen horses there, had always accessed the Application Land through gaps in the hedge along Osborne's Lane, there was no fencing save for possibly some old rusty barbed wire in the hedge and after the footbridge was brought into use she could exit the Application Land across the weir. She was adamant there had been no clearance of the Application Land in around 2004 and she could not recall any open spaces in the Application Land.

162. I then heard on 7 September 2020 from Mr Andrew Bennett. He had produced a personal statement dated 7 May 2020 in which he says that he and his wife moved into Symes Park in July 1995 and have used

the Application Land since 1995. Their sons were born in 1995 and 1998 and have enjoyed playing there as a family or with their friends. During cross-examination Mr Bennett was asked to describe how they used the Application Land. He said from 1995 it was just a woodland. They would walk down the lane with their children and enter through a gap in the hedgerow. He also referred to the little bridge. Mr Bennett was then asked if his recollection might have been from a slightly later period because the bridge was not built until 2003. Mr Bennett replied “*Ok, quite possibly*” but he said he was pretty confident that walking down Osborne’s Lane there were gaps into the woodland. Mr Bennett said he had no recollection of a five bar gate. He just recalls a gap in the hedgerow.

163. Mr Bennett was then asked to cast his mind back to 2000 and before and it was suggested to him that at that time the Application Land was fairly open with a line of trees along the West Brook and the boundary with Osborne’s Lane but was quite open in the centre. Mr Bennett said he wouldn’t like to say but that he wouldn’t call it a paddock. He said it is a sloping site with more plants in it now that it had before, it being more overgrown. He doesn’t recall the land having changed in character. It is just a piece of land with trees in it. He was told about the aerial photographs and what they are said to depict in the way of land that is open in the centre but Mr Bennett could not comment having not seen those photographs (they were not available to him when he spoke to the inquiry).

164. Mr Bennett was asked whether he recalled seeing a stable and he did not. He was asked if he remembered the Application Land being cleared in 2004 and the fences being maintained until 2010. He said he did not recall any particular activity there. When asked about the presence of horses Mr Bennett said he remembered horses at the farm but not on the Application Land. It was put to Mr Bennett that Mr

Osborne kept animals on the site in the early 2000s and Mr Bennett replied "*possibly, not cattle*". When asked if he agreed that it was possible there were horses on the Application Land Mr Bennett replied that it was possible but that he would have to ask his family. He said that they were accessing the land regardless of horses. He said that they were able to get in so horses would have had to have been in a paddock within the land. He later said whether there were horses there off and on he didn't know.

165. Mr Bennett said he did not recall signs. He said that there may have been signs somewhere but he could walk onto the land without any impediment. He was not aware of fly tipping. Nor was he aware of antisocial behaviour or the fire brigade being called out to the Application Land.

SITE VISIT

166. On 8 September 2020 I conducted an accompanied site visit of the Application Land and its surrounds. In attendance were Mr Graeme Stark of Bath and North East Somerset Council, the Objector and his counsel and representatives of the Applicant. Together we walked the whole of the Application Land, the length of Osborne's Lane and parts of the Orchard Development across the footbridge.

167. Unaccompanied I conducted a visit of the more extensive surrounding area to familiarise myself with some of the 'landmarks' mentioned by witnesses in their evidence and to be certain about the nature and extent of the neighbourhood / locality that was being relied upon by the Applicant.

THE PARTIES' SUBMISSIONS

168. In addition to the evidence presented to the inquiry, which I have summarised above, both parties made extensive submissions. The Applicant produced a document in support of and accompanying the Application, a rebuttal document in answer to the Objector's Objection Statement and a Pre-Inquiry Report. The Objector produced a detailed Objection Statement. Both parties produced opening statements / skeleton arguments and lengthy closing statements. Part way through the inquiry the Applicant also produced a document proposing a revision of the neighbourhood upon which the Applicant relied. I have of course read all of those documents and listened carefully to the oral submissions that were made during the inquiry.

169. I will not repeat the content of the aforementioned submissions herein as to do so would unnecessarily lengthen his report. I will, however, make reference to specific points made where necessary. Inevitably, each of the parties' submissions highlights the points that they perceived to be the relevant issues for me to consider and provided their own assessment of the evidence presented to the inquiry.

Jo O'Donoghue

170. Before I turn to setting out my findings of fact there is one discrete matter I will deal with here in respect of which both parties made submissions before and during the inquiry. The Applicant produced a handwritten personal statement in support of the Application from a lady named Jo O'Donoghue. The Objector then produced an annotated copy of the same document with a statement

by Jo O'Donoghue to the effect that she had not written it and that she wanted the statement retracted. I directed that the parties produce a document explaining the circumstances in which they had each procured their version of the document from Jo O'Donoghue. The Applicant's response effectively alleged improper conduct on behalf of the Objector.

