IN THE MATTER OF AN APPLICATION TO REGISTER LAND TO THE REAR OF CHERRYHOLT ROAD, STAMFORD, LINCOLNSHIRE PE9 2EP AS A VILLAGE GREEN (MW/SK V6/1/2019)

REPORT TO LINCOLNSHIRE COUNTY COUNCIL

In this report references to documents and page numbers within are as follows:
(i) in the Registration Authority Core Bundle – RACB 123;
(ii) in the Applicant's Bundle (contained in two lever arch files) – AB 123; and
(iii) in the Objector's Bundle – OB Tab X 123.
Supplemental documents will be referred to individually.

Introduction

1. I have been instructed to advise Lincolnshire County Council, as Registration Authority ("the RA") for the purposes of the Commons Act 2006, in connection with an application submitted to it, and received, on 28 May 2019 under section 15(2) of the Commons Act 2006 (as amended) to register land usually known as "Cherryholt Meadows, also known previously as Gypsy Meadows and Priory Meadows"[1] ("the Land"). My role is to examine the evidence in support of, and objection to, the application and to report to the RA with a recommendation as to whether the Land should be registered. However, it is important to emphasise that the final decision on whether to accept or reject the case for registration of the Land as a town or village green is one for the RA to make.

2. It is settled law that, on any application for registration of land as a village green under section 15(2) of the Commons Act 2006, the burden of proof is on the

[1] The application land has been referred to by various names during this matter e.g., Bowman's Paddock. However, there was no doubt about the location, size and characteristics of the application land irrespective of the name referred to. For that reason, I refer to it as "the Land" throughout this report.

Applicant to make the case for registration to the civil standard i.e., on the balance of probabilities. It has been said by the courts that "it is no trivial matter" for a landowner to have land registered as a green, and that accordingly all the criteria for registration must be "properly and strictly proved" and careful consideration must be given by the decision-maker to whether that it is the case – see Pill LJ in *R v Suffolk County Council ex parte Steed* (1998) 75 P & CR 102. This should be seen as the most crucial determining factor in relation to any village green application.

3. Furthermore, DEFRA Guidance advises that where applications are contested (as is this one), the courts have commended the use of independent inquiries – see *R (oao Whitmey) v The Commons Commissioners* [2004] EWCA Civ 951 where Arden LJ said that a registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry….The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest." A similar view was expressed by Carnwath J in the High Court in *R v Suffolk County Council, ex parte Steed* (1995) 70 P & CR 487.

4. As requested by the parties, the RA instructed me to hold a non-statutory public inquiry into the application and the objections made to it. This was held at Stamford Town Hall on Monday 6th – Wednesday 8th March and Tuesday 18th April 2023. I would like to record my thanks to the staff at the Town Hall for all their help with the inquiry. I also undertook an accompanied site visit encompassing both the Land and the extent of the claimed locality. The Application was made by Councillor David Taylor ("the Applicant') however he was unable to present the case for the application at the inquiry but was ably represented by Mr Sean Maddox. Whilst Mr Maddox is not legally qualified, he conducted the case for the application with efficiency and courtesy throughout for which I am grateful. The Objector (see below) was represented by Mr George Laurence KC, assisted by Mr Robert Bellin. I am also grateful to them for their contribution and courtesy. I am also grateful to all those witnesses who attended and gave evidence on behalf of the parties. Finally, I should also like to thank Ms

Robertson and Ms Ironmonger of the RA for the efficient and helpful way in which they organised and administered the inquiry, a task made more difficult due to the immense and unusual logistical difficulties caused by the pandemic.

The Application

5. The application was made on Form 44, as required by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The claimed locality is stated on the Application Form to be "South Kesteven, St Mary's Ward in Stamford". The relevance and significance of this claimed locality became a major issue between the Applicant and the Objector which I set out in further detail below.

6. The Application Form was returned by the RA to the Applicant for amendment. It was subsequently resubmitted to the RA and dated 2 July 2019. In my experience the need for such amendments is not uncommon.

7. A letter objecting to the application dated 11 December 2019 from Womble Bond Dickinson the solicitors acting for the Objector (the freehold owner of the Land) was received by the RA. Receipt was acknowledged by email on 16 December 2019 (RACB D9). The email also confirmed that the RA had determined that the original application required further information from the Applicant. This related to the accompanying Statutory Declaration and exhibits and clarification of certain aspects of the user evidence forms. Womble Bond Dickinson also helpfully drew the RA's attention to the existence of an additional landowner affected by the application – Western Power (East Midlands) Ltd who were then informed of the application by the RA and given until 31 January 2020 in which to submit any representations. This additional landowner took no part in the inquiry and therefore all references to the Objector should be taken as referring to the freehold owner of the Land.

8. On 30 January 2020 a second and more extensive letter of objection was received from Womble Bond Dickinson (RACB D13- 74) which included a

Witness Statements and supporting documents from Mr Szarawarski (Development Manager of Allison Homes Eastern Ltd), Mr Gray (accompanied by a number of supporting documents including a plan, evidence of the eviction of travellers from the Land, two paddock agreements (by way of examples) and a number of photographs) and Mr Gibbons (Director of Messenger Construction).

9. On 4 September 2019 an email was received by the RA from a Mr Griffiths, Director of Architecture at Ingleton Wood Martindales Ltd informing the RA that a planning application had been submitted to South Kesteven DC for development of the Land (19/1475) (RACB E2). There was a brief debate with the RA as to the existence and importance of 'trigger events'[2] regarding the Land and the application. On 26 September 2019 the RA confirmed (RACB E6) that both PINS and South Kesteven DC had determined that a relevant 'trigger event' had not occurred and that the application was therefore proceeding and would be duly advertised and that there would be a six-week objection period ending on 2 December 2019.

10. It hardly needs stating, but in late March 2020 the UK went into COVID lockdown which initially prevented any inquiries from being held and inevitably has resulted in unavoidable delay to the holding of the non-statutory inquiry and the determination of this application.

11. On 17 May 2021, I provided a Note to the RA and the parties seeking views as to the best way of determining this application in the light of the COVID restrictions and social distancing requirements (RACB E13- 15). On 21 May 2021 the Applicant replied and stated a desire for the matter to be determined at a non-statutory inquiry (RACB E16). On 28 June 2021 Womble Bond Dickinson replied on behalf of the Objector to similar effect (RACB E18).

[2] "Trigger events' were introduced into the Commons Act 2006 by the Growth and Infrastructure Act 2013. The purpose of these events, where they have been found to exist, is to effectively 'stop the clock' in relation to the accumulation of the relevant 20-year period required under section 15(2).

12. Therefore, at the clear request of both parties, I held a non-statutory public inquiry into the application and the objections made to it. I held that inquiry at Stamford Town Hall as detailed above. I carried out an accompanied site visit on Thursday 9th March 2023. I also undertook two unaccompanied site visits.