171. During the first day of the Inquiry the Applicant confirmed that it withdrew any allegation regarding conduct on the part of the Objector. At the heart of all of this is presumably whether I should pay any regard to the evidence of Jo O'Donoghue. I have not heard from Jo O'Donoghue personally and in light of the conflicting sentiments expressed by her or in her name I am simply going to disregard her original personal statement. That will have no material effect on my assessment of the correct determination of this Application.

FINDINGS OF FACT

172. In this section of my report I will make various findings of fact in respect of issues that were live at the inquiry and that are relevant to the meeting of the statutory test. The issues I regard as material are (1) the neighbourhood relied upon by the Applicant, (2) use of the Application Land for grazing horses, (3) access to the Application Land, (4) signage, (5) the condition of the Application Land throughout the Application Period, and (6) use of the Application Land for lawful sports and pastimes.

(1) The claimed neighbourhood

173. In the Application the Applicant relied upon “*the neighbourhood of Weston electoral ward and Charlcombe Parish within the locality of Bath and North East Somerset*”. In the supporting documentation [AB/A/14] the Applicant addresses the question of neighbourhood or locality under the heading “*locality*” but by reference to the Weston electoral ward and Charlcombe Parish. In the Applicant’s Pre-Inquiry Report [AB/F/16] the Applicant, again, refers to the locality and states “*Charlcombe Parish and Weston electoral ward are each clearly defined regions under the law*”. It then goes on to describe those two regions as a “*clearly defined conjoined locality*”. The Pre-Inquiry Report at section 2.3 [AB/F/19], dealing with “*cohesiveness*”, again refers to the “*conjoined locality*” saying “*there is a natural cohesiveness to Charlcombe Parish and Weston. Charlcombe Parish forms the green hillside crowning Weston, and a number of footpaths bind the region, including the Cotswold Way*”. Finally, reference is made at the end of section 2.3 to “*the range of amenities in the locality*”, all of which are located in Weston. The Applicant’s skeleton argument repeats much of the foregoing under the heading “*the locality*”.

174. At the start of the inquiry I raised points with the Applicant about whether they were relying on a neighbourhood or a locality, their various submissions appearing to conflict on that issue. Having been given some time to consider the point Mr Phillips, on behalf of the Applicant, confirmed that the reference to a “*conjoined locality*” was made in error and that the Application was proceeding on the basis of the neighbourhood set out in the Application.

175. After the close of the inquiry on 7 September 2020, part way through the inquiry and after all of the evidence had been heard, the

Applicant sent to the Council a document entitled "*proposed revision of neighbourhood*" which was forwarded to me (and the Objector) on 8 September 2020. Therein the Applicant proposed a revision of the neighbourhood to read "*within the locality of Bath and North East Somerset, the neighbourhood of 'Weston' defined as Weston electoral ward plus the adjoining areas of Charlcombe Parish outlined in our map (Neighbourhood of Weston)*". It appears that the proposed revision was triggered by questions to witnesses during the inquiry as to whether they considered areas such as Lansdown, Upper Langridge, Langridge, Woolley and Charlcombe to be part of their neighbourhood to which the response was universally that they did not.

176. Dealing first with the original definition of the neighbourhood, "*the neighbourhood of Weston electoral ward and Charlcombe Parish within the locality of Bath and North East Somerset*". As a matter of fact it seems to me that the limited evidence I heard on this issue, largely initiated by questions from me, confirms that the neighbourhood as defined by the Applicant is not a single neighbourhood at all. Not only is Charlcombe Parish a locality in its own right as a legally recognised entity, and it is possible that the Weston electoral ward might also be regarded as a locality although there remains some doubt about whether an electoral ward can satisfy that description, it is clear to me that outlying villages such as Langridge, Upper Langridge, Lansdown, Woolley and Charlcombe cannot be sensibly regarded as part of a cohesive neighbourhood together with the areas of Upper Weston, Weston and Weston Park that make up the Weston electoral ward together with a few roads near to the Application Land that fall within Charlcombe Parish but are physically most closely associated with Weston.