13. In preparation for the inquiry, I provided directions to the RA and the parties for the expeditious preparation of the evidence for, and conduct at, the inquiry. I would like to take this opportunity for thanking them all for their general adherence to my directions and for their overall conduct throughout the determination of the Application, including at the inquiry.

14. On 12 October 2022 the RA received a letter from the Objectors solicitors enclosing a written submission from Mr George Laurence KC that appeared to raise a new issue regarding the locality relied on by the Applicant (RACB E40-52). This letter and the written submission were passed, at my direction, to the Applicant (RACB E36-38). I received a written response from Mr Laurence KC dated 14 November 2022 (RA CB E60-61) and from Mr Sean Maddox on behalf of the Applicant on 28 November 2022 (RACB E66-85). Subsequently, the Applicant provided written legal submissions from Mr Cain Ormondroyd (of counsel) dated 28 February 2023 (AB16A-16M). These submissions were presented on a *pro bono* basis via the Environmental Law Foundation. I am grateful to both Mr Ormondroyd and the ELF for their assistance which I have found extremely useful. As this has become a major issue between the parties, I shall address this in further detail below. In a Further Note to the parties, I expressed my initial view that the Objector's legal submissions appeared novel and that they had not previously been considered, directly at least, in any of the relevant case law. To this extent, this represents an unusual but important legal issue in the determination of this application.

15. It is important to record that the Applicant has stated in its Skeleton Argument for the inquiry that "the latest estimated population of St. Mary's Ward was 4985 as of 2019" – AB 15. I also note that in the Objector's evidence there is reference to the electorate of St. Mary's Ward being 4,229 in 2019. Given that the

electorate of a ward can be expected to be lower than the overall population of that ward (e.g., because children under voting age would be excluded), it is reasonable to consider that the estimated population of the claimed locality throughout the 20-year period is in the region of 4,500- 5,000.[3]

16. For ease of reference, the geographical extent of the claimed locality, and the location of the Land within it, can be found in the location plan JD1 (OB Tab 4 46).

17. Another unusual factor in the determination of this Application is the status of the footpath crossing the site (RACB F1-11) which also impacts on some of the legal and evidential issues in relation to this application. Again, I shall address this in further detail below.

18. In support of the application, the Applicant provided as supporting documentation a site map, 30 Open Spaces Society Evidence Questionnaires from residents and various photographs. The justification for registration in section 7 of the statutory Form 44 was set out as:

> "Local Residents and visitors have used this area for recreational purposes including walking, family picnics and ball games for over 20 years.
>
> COMMUNITY USE
>
> The site, which is the only green meadow this side of the Town, offers easy access and is very inclusive allowing all ages and abilities to enjoy much needed open space, - we estimate that there are approx 70 people that use this site daily. The site has good footfall and is overlooked by houses around the green ensuring that the site is safe for people that utilise the area whether that be to walk their dog or meet with friends. In fact there have been instances where peoples absence from their routine use of the site has flagged up concern for neighbours. It can be said that this site Is the beating heart of the community, where friendships are struck up and maintained and a feeling of community is built.
> There are times during the year that the footpath at the bottom of the fled are Impassable and boggy so guarding this better walking terrain is of high importance to the local residents.
>
> ST LEONARDS PRIORY

[3] See OB 746 -appended to the Report of Mr Ross Thain and which is based on information provided by South Kesteven DC to the Local Government Boundary Commission for its boundary review Final Recommendations to the District Council.

The footpath and circular walk also offer easy access to view and visit the old Priory at St Leonards, which is forms part of Stamford's history and defines the importance of the Town in the middle ages. We feel we need to protect the views and approaches to this fine monument of over 800 years, it is thought that its founding may be as early as 647AD. Importantly this area is also one section of a wider walk which we are currently working on reinstating.

WILDLIFE AND HABITAT

The meadow's location by the River Welland make it a good habitat for a mix of wildlife and birds for all ages to enjoy and appreciate. This land itself is very special as It has only as a pasture and grazing since before 1975 with no ploughing. The mixture of plants and grasses has resulted in a wide variety of butterflies and bees. Herons, goshawks, and red kites use the meadows regularly to prey and scavenge.

The pond in Priory Meadow Is home to newts both smooth and crested forms. Many wild flowers are unique to the area eg Snakehead Flotilery, Orange Hawkhead and ladles smock, an Important food source for the resident Orangetip butterfly which are very rare. Buckthorn is in the hedges, which is food for the Brimstone butterfly, and nettle species are feeding the Tortoiseshell, Peacock, Red Admirals and Comma butterflies. Meanwhile the Docks feed the large Copper, whilst grasses feed the Ringlet butterflies and other brown type."

The relevant 20-year period

19. For the purposes of section 15(2) of the Commons act 2006, it was agreed that the relevant minimum 20-year period during which it is claimed a significant number of inhabitants of the locality had used, as of right, the Land for lawful sports and pastimes ran from 28 May 1999 to 28 May 2019.

The Application Land ("the Land")

20. On the application form (Form 44) the Applicant describes the Land as being known usually as "Cherryholt Meadows, also known previously as Gypsy Meadows and Priory Meadows". Its location is stated to be "East of Cherryholt Road, Stamford, South of Priory Road and to the East of Bowmans Mews, and North of the River Welland". It also notes that it is referred to in the South Kesteven DC Sites and Allocations Consultation as SKLP 122. Despite the Land being known by a variety of names it was clear that there was no dispute between the parties as to the location or extent of the Land. This was shown edged red on an aerial photograph exhibited with the application form (AB 9). It can also be seen as the area coloured pink on the Applicant's Exhibit A at AB 17.

21. The Applicant identified the Land as lying within the locality of St Mary's Ward, Stamford. The physical extent of the locality is shown edged and coloured blue on the Applicant's Exhibit B at AB 18[4]. The Land was stated to be owned by the Cecil Family Trust. The Objector has confirmed that the Land is owned by the Cecil Estate Family Trust (see, for example, OB E44). Further details of the ownership of the Land are to be found in paragraph 2 of the Objector's solicitor's letter of 11 December 2019 (OB 1).

22. From my inspections of the Land and the locality, there is a useful description of the Land and the immediately surrounding area to be found in paragraphs 4 -15 of the Witness Statement of Jeremy Dawson (OB 12 – 15). In summary it notes that the Land is the most westerly of three fields owned by the Objector. In total the Objector's land extends to approximately 11 acres of which the Land comprises approximately 2 acres. Mr Dawson's Statement also exhibits a very informative site plan (Exhibit JD1 at OB 44) which shows the Land and its relationship to the surrounding area including footpaths (both formal and speculative) and access points to the Land. The Land is shown edged red on that plan.

23. It is important to note that Land is enclosed by housing on Priory Road to its northern boundary, the housing development on its western boundary known as Bowman's Mews (which was completed in late 2012 and had previously been the location of Bowman's builder's yard), iron railings and bushes on its eastern boundary with the allotments and a continuous chain link fence on its southern boundary with the Car Park Field (not owned by the Objector). The chain link fence is approximately 6 feet in height. The Land gently slopes down from the northern boundary to the southern boundary with the Car Park Field. The Land does not have any river frontage. The southern part of the Land is also crossed by three overhead electricity lines running in an east/west direction (see Exhibit JD3 at OB 48 and the photographs in Exhibit JD4 at OB 50 - 55).

[4] An identical but larger version can be found as Exhibit JD2 to Mr Dawson's Witness Statement at OB 46. It also shows the names of the surrounding roads and streets in more detail.

24. Access to the land throughout the relevant 20-year period could be gained by three points. These can be seen on Exhibit JD1 (OB 44) and were:

    (a) On the western boundary via Access Gate 1 and Stile 1 leading off Cherryholt Road (an adopted highway);
    (b) On the northern boundary via a private accessway (shaded blue) leading off Priory Road between nos 16 & 17 Priory Road to Gate 2; and
    (c) On the eastern boundary via Gate 3/Stile 2 leading to/from Priory Meadow 1.

25. As mentioned above, one unusual feature of this application is that lawful pedestrian access to the Land was previously believed by the parties to be on the western boundary via Stile 1 off Cherryholt Road at point P on JD1 and on the eastern boundary via Stile 2 using what was then considered to be a public footpath and signposted as such. However, following the confirmation of the Definitive Map Modification Order made on 16 May 2019 the stiles were removed. Mr Dawson's Witness Statement explains in further detail (at paragraphs 19 -29) the confusion that has surrounded the status of that access route (OB 16 – 18). The Applicant has also provided a copy of the Order Decision dated 16 May 2019 (AB 20 – 27) made by the inspector appointed Secretary of State for Environment, Food and Rural Affairs pursuant to section 53(2)(b) of the Wildlife and Countryside Act 1981. It will be noted that the relevant Order (the Lincolnshire County Council (Amendment of Kesteven County Council (Rural District of South Kesteven) Definitive Map and Statement – Evidential Events) (No. 1) Modification Order 1992 was originally made on 26 February 1992 (and the application for the Order was made on 3 April 1987) but not confirmed by the Secretary of State until 16 May 2019. The evidential basis for the Order appears to be use over the 20-year period from 1966 – 1986 (see paragraph 16 of the Order decision letter of 16 May 2019 (AB 22). As a consequence, up until the date the Order was confirmed, it was both the Objector's and the wider public's general understanding that there was a public footpath running east- west along the southern edge of the Land and therefore the Objector had not prevented the use of this route by the public as a footpath (see paragraph 23 of Mr Dawson's Witness Statement) to gain access to the Land.

The Objector also confirmed that it appears that it was only in September 2019 (after the expiry of the relevant 20-year period) when confirmation was received from the County Council about the Order and its ramifications that signs were then erected on Gate 1 stating "Private Land – No Access without permission".

26. In my view, one consequence of the unfortunate confusion regarding the status of this section of footpath is that, viewed objectively, for all material purposes and at all material times the members of the public used this access point and footpath point in the genuine belief that it was part of a public right of way. By the same token, the Objector, as the landowner, did not call into question this use of the access and footpath due to a similar belief that the relevant section of the footpath was part of a public right of way and therefore footpath usage could not be challenged. For the purposes of this Application, and in the evidence to the inquiry, this section of the footpath was referred to as the "Speculative Route".

27. One further undisputed fact that needs to be considered is that part of the Land was fenced off (and public access therefore prevented) with Heras fencing for a period of 24 months between February 2011 and February 2013. This was to provide a compound during the construction of the Bowman's Mews residential development. Details of this can be found in the Witness Statement of Alex Szarawarski at OB Tab7 216 -218. The area of land continued to be occupied by the developer until 30 September 2013 whilst it reinstated that part of the Land to its former use as a paddock.

The Parties

28. As mentioned above in paragraph 4, the Application was made by Councillor David Taylor but Mr Sean Maddox presented the case to the inquiry and called witnesses as set out below. At the inquiry there was one Objector – the landowner – as detailed in paragraphs 4 and 7 above.

The original objections to the Application

29. The Objector originally objected to the Application in the letter from Womble Bond Dickinson of 11 December 2019 [OB Tab 1 1-3]. In summary, the objection was made on the basis that the Application did not satisfy all the criteria required under section 15(2) of the Act. In particular, it was argued that, on any analysis, the use of the Land did not constitute use by "a significant number" of inhabitants of St Mary's Ward. It also argued that use had been challenged and, further, that some use of the claimed use of the land would have been extremely difficult. It also argued that part of the Land had been fenced off as a construction compound and therefore that part of the Land could not satisfy the 20-year uninterrupted use criterion.

30. Subsequently, Womble Bond Dickinson wrote to the RA on 30 January 2020 with supporting documentation to supplement the original objection letter of 11 December 2019.

31. On 12 October 2022 the Objector submitted a further ground of objection. This was in the form of a written submission by Mr George Laurence KC and focussed on an argument that the claimed locality lacked the 'necessary characteristics' to constitute a "locality" for the purposes of section 15(2). In the final paragraph of Mr Laurence's submission it was argued that another question that may need to be addressed is whether the numbers of people using the Land are significant in relation to the population of the entire electoral ward over the relevant period.

The relevant legal framework

32. The law regarding applications to register land as a new town or village green is contained in the Commons Act 2006 (as amended) and relevant case law. Applications are to be determined by testing the facts against this legal framework. Matters such as the planning merits or social and environmental considerations are irrelevant to such applications. Further, any recent grants of planning permission for development on any land included within an application

are also irrelevant unless they raise evidential matters that directly affect the legal tests to be applied to the application.

33. The Application was made under section 15(2) of the Commons Act 2006 which sets out the legal criteria that an application must satisfy. Thus, section 15(2) applies where –

    (a) a significant number of 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 continue to do so at the time of the application.

34. It is settled law that the burden is on the Applicant to satisfy, on the balance of probabilities, each element of the criteria in section 15(2). This means that if any one element is not satisfied then the Application must be rejected as a matter of law.

35. Unsurprisingly, various aspects of the statutory test have been the subject of numerous cases in recent years. It is important to recognise that many of these cases are fact sensitive and can often be distinguished. Therefore, the guidance that they provide may be subtle and nuanced and to such an extent that it may be inappropriate to draw general principles of law from these cases.