177. Turning then to the proposed amended definition of a neighbourhood that includes Weston electoral ward and part of

Charlcombe Parish. As drawn it appears to me that the Applicant has simply sought to exclude those areas of Charlcombe Parish that fall within the aforementioned villages but still incorporates a substantial area, most of which appears to me to be open countryside save for a few residential roads near to the Application Land and the odd outlying rural property. Inevitably, given that the proposed revision to the neighbourhood was produced after hearing all of the evidence it is impossible to know what any of the witnesses would have had to say about the redefined neighbourhood. I cannot simply assume that witnesses would agree that areas such as Weston Wood, Foxhall Wood, Ash Plantation and so on fall within what they would describe as their neighbourhood. The newly drawn boundaries of the Applicant's revised neighbourhood simply look to me like lines drawn on a map for convenience to ensure that the area incorporates all of those witnesses upon whose evidence the Applicant wishes to rely.

178. The Applicant has produced a list of amenities, all of which fall within the Weston electoral ward, but I do not know if the local residents from all parts of the electoral ward or those living in the part of Charlcombe Parish included in the redefined neighbourhood use those facilities and consider that they make the claimed neighbourhood a cohesive single entity. It is quite possible, given that the claimed neighbourhood is so close to central Bath, that many of the local inhabitants on whose evidence the Applicant relies go outside the electoral ward for certain amenities.

179. The real difficulty I have is that the Applicant has produced maps with features identified on them but has produced nothing in the way of actual evidence from its witnesses (either those who gave live evidence or those who have provided written evidence) to establish that the claimed neighbourhood is a cohesive entity. The EQs, of course, asked people to identify which of two areas they lived in

(which can be discovered from looking at a map in any event) and those completing the EQs were then asked if they considered themselves to be local inhabitants in respect of the land. What they were not asked, and could not be asked in respect of the revised neighbourhood given that it was constructed after the witness evidence had been produced, was whether they considered themselves to be an inhabitant of the claimed neighbourhood and why.

180. I am satisfied on the basis of the limited answers that I heard from a small number of witnesses that the neighbourhood as originally formulated is not a neighbourhood that enjoys the necessary cohesiveness for it to be considered a neighbourhood for the purposes of this Application. I have simply not seen or heard any evidence at all about the newly defined neighbourhood save that when I asked Mr Beavis, who lives in Westmead Gardens in Charlcombe Parish, to describe his neighbourhood he said he lives in Weston. Whether or not Weston includes all of the area that is delineated in the new Weston Neighbourhood map I do not know. There is simply an evidential vacuum in relation to the neighbourhood issue. I cannot make a positive finding of fact based upon submissions alone, which is what the proposed revision of the neighbourhood document is. I am therefore unable to make any positive finding of fact that the newly defined neighbourhood of Weston is a neighbourhood for the purposes of this Application.

(2) Use of the Application Land for grazing horses

181. The evidence for the Applicant and Objector on this matter could not be more polarised. It is the Applicant's evidence that during the Application Period there were no horses kept on the Application

Land and the Objector says that until the early 2000s, up to around 2004, horses were kept and grazed there. It is impossible for both sets of evidence to be right so I must choose whose evidence I prefer. Before I consider the evidence in more detail and make my findings of fact I should say that I do not consider that anyone deliberately tried to mislead the inquiry. I fully accept that it is always difficult to pinpoint events going back as far as 15 or 20 years.

182. On the Applicant's side the only witness who said that she remembered ponies on the land was Lisa Pritchard, but that was prior to 1989, so well before the Application Period. Otherwise, the witnesses who said they were using the Application Land between 1998 and 2004 (that part of the Application Period during which the Objector's evidence was that there were horses on the Application Land), or part thereof, claim to have no recollection of horses at all (Skinner, Williams, Pritchard, Chappell and Shiels). Mr Shiels, when it was put to him that the Objector's evidence was that there were horses there, did reply that there may have been but that he could not recall that.

183. For the Objector the evidence was overwhelmingly the opposite. Mr Michael Osborne, the neighbouring farmer, gave evidence that throughout the 1970s, 1980s and 1990s the Application Land was used to keep horses and that he himself had, with Mr and Mrs Hook's permission, put horses on the Application Land in the early 2000s for a couple of months to give his paddock a rest at a time of particularly wet weather.

184. Mr Hook, the son of the former owners, said that his parents rented the Application Land for the purposes of grazing horses there until 2003. Mr Ealey said he recalled horses on the Application Land from the 1970s until the early 2000s and Mr Davies was clear that there had been horses on the Application Land from 1995 to 2001 which is

the last time he walked past until he resumed walks along that route a few years later.

185. The remainder of the Objector's evidence on this topic is written only and was not subject to cross-examination. However, I have read evidence from the former owners, Mr and Mrs Hook, Mrs Hook saying that they rented the Application Land for keeping horses until 2004. I have seen evidence from Kaye Brown who says she has kept horses at Lansdown Grange Farm since 1988 and she recalls the Application Land being rented to horse owners, the last occupant being Linda Cole. Linda Cole provided a statement which said she kept horses there between 1971 and 2002. Joss Ealey says he recalls horses throughout the 1990s. Joanne Grimes said she rented the Application Land to keep horses in the late 1990s and there were other occupants before and after her. Finally, Paul Robinson says he recalls horses in the 1980s and 1990s.

186. As recorded above, I have also received submissions from members of the public. Dr Jane Fitzpatrick, whose property adjoins the Application Land, said that she recalls horses there between 2001 and 2004. She says nothing about the period before that despite having lived in Symes Park since 1991. Ms Marie John refers to horses on the Application Land but does not give dates. Mrs Carla Barber said she saw ponies on the Application Land in 1994 from the WASPS infants' school playground. She does not say for how long they were there. In contrast, Mrs Jacci Jones who moved to the area in 2002 says she passed the Application Land and it was not suitable for keeping ponies on and Mr Andrew Bennett who says he was using the Application Land from 1995 has no recollection of horses there although when pressed he did say that if they were there they would have to have been in a paddock within the Application Land.

187. I am more persuaded by the Objector's evidence, not least because a neighbouring farmer who has passed the Application Land every day, who has horses on livery at his own farm and gave unchallenged evidence that he had used the Application Land to house his liveries to rest his own paddock in the early 2000s, is in my view likely to have a better recollection of such events than people claiming to have used the Application Land. That evidence is consistent with all of the other evidence produced on behalf of the Objector on the topic of horses on the Application Land and is borne out, to some degree at least, by the written submission of Dr Fitzpatrick who has expressly declined to affiliate herself with either party's position.

188. What of the Applicant's evidence? When pressed Mr Shiels said there may have been horses but he simply couldn't recall. Mr Bennett, who spoke to the Inquiry as a member of the public but had in fact produced an EQ in support of the Application, was equally equivocal when he was pressed on the presence of horses saying that if there had been any they must have been in a paddock within the Application Land. Other witnesses were more certain but in my view the passage of time is such that certain facts might have been forgotten, dates confused or perhaps the witnesses claiming to have used the Application Land were not using it during the relevant period or at least not very frequently. I certainly have concerns about the accuracy of some of the evidence that I have heard regarding use of the Application Land, particularly from those claiming to have accessed the Application Land from the Orchard side of the West Brook prior to the Orchard Development.

189. Accordingly, and in conclusion on this issue, I find as a fact that it is more likely than not that horses were kept on the Application Land during the early part of the Application Period until at least 2002 and quite possibly until around 2003 or 2004.

(3) Access to the Application Land

190. Again, the difference between the Applicant and Objector's evidence on the ability to gain access to the Application Land throughout the Application Period is starkly different. The Applicant's evidence is that access could be gained throughout the Application Period through gaps in the hedgerow bordering Osborne's Lane, from or to the Orchard across the weir or stepping stones, and since the construction of the footbridge and diversion of the public footpath, along the northern boundary through gaps in the trees.

191. In contrast, it is the Objector's evidence that the hedge boundary along Osborne's Lane was secure until 2010, that boundary having been maintained by Mr Hook and his son and that there was no means of accessing the Orchard from the Application Land or vice versa until the Orchard Development was complete.

192. I find that on the question of access to and from the Orchard prior to the Orchard Development being complete I prefer the evidence produced on behalf of the Objector. It is very clear to me that the parcel of land historically known as the Orchard did not share a boundary with the Application Land. It would not therefore have been possible, even absent any physical impediment, to access the Application Land from the Orchard although that is what some of the Applicant's witnesses claim to have done.

193. I am more persuaded by the evidence of Mr Colin Barrett who was closely connected to the Orchard land between 1998 and 2003 as Chairman of the BLRA, an organisation that sought to have the Orchard registered as a new TVG in 1999. It is his evidence that prior

to the construction of the Orchard Development access to the West Brook was prevented by a chain link fence and thick brambles. Furthermore, there is evidence of the Orchard having been securely separated from neighbouring land (including the Chittem Land that did share a boundary with the Application Land) by mature hedgerows [OB/2/420], as confirmed by the evidence of Mr Tom O'Connor, and a report that funding for fencing was applied for and assumed provided to prevent users of the Orchard trespassing on neighbouring private land [OB/2/430]. I simply did not hear any adequate explanation as to how people, prior to the completion of the Orchard Development, gained access to the Orchard directly from the Application Land in light of this evidence.