36. The first criterion is that the use should be by "**a significant number of inhabitants**" of a locality or a neighbourhood within a locality. Useful guidance on what is meant by a "significant number" was given by Sullivan J in the High Court in *R v Staffordshire County Council, ex parte Alfred McAlpine Homes Ltd* [2002] EWHC 76 (Admin) at paragraphs 71 – 73:

> "71. Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of section 22(1) as amended means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. In

> my judgment the inspector approached the matter correctly in saying that "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. In addition, the inspector correctly concluded 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 necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that 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 individuals as trespassers.
> 72. The inspector concluded in paragraph 7.1 that substantial use had been made of the meadow for informal recreation for more than 20 years before the application. He referred specifically to six of the witnesses who could give evidence covering the whole of the 20-year period. Mr Wolton's criticisms of the inspector's conclusions are not well founded. It is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period.
> 73. It is difficult to obtain first-hand evidence of events over a period as long as 20 years. In the present case there was an unusual number of witnesses who were able to speak as to the whole of the period. More often an inspector at such inquiries is left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period. In the present case, however, the evidence of the six witnesses who were able to cover the whole 20-year period was amply supported by many other witnesses who dealt not simply with the last few years but with a very considerable part of the 20-year period, some of them going back almost 20 years, some going back to times before the 20-year period began."

37. There is a related issue and that is whether the use should be exclusively by inhabitants from within the locality. After the High Court decision of HHJ Waksman QC (as he then was) sitting as a Judge of the High Court in *R (oao Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and another) v Oxfordshire County Council* [2010] EWHC 530 (Admin) the position now appears that there is no implicit requirement for most of the users of the Land to have lived in the locality. So long as a significant number of inhabitants of a locality or neighbourhood were among the recreational users of the Land, it does not matter if many, if not most, users came from elsewhere – see paragraphs 58 -79 of his judgment. Nevertheless, the legal test still requires that those users of the Land that do live within the locality, even if only a minority of the overall total of users, must still amount to a "significant number" of local inhabitants.

38. The second criterion is that of the "**locality**". This criterion is the subject of legal dispute between the parties, which I address in further detail below. As is often the case with village green registration applications, many of the users giving evidence, making declarations, or submitting other forms of written evidence live closest to the Land. In the first instance decision of Vos J in *Paddico (267) Ltd v Kirklees MBC and Clayton Fields Action Group Ltd* [2011] EWHC 1606 (Ch) at paragraph 106(i) the judge stated that he "was not impressed with [the] suggestion that the distribution of residents was inadequately spread" across the specified localities. It follows that the only judicial guidance on this point is that it is immaterial if a large proportion of inhabitants using the Application Land come from one particular part of the locality. Furthermore, this issue was also discussed by Patterson J in her decision in *R (oao Allaway and Pollock) v Oxfordshire County Council* [2016] EWHC 2677 (Admin) at paragraphs 69 – 73 where she rejected the notion that there needed to be a spread of users from across the locality.

39. The third criterion is that inhabitants must have used the Application Land for "**lawful sports and pastimes**". It was established by the House of Lords in *R v Oxfordshire County Council and another ex parte Sunningwell Parish Council* [2000] 1 AC 335 that "lawful sports and pastimes" is a composite class which includes any activity that can properly be called a sport or a pastime and there is no necessity for any organised sports or communal activities to have taken place. Solitary and informal kinds of recreation, such as dog walking and children playing (by themselves or with adults) will satisfy that criterion. Equally, it is not necessary for local inhabitants to have participated in a range of diverse sports and pastimes. However, trivial or sporadic events such as annual Bonfire Night or May Day celebrations, on their own, may not suffice.

40. The fourth criterion, "**as of right**" contains three separate aspects which all must be met. Therefore, to meet the criterion of use "as of right" the long line of case law establishes that the Applicant must show that the use throughout the 20-year period occurred *nec vi, nec clam, nec precario*, which in modern-day

language, means without force, without stealth and without the permission of the landowner.

41. It is irrelevant whether the users believe themselves to be entitled to do what they are doing, or know that they are not, or are indifferent to which is the case. On the other hand, as Lord Hoffman made clear in *Sunningwell*, English law places the focus on "how the matter would have appeared to the owner of the land" – at 352H-353A and see also the judgment of Sullivan J in *R (oao Laing Homes) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) at paragraphs 78-81. Thus, the question of whether a use of land is "as of right" must be judged from the perspective of how the matter would have appeared to an owner of the land and that question must be assessed objectively.

42. In cases where there has been use of the land by the landowner as well as recreational use by local inhabitants which involves the local inhabitants deferring to the landowner's use the Supreme Court made clear in *R (oao Lewis) v Redcar & Cleveland Borough Council (No.2)* [2010] UKSC 11 that there was no bar to registration where local inhabitants had deferred to the landowner's use. In that case, the land was held to be properly registrable despite the inspector finding that there was "overwhelming" deference by local inhabitants to its use as a private golf course. In so doing, the Supreme Court effectively disagreed of the view of Sullivan J in the *Laing Homes* case on the point. As Lord Hope in *Lewis* said: "Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring". Similar considerations apply where use for lawful sports and pastimes by local inhabitants had peacefully co-existed with other kinds of use by the landowner (or by other people with the landowner's authority) during the 20-year period.

43. It is settled law that it is important to discount any use of the public footpath as a right of way. However, in County *R (oao Allaway and Pollock) v Oxfordshire Council* [2016] EWHC 2677 (Admin) Patterson J was faced with a not dissimilar position where a public footpath running along the eastern side of the land in

question. In that case the village green inspector "made clear in his supplementary report that he discounted those who used the public footpath, entering at one entrance and leaving at the other. The remainder of the walkers, he concluded, were mostly using the land for the assertion of a village green right." Patterson J endorsed the inspector's approach, that if the walking was such as to indicate use of an actual right of way (for the purpose of passage along it) it had to be discounted but that does not mean that use of the right of way will always be associated with the assertion of a public right of way. It is possible that a person may use the whole or part of that section of the right of way that traverses the Application Land for general recreational purposes consistent with the assertion of a village green right. In coming to her decision, the judge specifically followed the judgment of Lightman J in *Oxfordshire County Council v Oxford City Council & Robinson* [2004] EWHC 12 (Ch) at paragraph 102:
"Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential Green will ordinarily be referable only to a public right of way to the Green. But walking, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his 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)."

The Evidence

44. In my view it is unnecessary to recite in any detail all the evidence produced by the parties save where it has a direct bearing upon issues relevant to the statutory criteria. It is also important to repeat that the burden of proof rests with the Applicant who must establish the case for registration on the balance of

probabilities. In his skeleton argument on behalf of the Objector Mr Laurence KC submitted that the RA must scrutinise the Application with due care because, from the Objector's point of view, registration of the land will have a catastrophic consequence as it will render the Land effectively valueless. In my view this submission is correct – see the comment of Pill LJ referred to in paragraph 2 above.