194. I appreciate that a number of witnesses professed to have enjoyed straightforward access pre 2004 between the Orchard and the Application Land across the weir or stepping stones but I cannot accept that to have been the case in the face of the foregoing evidence. In my view this is likely to be one of those examples of witnesses recalling what they have been doing quite possibly for many years and then projecting that use back even further to a time when it was not possible.

195. Accordingly, I make a finding of fact that access directly between the Orchard and the Application Land was not possible prior to 2004 and I do not accept evidence that professes the opposite.

196. Turning now to the hedge along Osborne's Lane and the gaps that people say they have used to access the Application Land. My view is that those gaps have existed for longer than the Objector's evidence states. I accept that Mr Darren Hook said that he and his father maintained the boundaries of the hedge until 2010 but even if they did so, I am not certain that they did so terribly effectively. Whilst

it is impossible for me to establish the age of any original fencing the remnants of fence that I saw on my site visit were just that, although there were some very short sections of post and barbed wire in tact albeit on the ground or heavily leaning. Furthermore, Mr Osborne's evidence is that once the public footpath was diverted in 2003 that was when people started to break down the fences. I therefore find that breaches to the fencing providing access to the Application Land along Osborne's Lane probably occurred some time after 2003, in the mid 2000s.

197. There were gaps created in the northern boundary at some point. I suspect they were a little later than those along Osborne's Lane but I cannot put a date on that because I heard very little clear evidence regarding access there. I do note that the Facebook post by Julia Brigden [OB/1/199] refers to that boundary having no points of access 12 years previously, which would have been around 2006 / 2007.

(4) Signage

198. The Applicant's witnesses were resolute in their rejection of the suggestion of any signage ever having been visible on the Application Land. In contrast, it was Mr Darren Hook's evidence that he frequently re-erected signs that had been taken down until 2010. I have seen a photograph of a sign that Mr Ealey found on the Application Land shortly after he and his wife purchased the land [OB/1/208]. Many witnesses referred to signage either on the fence by the gate or on the gate (Gerald Hook, Joanne Grimes, Michael Osborne, Jane Fitzpatrick).

199. I am satisfied that there had been prohibitory signage on the Application Land at some time, more likely than not during the

beginning of the Application Period. Once horses were removed from the Application Land in the early 2000s and Mr Leakey decided not to keep livestock there after all it may be that signs disappeared and were not so religiously re-erected such as to bring it to the attention of users that their continued use was being objected to. I do, however, consider it more likely than not that during the time when horses were kept on the Application Land signage would have been maintained more rigorously. I therefore find that it is more likely than not that there was prohibitory signage erected on the Application Land until the early 2000s.

(5) The condition of the Application Land

200. The condition of the Application Land throughout the whole of the Application Period was a frequently visited subject. In short, the Applicant's witnesses maintained that it had been a woodland throughout, and therefore not a place where people would keep horses, and it was the Objector's case that the Application Land had been much more open in the early part of the Application Period and had become increasingly overgrown after the horses were removed and maintenance ceased.

201. Rather than dwelling on people's perceptions of whether a piece of land is properly classed as woodland or something different, there are a number of photographs within the evidence that are of assistance.

202. The first is a photograph of two ponies standing behind a gate [OB/2/233]. This was exhibited to the WS of Kaye Brown who says that it shows the use of the Application Land as a paddock. She is unable to date the picture. Mr Darren Hook confirmed that it was the

Application Land and thought it was probably taken a year or so after his grandmother acquired the Application Land, which would date it at around 1989.

203. None of the Applicant's witnesses were prepared to accept that this was a photograph of the Application Land, which is perhaps unsurprising given how different it looks today and has done for the past many years. Mr Hook, whose family owned the Application Land for three decades, confirmed that it is a picture of the Application Land, albeit a historic one. He was not challenged on that point. I therefore accept that this is a photograph of the Application Land that is just over 30 years old and predates the beginning of the Application Period by approximately 9 years.

204. I can see that the gateway resembles the shape of the gateway into the Application Land. The photograph is taken in winter so foliage and leaf cover are at their sparsest. There is a line of trees in the background along a line that is topographically lower than the foreground, quite probably along the line of the West Brook, and a fence just beyond representing the far boundary. There is open land beyond which is consistent with it being the playing field of WASPS. I can faintly see a building in the upper right hand side of the photograph that may be the school building (although it is possible that the school building would not have been visible in this photograph at that time). I can also see a property and a hedge line in the upper left to centre part of the photograph which would be consistent with the location of the Chittem house and the hedge boundary between the Chittem Land and the WASPS playing field.

205. What is apparent from this photograph is that the part of the Application Land that is visible in this photograph is very much more open than it is today or indeed must have been for many years.

206. I then have an aerial photograph that is described as coming from Historical England [OB/2/460]. I was told that this photograph is dated 1998, the start of the Application Period. Whilst the scale of the photograph makes it impossible to see the Application Land in any detail, what is apparent is that it is taken at a time when the trees appear to be in leaf and the Application Land does have a line of trees along the West Brook and some trees along the boundary with Osborne's Lane although the part of the Osborne's Lane boundary closest to Lansdown Grange Farm does not appear to have large trees along it. The centre of the Application Land, as far as one can see given the scale and the tree canopy cover, is clearly much more open than it is now. It may be possible to perceive some bushes that appear to be further towards the Lansdown Grange Farm boundary.

207. I then have a series of aerial photographs acquired from an organisation called 'Getmapping' who were able to certify the dates upon which the photographs were taken. The photographs are dated 19 June 2000, 8 June 2006, 1 June 2009, 9 September 2014 and 19 June 2017 [OB/2/391-5]. Those photographs paint a very clear picture of a parcel of land that has become progressively more and more overgrown. The photograph taken in 2000, which is the poorest quality of them all, shows a brown area down the centre of the land. Whilst I do not know why it is that brown colour (it predates the period when Adrian Leakey is said to have cleared the land) but it certainly appears to be an area that is not covered in trees.

208. The next photograph taken in 2006 is much clearer in illustrating the openness of the centre of the southernmost part of the land and the concrete pad upon which the stables and tack room had been built is very clearly visible. Save for a few trees along the boundary with Osborne's Lane at the southern end of the Application

Land, there does not appear to be what might be described as a well established hedgerow extending further north from them. By 2009 one can perceive the 'filling in' of the land at the southern end with more tree cover but the hedge along the boundary with Osborne's Lane has still not established itself as a clear boundary that one could not see through onto the Application Land. By 2014 it is clear that the Application Land is more or less covered by tree canopies and the denser growth closer to Osborne's Lane has extended north. Finally, by 2017 the extensive growth along the whole of the Osborne's Lane boundary is apparent.

209. Having reviewed the various photographs available to me I am very satisfied that the Application Land has changed significantly in its appearance during the Application Period, from having been relatively open in the centre during the early part of the period and less well sheltered from Osborne's Lane along the northern section of the western boundary towards Lansdown Grange Farm to being relatively densely covered with a mixture of mature trees and self seeded saplings and young trees and having a well established hedgerow extending north to the top of Osborne's Lane where the public footpath bears right across the footbridge into the Orchard Development.

(6) Use of the Application Land for lawful sports and pastimes

210. I have seen and heard a wealth of evidence from the Applicant's witnesses on the use that they have made of the Application Land and I accept that they have undertaken the activities they say they have such as dog walking, walking, children playing and so on. The real question for me to dwell upon is for how long they have been undertaking these activities. The Applicant's evidence suggests that

such use has extended back decades to well before the start of the Application Period.

211. Whilst I have no doubt at all that none of the Applicant's witnesses have sought to mislead the inquiry as to the use they have made of the Application Land I do not accept that such use extends back as far as is claimed. In my view questions arise as to whether some witnesses were actually describing use of the Application Land at all given that they claim to have accessed the Application Land directly from the Orchard which was not in fact possible prior to the Orchard Development which incorporated the Chittem Land that shared a boundary with the Application Land.

212. It is also my view, given witnesses attachment to the consistency of the state of the Application Land throughout the Application Period, that what many of them were doing, as is common when one is asked to give evidence relating to a very lengthy period (extending back 22 years before the inquiry), was recalling the Application Land and their use of it over recent years and projecting that backwards to the beginning of the Application Period and beyond. Mr Osborne, in his oral evidence, said that he thought a lot of people were 'remembering' the Application Land as it is today and in doing so forgetting or overlooking how different it was in the 1970s, 1980s and 1990s. I agree with him and that is entirely consistent with the picture painted by the photographs to which I have referred above in contrast to the majority of the Applicant's witnesses who have largely refused to accept that the Application Land was very different at the beginning of the Application Period.

213. It is my view, and I find, that any use of the Application Land for lawful sports and pastimes by members of the public, of sufficient quality and quantity to support an application to register the

Application Land as a TVG, only began after the Orchard Development was completed and ready access from that side of the Application Land was made possible. I suspect that use increased relatively quickly thereafter which accounts for photographs showing well worn paths within the Application Land by 2008 (produced by Mrs Jacci Jones). Furthermore, the hedgerow in which gaps were made to gain access from Osborne's Lane as shown in the Applicant's Application [AB/A/6] did not, in my view, establish itself as a hedgerow along the full length of Osborne's Lane until well into the Application Period so witnesses who claim to have been using gaps in the hedgerow at the beginning of the Application Period, certainly in the northern section of that boundary with Osborne's Lane, are, in my opinion, mistaken or have misremembered.