45. In general, the evidence can be divided into three broad categories of differing evidential value or weight. The first category is the oral evidence of both parties provided to the inquiry by their respective witnesses which was subject to, or made available for, cross-examination. This evidence has the highest evidential value because the evidence of the witness is open to direct challenge by cross-examination. The second category are the witness statements (and exhibits) accompanied by statements of truth of those who did not appear at the inquiry. Nevertheless, it should be accorded lower weight because there is no opportunity to directly challenge the evidence at the inquiry. The final category is the Evidence Questionnaires submitted with the Applicant. This final category needs to treated with caution as these documents tend to be in a standard format and therefore it should be accorded the lowest evidential weight, save for those few questionnaires that were completed by a witness who subsequently gave oral evidence at the inquiry.

A. The Applicant's Evidence

46. The Application was accompanied by several documents. At [AB 10] there is a collection of 15 photographs said to show "examples of community use during May 2019". Further photographs [at AB11-13] showed the Land during flooding, St Leonard's Priory and the wildlife and habitat seen on the Land. A photograph taken in September 2019 is said to show the members of the Save Cherryholt Meadows campaign group. Exhibit C [AB19] showed various accesses to the Land during the relevant period and Exhibit G [AB57] showed the signs erected by the Objector after the date of the Application drawing attention to the fact

that the Land was private land, there was no right of way and there should be no trespassing. Exhibit H [AB58-64] showed various satellite images of the Land from January 2000, April 2004, April 2005, January 2006, April 2016 and June 2018. These photographs also show the relationship between the Land and the adjoining land known as Priory Meadow 1 and Priory Meadow 2 and the River Welland. Further, an examination of the first photograph at AB58 against the sixth photograph at AB63, shows the physical changes resulting from the construction of the new housing development.

47. The following witness statements were before the inquiry [AB75-77]:

(1) Lesley Battley dated 29 June 2020; and
(2) Peter Turton dated 29 June 2020;

48. Also before the inquiry were the following supplementary witness statements [AB79-92]:
(1) Lesley Battley dated 22 August 2022;
(2) Susan Clifford dated 2 September 2022;
(3) Margaret Emerson dated 28 August 2022;
(4) Linda Gomila dated 12 August 2022;
(5) Ian Halliday-Pegg dated 19 August 2022;
(6) Kathryn Longbone dated 30 August 2022;
(7) Chrissie Muir dated 19 August 2022;
(8) Rupert Speechley dated 23 July 2022;
(9) Mervin Thorpe dated 16 August 2022; and
(10) Peter Turton dated 27 July 2022.

49. At the inquiry, Mr Maddox called the following witnesses:
(1) Peter Turton;
(2) Peter Hall;
(3) Chris & Margaret Emerson (*via WhatsApp*);
(4) Susan Clifford;
(5) Ian Halliday-Pegg;
(6) Lesley Battley;

(7) Mervyn Thorpe; and

(8) Kathryn Longbone

50. In addition to the above, at the inquiry the Application was accompanied by 47 Evidence Questionnaires. These are listed [at AB94] and can be found exhibited on the following pages [AB95-469]. I have set out below the evidence of the parties in two sections. However, due to witness availability, it was necessary for Mr Thain to give evidence in support of the Objector before hearing from the Applicant's last witness.

Oral evidence

(1) Peter Turton [AB 77, 91 & 445-456]

In Evidence in Chief, Mr Turton stated that he has lived at 12 Priory Road since 1994. It is directly behind the Land. He has known the Land since 1975 and had a dog all his life. He has walked his dog on the Land twice a day, weather permitting. His wife and he walked the Land a lot. His grandson and great grandsons, when they visited, used it for knock about football and kite flying. The Land was convenient for recreation. It was good for walking the dog. When he was younger, he used to jog and run around a lot to keep fit. He would access the land from Cherryholt Road where there was a gate and stile that you could get over or he would go to Priory Road where there was an entrance with a gate which was dilapidated and to the side. He could also go via the Priory itself. Once the gate had been put into his rear fence it was convenient to use as access to the Land. His granddaughter lived at No.23 where at the back of her garden there was a gate leading into the allotments. He would walk his dog from 10am to 11am and then from 3pm, 4pm or 5pm. Quite often he would meet other people – dog walkers, fishermen who used it and still do. Students from the tech college used to walk along, cut through the back and down at the bottom of Cherryholt Lane as a shortcut. Dog walkers, fishermen and ramblers were passing through. He would meet people there because dog walking was a social activity. He saw signage forbidding access but not before 2019 or before the gates were locked.

Before then there had always been a right of way notice by the stile and a yellow County Council footpath sign. There was also a yellow arrow sign which was repeated further along the path. He did see a sign saying that there were sheep in the field, poison on the ground and do not enter. He thought it was a contradiction in itself and he felt sorry for the sheep. There had never been any need to force entry onto the Land as the gate was always open. A heavy chain and a padlock had been put on it but it was padlocked to the bar of the gate and did not lock it. You could always get in. There had been no secrecy. He did not know before 2019 who owned the Land. He thought it was common land. He used to jog and run around the Land – he was a young 70. He did not use the Recreation Ground on the north side of the town. He was asked about Mr Gray who had held a grazing licence and had horses on the Land from 1999 – 2009. He recalled seeing a lovely old black pony. The most he had seen on the Land were two (one pony and one horse). He saw them on the Land, but he could not see the other paddocks. He did not see Mr Gray and did not know who he was. The pony was in a deplorable condition. He fed the pony carrots. He saw other people feeding them.

In Cross-Examination by Mr Laurence KC, Mr Turton was taken to the plan at page 12 and confirmed that he could identify his house on the plan, the Land (edged red), the area edged in blue (Priory Meadow 1) and a bigger area of land edged green (Priory Meadow 2) and an area to the east (Priory House). He confirmed that there were three gates along Priory Road near his house: Gate 2 (an access track between 16 and 17 Priory Road), Gate 6 (further to the east) into Priory Meadow 2 and then Gate 7 which gives access to St Leonard's Priory which was always open for the public to visit the Priory. Two footpaths were shown on the Plan. Footpath P-Q-R (which was referred to as the "Speculative Route"). P to Q runs along the southern boundary of the Land and southerly from Q to R along the western boundary of Priory Meadows 1. Everyone thought until recently that this was a public right of way and even the County Council had erected a yellow footpath sign. About 4 years ago, it was established that the true public route starts at A to B then along the river past R and Stile 3 then past B1 all the way up to C and then up to Priory Road at point D. The yellow signs have

since disappeared. He agreed that references to "the meadow" includes not just the Land but also Priory Meadows 1 and 2. There are three areas of land, connected with each other, all of which could be used by dog walkers. The fishermen were not fishing on the Land because the river is not there, they were fishing between point R and easterly along the river to C. The only reason the fishermen would be on the Land was to gain access to the river. He was asked whether he agreed that when many of the people completing the Evidence Questionnaires were referring to the meadow it not only included the Land but also to Priory Meadows 1 and 2 where they had enjoyed recreation. He did not entirely agree because the only area that he could see from his house was the Land. He was then asked about his jogging routes and agreed that there were several circular route options available to him which included over Priory Meadows 1 and 2 and along Priory Road or along by the river.

Mr Turton agreed that when he and his late wife moved into their home in Priory Road his daughter (Linda) was about 38 years old. At a certain time, when she was young, she had left home and got married and lived elsewhere. She now lives in Marholm and has lived at various addresses outside Stamford. He confirmed that she has never lived with him in Stamford as she was married by the time they moved into Priory Road. Before then they had lived in married quarters as he is an ex-service man. Her children were nearly adults by the time he moved into Priory Road. It was the grandchildren and great grandchildren that would have used the Land when they were visiting.

He was then asked about his Evidence Questionnaire [AB 445-452] which was signed on 29 April and on 16 June 2019 and he was taken to his answer to question 41 [AB 450] and question 39 and he was asked about the gate in his back garden. He accepted that the gate was in the new fence erected once the original brick wall (shown in Mr Dawson's photos) had collapsed. [It then became an agreed fact that the fence with the gate in it was erected sometime after 2013]. There was a debate as to whether gate 2 was always locked as he had indicated on the map [at AB 452] or whether it occasionally had fallen down or off its hinges. Mr Turton was unable to recall any sheep in on the Land although he had seen sheep on Priory Meadows 1 and 2. He thought that the notice about sheep and poison was a frightener to deter people. He confirmed

that part of the Land (approximately 7%) was fenced off for a time whilst the residential development was under construction, but access could still be gained to the rest of the Land. He did not feel he was trespassing because of the right of way sign and that he had a right to walk in the direction of the arrow from P to Q. He accepted that he did not interpret this as giving him permission to walk on the whole of the Land. He accepted that he has only had one dog at Priory Road from about 2010-11. Before that he would use the Land once a day for jogging but after getting a dog he used the Land twice a day. He accepted that when he went jogging he would sometimes see the pony and horse in Priory Meadows 1 or 2 and sometimes on the Land. He referred to jogging round the Land. Mr Turton was then taken to the aerial photographic evidence. It was put to him that during the time Mr Gray had horses on the Land until 2009 there is no evidence on the photographs of there being any track around the Land and that this suggested that if people had been using the Land there would have been evidence of the track on the aerial photographs. It was also put to him that the track only appeared after Mr Gray had left in 2010 and after Bowman Mews was constructed and the track can only be seen on the photographs from 2015 onwards. Mr Turton did not accept these two points. He maintained that the pathway was always there and that when he started jogging the path was in situ. He did accept that there were times of the year when Mr Gray would take a hay crop and that when the grass was fairly high it was difficult to run or walk. He agreed that for a few months the whole field would be overgrown.

51. The Applicant had originally intended to call as a witness Mr Turton's daughter, Mrs Linda Gomila. However, it was decided by the Applicant not to call her as Mr Turton had confirmed that she had never lived in the area and had only been on the Land when visiting her parents in Priory Road.

(2) Peter Hall [OB 284-291]]

In evidence in chief Mr Hall stated that he lives at 15 Bowman Mews. He moved back to Stamford in 2011 and has known the Land since then. He uses the Land for exercise and dog walking. He has seen blackberry pickers, joggers, cyclists,

dog walkers and families enjoying themselves. He has even seen someone with a drone. He regularly walked the Land. He had a boisterous dog from 2014 onwards and walked him around the Land and the other meadows twice a day. He accessed the Land from the gate and stile on Cherryholt Road and after 2015 from a gate in his fence. This would be around 8 am and 5pm. He would see other people quite frequently. After he had put his gate in, he would often wait for one or two people to clear the Land so he could step out without the dog tearing off. He has a balcony overlooking the Land. He had not seen any notices forbidding access to the Land, but he had seen the yellow arrow public footpath signs. He had not forced entry onto the Land nor used it secretively. He did not know who owned the Land. He had not visited the Recreation Ground. He did not know Mr Gray. He estimated that about 40-50 people per day used the Land (about 4 or 5 people per hour).

In Cross-Examination by Mr Laurence KC, it was put to him that it was the Objector's case that from 2011 onwards those using the Land did so with the implied permission of the landowner and that the Inspector was going to be invited to find that this was the case. Mr Hall confirmed that he made an access for himself in 2015. He recalled that before then when he gained access from the gate and stile, the gate was very rarely locked. It was suggested to him (and he agreed) that he could not have first used the Land in 2011 as his house had not yet been built. He was then asked about the various Stamford addresses that he had lived in. Between 2011 and 2012 he had been living at 39 Elgar Way which is outside the locality. He agreed that he had first used the Land from 2011. He had a dog but did not like taking him to the same place. He would take him to the quarry at the top of Stamford, to the meadows, to Burley Woods. He was questioned about his recollection of the housing development works and his various addresses to clear up some confusion arising from his and his wife's Evidence Questionnaires. He was able to confirm that he moved into his then girlfriend's (now his wife) house at 4 Bowman Mews in or around 2012/13 and then he subsequently bought 15 Bowman Mews in December 2015 and they married in 2016. He confirmed that the construction works were going on when he first used the Land in 2011. He remembered the builder's compound used

whilst the Bowman Mews housing development was being constructed. He recalled the Heras fencing and agreed that access to that part of the Land (amounting to 7%) was prevented whilst the works were going on. He confirmed that his wife had become aware of the land in 2006 when she began working as an estate agent in the town. She had lived in Queen Street but that is outside the locality. However, she did not begin using the Land until 2012. He was asked about the hay crop and the circular path around the Land. It was put to him that the aerial photographs do not show a path until 2015. He said that he could not recall there not being a path. He thought it had been there since 2012. The path was used by people, and he had seen someone walking on it. It was put to him, and he accepted, that the prevailing way the Land was used was by the majority of people walking dogs and walking around the path.

(3) Chris and Margaret Emerson [AB81, 200-207]

Mr and Mrs Emerson jointly gave evidence virtually by Whatsapp video link. It was noted that the witness statement and Evidence Questionnaire had been prepared by Mrs Emerson although both had signed the witness statement. However, Mr Emerson took the lead in answering questions. Whilst this did not accord with the Directions, I attach no significance to this because at the end of the evidence session Mrs Emerson was asked whether there was anything that her husband had said that she wished to amend or add to. She confirmed her husband's answers. She also confirmed that they had used the three pieces of land over 20 years but that their needs and the way they used the Land had changed over the years.