APPLYING THE LAW TO THE FACTS

214. I turn now to the legal test that I set 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. 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 legal test must be properly and strictly proved on the balance of probabilities and that the onus of proof rests firmly with the Applicant. I should also remind those reading this report that I must disregard matters that are irrelevant to the legal test such as the desirability of preserving the opportunity for the public to continue to use a piece of land that they value.

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

215. I shall begin by addressing the question whether the claimed neighbourhood is a neighbourhood for the purposes of the statutory test. Lord Hoffmann in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para [27], observed that “[A]ny neighbourhood within a locality’ is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries ...”. It is clearly intended to be a more flexible concept than the law as it applies to a locality and should be approached with that clearly in mind. However, in *R (Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin); [2004] 1 EGLR 85 Sullivan J (as he then was) identified the need for a neighbourhood to have a “sufficient degree of cohesiveness” at para [85] of his judgment. In other words there has to be something that binds the identified area together rather than it simply being a line drawn on a map.

216. More recently, in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch), HHJ Behrens sitting as a High Court Judge said, at paragraph 103 of his judgment, “I shall not myself attempt a definition of the word ‘neighbourhood’. It is, as the Inspector said, an ordinary English word and I have set out part of the Oxford English Dictionary definition. I take into account the guidance of Lord Hoffmann in paragraph 27 of the judgment in the *Oxfordshire* case. The word neighbourhood is deliberately imprecise”. However, at paragraph 104 of his judgment, he concluded, in agreement with the Inspector, “... that there is sufficient cohesiveness to justify the description of each area as a neighbourhood” in that case. For completeness, the Oxford English Dictionary definition of cohesion is “the action or fact of holding together or forming a united whole”. Cohesiveness is “characterised by or causing cohesion”.

217. In this case I have already concluded that the original neighbourhood relied upon is not capable of being a neighbourhood for the purposes of this application, it not having the necessary degree of cohesiveness. As I have found above, having heard no evidence from any witness about the redefined neighbourhood I am simply unable to conclude that the redefined neighbourhood has the requisite degree of cohesiveness. I do, of course, recognise that Mr Beavis described his neighbourhood as Weston (despite living in Charlcombe Parish) but whether he, or indeed any other witness, would consider the redefined neighbourhood to be a cohesive neighbourhood (called Weston, Weston electoral ward or some other name) I simply do not know having heard no evidence at all on that point. I therefore conclude that the Applicant has not satisfied me on the balance of probabilities that this element of the statutory test is met.

218. It is within my remit, arguably, to recommend registration on the basis of a different neighbourhood to that presented to me by the Applicant. That is what the Inspector did in the *Warneford Meadow* case and that element of the Inspector's decision was not challenged in the High Court. Had the Application succeeded on all other components of the statutory test I would have invited the parties to address me on that point. However, as will become apparent in due course I do not consider that the Applicant has satisfied every other element of the statutory test so I will not trouble the parties further on this point. I also remind myself that it is not for the registration authority to make the Applicant's case. The registration authority has no investigative duty which requires it to find evidence or reformulate the Applicant's case, para [60], *Oxfordshire*, per Lord Hoffmann.

219. The question whether there has been use by a significant number of the inhabitants can only sensibly be asked by reference to a

particular neighbourhood or locality. Given that I have concluded that the Applicant has failed to establish that either the original or the redefined neighbourhood is a neighbourhood for the purposes of the Application there is no qualifying neighbourhood by reference to which this question can be addressed.

... have indulged as of right ...

220. As noted in the foregoing the 'as of right' test requires qualifying use to have been without force, without stealth and without permission (*nec vi, nec clam, nec precario*). There is no suggestion of either stealthy use or permissive use in this case. The only issue I need to consider before assessing the use as a whole is whether use was 'by force' or 'vi' at any point in time during the Application Period. There are two matters that arise in that regard in this case. The first is that of prohibitory signage and the second is the breaking down of fences and forcing gaps in boundary features such as a hedge.

221. As I have already set out, user is by force not only if it involves the breaking down of fences or gates (or hedges) but also if it is user that is contentious or persisted in under protest (including in the face of prohibitory signage) from the landowner, *Smith v Brudenell-Bruce* [2002] 2 P & CR 4. 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, *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250.

222. As I have found above I consider that on the balance of probabilities there was signage displayed on the Application Land

alerting people to the fact that it was private land until the time that horses were no longer kept on the land. That, in my view, was in the early 2000s. Accordingly, to the extent that there was any recreational use of the Application Land during the period from 1998 to the early 2000s I have to consider whether such user was 'by force'. Did the then landowner bring it to the attention of users that their use was not acquiesced in? Mr Hook said in evidence, and I accepted certainly up to the point that horses were no longer present, that he was frequently replacing signs that had been removed or taken down. In my view, therefore, such use would have been in the face of conduct on the part of the landowner that made clear that such use was opposed and not acquiesced in.

223. Furthermore, use by those members of the public that broke down fences and forced gaps in hedges would also have been use 'by force'. I did not hear evidence from anyone who claimed to be responsible for such conduct and it was not put to any of the witnesses that they had been (although some were asked if they stepped over barbed wire in the hedgerow for example). Nevertheless, there would have been a period of time during which horses were still on the Application Land and fences were necessarily being maintained that users that gained access to the Application Land must have done so by breaching the boundaries, such use being 'by force'. I must therefore conclude that any use until the early 2000s would have been user 'by force'.

224. Once the Application Land had effectively been 'opened up' to public use (following the initial breaching of the boundaries) I consider subsequent use that I have heard evidence of to have been user 'as of right'. That use continued from the early 2000s until the Application Land was secured by the Objector in November 2018.

225. There is some use that I heard evidence of that would not, however, have contributed to qualifying use in support of the Application. That is use that could be better described as ‘thoroughfare use’. In particular I am referring to use by people who were simply passing through to get to somewhere else, such as Mr Thomas-Widger using the route through the Application Land to get to the train station. I make that point because 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”.

226. 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)”.

227. As well as clear evidence of the Application Land being used as a cut through I also heard evidence of people walking on or through the Application Land as part of a longer walk. It may be that some of that use would not have been use that would have given rise to the presumption of dedication at common law as a public right of way and might be better described as user for a lawful sport or pastime for the purposes of a TVG application. In this case, given that my findings of fact and application of the law thus far mean that this Application does not succeed, I do not need to undertake the forensic exercise of pigeon holing the type of use (TVG or thoroughfare) made of the Application Land by various witnesses as part of a more extensive walk or recreation.

228. To conclude, and for completeness, I find that there was user as of right from the early 2000s, but not before.

... in lawful sports and pastimes ...

229. There was much reference during the inquiry to antisocial behaviour, fly tipping and so on, but it was never suggested that any of the witnesses giving evidence had engaged in such conduct which would not have qualified as use for lawful sports and pastimes. I am satisfied that all of the use that I have heard and read evidence of does constitute use for lawful sports and pastimes within the statutory framework.

... on the land ...

230. Reference to the land is to the whole of the Application Land. It is not necessary for each and every inch of the Application 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 the *Trap Grounds case*.

231. In the present case there was not the same degree of impediment to using the Application Land as in the *Trap Grounds case*. Parts of the Application Land did become progressively more overgrown over time and parts of the Application Land may have become effectively inaccessible but I am satisfied that such qualifying use as has occurred did constitute use of the whole of the land for the purposes of the statutory test.

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

232. As will be clear from the foregoing I am not satisfied that qualifying use of the Application Land satisfies this component of the statutory test because I have found that qualifying user only really became established after the Orchard Development was completed and that prior to the early 2000s any use was in the face of prohibitory signage and as a result of users breaching the boundaries, all such use being 'by force'. Therefore, the Applicant has failed to satisfy this part of the statutory test.

ACKNOWLEDGEMENTS

233. Before I set out my final conclusion which will by now have become apparent in any event I would like to express my thanks to the Commons Registration Authority, Bath and North East Somerset

Council, and, in particular, Graeme Stark for the efficient organisation of the inquiry and the assistance provided to me, the parties and members of the public, especially in light of the very challenging circumstances that required the inquiry to be conducted remotely via a platform that may have been unfamiliar to many. I am certain that everyone involved would agree that the forum worked extremely well and has facilitated a timely determination of the Application.

234. I would also like to thank the witnesses and members of the public who attended, albeit virtually, and spoke to the inquiry. Finally, I was greatly assisted by the parties' representatives and am grateful for their thoughtful analyses and submissions on the issues before the inquiry.

FINAL CONCLUSION AND RECOMMENDATION

235. 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 or delegated officer adopting my recommendation, can simply be stated to be those set out in this report.

ROWENA MEAGER

No 5 Chambers

6 January 2021