In Evidence in Chief Mr Emerson stated that they moved into St. Leonard's Street in summer 1996. They have known the Land since then. They arrived with two dogs and a young child and immediately began using the Land as it provided a safe and quiet area for exercise and fresh air and without the need to cross busy roads. They have used the Land over the years for a variety of activities, most frequently walking the dogs. About 20 years ago Mr Emerson would use the Land for running starting in the bottom left-hand corner by the electricity pylon and would go round the Land about 6-8 circuits. He and his children played frisbees

and ball. His eldest son was a keen fisherman so on Priory Meadows 1 he could fish. He would use a circular route. Other activities included going to the Priory. They would enter via Gate 1 and do a loop before going on to Priory Road and the Priory itself. They used the Land regularly as well as other places. It was a very convenient place. Access would be via Gate or Stile 1 rather than walk down Priory Road. Entry was never via Gate 2. Sometimes Gate 3 or Stile 2 would be used to get into Priory Meadow 1 and then on to the Priory. Often, other people were seen by them using the Land. Sometimes Mrs Emerson would walk with a friend who lived on Priory Road as they both had dogs. They would see others walking dogs and fishing. They did not see any notices forbidding access to the Land. The stile always made them think that the Land was a place where they were allowed to go, and it looked like a footpath and an area where people could go. Entry was never forced or obtained by secrecy. They did not know who owned the Land. They occasionally used the recreation ground, but it involved crossing a much busier road.

In Cross-Examination by Mr Laurence KC, Mr Emerson confirmed that he was born in 1966 and was about 30 years old when he moved to St Leonard's Road. He was self-employed. Mr Laurence sought to identify how much time he would have used the Land at that time. Mr Emerson stated that if one had a dog one would have to walk the dog irrespective of employment status. He was asked about sheep and other animals on the Land. He remembered seeing some animals including sheep, horses and ponies. He remembered a notice about the sheep but could not recall the precise wording. He recalled meeting someone who saying to him to keep his dog on a lead and but he did not recall being told to stick to the footpath. Whilst people could use the path from P to Q Mr Emerson stated that it was equally possible to turn left at the electricity pylon and to use the well-worn path up the field (the Land) to the top and past Gate 2 and down the other side. There were not often sheep on the Land blocking his way. The sheep or horse would be in the middle of the Land or on Priory Meadow 1. He did not consider that he had disregarded the notice because the footpath around the Land was as well-worn as that from P – Q. Once at Stile 2 it was possible to turn right and walk to R or walk across Priory Meadow 1 and reach the river

anywhere between R and Stile 3. After being asked by Mr Laurence KC about the various routes to go fishing and the exhibited photographs Mr Emerson confirmed that it would be fair to say that the statements in their evidence about the Land showed that they had used all three areas of open space. He repeated that the well-worn paths around the Land had been there from soon after they had moved in and that sheep were not always there. He repeated that he had never been told to stay on the footpath and only once had been asked to keep his dog on a lead. It was not for him to surmise what was being implied. He was asked about his wife's Evidence Questionnaire and the omission of reference to the compound enclosed by the Heras fencing. However, he did not believe that this impacted on the use of the rest of the Land although he recalled it coinciding with the demolition of the Bowman's site and its redevelopment for housing. He was asked whether they had used a circular route going from P – Q, down to the river and along beside it and exiting onto Priory Road by Gates 6 or 7 or at point D. He agreed it was possible but rarely did as they wanted to avoid the traffic on Priory Road. If they wanted to avoid the traffic, they could use all three areas of land. He accepted that his wife's answer to question 24 she was referring to all three areas of land and he confirmed that they had used all three. In answer to questions from me, Mrs Emerson confirmed that they had used all three areas of land over about 20 years and the way that they had used them had changed over the years, but it was difficult to specify one particular use when you have used something for such a long time.

(4) Susan Clifford [AB 80, 160-167]

In Evidence in Chief, she confirmed that she had lived in Adelaide Street since 1985. She had always known the Land because she went to school in Stamford and has lived near it since 1985. She has known the Land for over 35 years. She used the Land primarily for dog walking, and as a route through to beyond the field in question. She would also pick blackberries and other fruit when in season. She saw lots of dog walkers and that the numbers increased as the area was developed so more people with dogs would use it. She also sometimes saw children playing and fisherman using the Land to gain access to the riverbank.

She used the Land because it was the nearest green space to her home as the other green spaces in Stamford are not always easy to access. The Land was perfect for dog walking. It was always peaceful early in the morning and you could sense that the fields were untouched. She used the Land regularly since she retired but before then she could not claim to have used it regularly. Access was easy through the gate that was always open or any of the multiple access points. She would use the Land in the early morning and in the afternoon at about 2pm when it was more likely that she would see people. There was evidence of significant usage because the paths people used were worn and well-defined around the perimeter. She did not see any notices forbidding use or access but equally she did not see any notices encouraging access. There was a footpath with stiles so that to her and there were maps showing the footpath across the Land. She did not use the Land secretly. She thought that Burghley owned the Land but had no proof of that. She did not use the recreation ground very often as it was not in her neighbourhood, and she had a nice peaceful field nearby. She recalled seeing two ponies in the field immediately off Cherryholt Road but she did not recall them in the other fields. She did not recall seeing Mr Gray. She then commented on the condition of the horses and ponies and that she was not the only resident concerned about their care. She witnessed their removal by the RSPCA and Horse Protection Society.

In Cross-Examination by Mr Laurence, she was asked about her response to question 35 of her Evidence Questionnaire where she had changed the date from 2008 to 1985 which was different to paragraph 4 of her Witness Statement. She confirmed that it would be more accurate to say that her reference to the "line of the original footpath" could include going down to the river from Q to R as well as going across the field to point S and Gate 4 or from Stile 2 to Stile 3. Generally, when walking and there are stiles she would tend to head from stile to stile as there were a variety of routes to choose from. After 2008 there was a change in her pattern of her use as she bought two dogs and her walking increased significantly. It was put to her that Mr Gray was still a tenant farmer until 2010 so that the use of the Land for recreation only began to after Bowman Mews had been constructed. She stated that there were more children seen but that when

she began dog walking in 2008 there was already a regular cohort of dog walkers walking around the Land, and around the edges of it and the other fields. She was asked about the construction compound and recalled that there was a small area with a lot of stuff dumping and it was untidy. It did not get in the way of the gate access point, and it was possible to still gain access to point P1 (the pylon) and to the remainder of the Land.

(5) Ian Halliday-Pegg [AB 85, 292-299]

In Evidence in Chief, Mr Halliday-Pegg confirmed that there were three periods in his life that he has known the Land. First, as a child every few weeks he would cycle from his home in Ryhall into town to use the Land and there would be other children on the Land. Access would be via Gate 2. Second, after he married and moved in to Kesteven Road they would go blackberry picking, gaining access via Gate 1 and on to Priory Meadows. Third, when living at 19 Cherryholt Road between February 20014 and June 2020, he would go on the Land regularly. He worked from home and his office overlooked the Land. He saw between 20 or 30 dog walkers each day. In 2016, when his daughter got a dog in they would walk the dog on the Land several times a week and gain access via Gate 1. He recalled the yellow and green footpath signs.

In Cross-Examination by Mr Laurence KC, he agreed that he used the Land during a period around 1994-98 when he was living in Stamford and again when he returned to Stamford in 2014. Kesteven Road is outside the claimed locality although within walking distance of the Land. He accepted that his actual use of the Land during the relevant period was limited to a five-year period from 2014 to 2019 and that his wife did not claim to use the Land before 2014. He confirmed he used the trodden perimeter path on the Land.

(6) Lesley Battley [AB 75-76, 79, & 127-134]

In Evidence in Chief, she confirmed that she has lived in Stamford since 1974, beginning in Scotgate. While on maternity leave in 1974-75 she discovered the

footpaths along Cherryholt Road and from 1975 she used them to walk with her daughter. As her daughter grew older, she would bring her friends with her and they walk around to the Priory and play games and then through the three fields. She would teach her daughter and friends the name of the trees, flowers and birds and then play games on the Land before walking home. She was never told not to go on the Land, and she has never been told off for accessing the Land. She also went blackberry picking. She has adult children, and her grandchildren would come and play on the Land. When the grass was cut some children would use it to make igloos. The Land was not manicured whereas the recreation ground does not have the range of flowers and there is nowhere else like the Land in Stamford in terms of wildflowers because the other areas are all cut down and trampled on. In 2001 she suffered a stroke and having the Land helped her to start walking again. It also helped with her mental health. In the early years her access was via the Priory gate (Gate 7) and as she saw others using it, she presumed it was alright to use. Since moving into Cherryholt Road in 2004 she used it every day and accessed via Gate 1 and Stile 1. He did not recall the gate being locked until Kier started building the homes and then started to lock the gate. However, it did not prevent access to the Land because of the stile. After the works were completed, the gate was locked intermittently. She did not see any signs forbidding access until after the application for planning permission on the Land. She did not see any permissive signs, nor did she force entry. She had presumed that the Land was owned by Burghley. She saw Mr Gray's ponies, but they were mainly on Priory Meadow 2. She also saw sheep in the field before 1999 and someone had out up a sign advising dogs to be on leads as there was poison on the field. She agreed that there were no sheep after 1999. She did not speak to Mr Gray but did see him once when she was in the Priory, and he did tell her that if her dog went in the field he would shoot it. He did not tell her not to go on the field but just to keep it on a lead. She recalled the horses and ponies being in a neglected condition and that they were taken away by the RSPCA. She used to feed them carrots. She recalled meeting Mr Gibbons, the foreman at the joinery business that was on the site before the construction of Bowman Mews. She said that there was only one place from the builders' merchants where you could see onto the Land. She recounted a night when they were burgled, and she

called the police. She thought it was very difficult for people to get access to the merchants building from the Land.

In Cross-Examination by Mr Laurence KC, she agreed that she had lived at Cherryholt Road for 16 not 18 years as stated on her Evidence Questionnaire. She remembered some sheep on the Land and on Priory Meadows 1 and 2 at different times. She recalled the sign about sheep in the field and poison on the ground but did not recall reference to rat poison. However, she continued to walk through the field but carried her dog. She agreed that she kept to the old footpath from P-Q-R. If the sheep were on the Land, she would carry her dog but if they were in the middle field, she would let her dog walk in the field. Between January and April, the area of the Land at the bottom where the footpath was would be flooded fairly often so it could not be walked on, and she had to walk higher up. You could go in at Stile 1 if it was boggy, but it depended on how bad it was. If not too boggy, she would follow the route up to Gate 2. She had correctly remembered when part of the Land was used as the builder's compound and agreed that the car park field is fenced off. When she wanted to get onto the Land, she would climb over the Stile 1 and although the Heras fencing would be to her left she could still walk through the corridor between the two fences. The Heras fencing did not go as far as P-Q: it just went to where the field turned left by Pylon 1. She agreed that she recalled 7% of the Land not being available during construction of the houses, but the remaining 93% was always accessible. Mr Gray had gone some 2 years earlier and no one else was doing anything on the Land. She thought it was okay to walk on the Land and there were no signs saying 'private property do not trespass' so she presumed it was free to use. Workmen used the field with their dogs. It was put to her by Mr Laurence KC, and she agreed, that the broad thrust of the evidence heard was that, even before the building works of what became Bowman Mews were taking place and during the period of Mr Gray's use (including when there were sheep on the Land also ponies) people did still use the Land but not to any substantial extent. She also agreed that people used it by going along the path and doing a kind of upside-down U route around the Land. However, she did not agree that the Land could not be used when it became overgrown with hay because the footpath was so

well used that the growth did not go along the footpath and you could use sticks to push back nettles. Some people still used the Land even when there were livestock there and, in an act of defiance, they did not care what Mr Gray was saying. She, however, knew what his wish was and kept to the footpath as she did not want him shooting her dog and would carry her dog when livestock were present. She thought that there were some others who felt intimidated by the tenant farmer and would not use the Land. She could not say whether most of those who kept to the footpath did so in order not to be in trouble with Mr Gray. She ended by correcting her answer to question 9 on her Evidence Questionnaire – it should read that she used the Land daily from 2004 rather than 1975 but she did use the Land from 1975 but on a weekly basis.

(7) Mervin Thorpe [AB 90, 437-444]

In Evidence in Chief, Mr Thorpe confirmed that he had lived in the Priory Road area for 31 years. He has known the Land since he moved into his first house in Adelaide Gardens in Back Lane. He thought it would be a very convenient place for walking his dog. He used the Land mostly for dog walking. He has seen a lot of people walking their dogs and talking, possibly meeting up. He liked using the Land as it was very near to both his houses. It was a bit of green space right by his house. He always accessed the Land via Gate 1 or Stile 1. He had entered via Gate 2 when the gate was lying on the ground. He would use the Land early in the morning or late afternoon. He would meet or see other people on most occasions. He did not see any signs forbidding access, but he had seen a handmade sign saying the ground was poisoned. He has never seen a sign encouraging access and he never needed to force entry to the Land. He presumed the Burghley estate owned the Land. He had seen Mr Gray's ponies. He thought there were about 3. He had not seen them on the Land. He had seen Mr Gray once or twice around the Priory and once when he was walking to the gate, he was leaning on looking at me, Gate 5. Mr Gray did not say anything to me. The ponies were a bit lethargic, but he is not a horse expert.

In Cross Examination by Mr Laurence KC, he stated that he had gained access via Gate 2 when that gate was dilapidated and lying on the ground but his main access to the Land was from Gate 1 and Stile 1 or via the Priory. He did not agree that Gate 6 had always been locked because about 10 or 15 years ago it had been lying on the floor and you could go through without any difficulty, but the gate has now been fixed. He had moved from Back Lane to Bourne but they did not like it, so they bought and moved to their home in Priory Road in 2006. There has therefore been a gap of 10 months in 2006 when they were not living in the area. He remembered the temporary fencing around the builder's compound between 2011-13 but when they were walking their dogs, they would come through Gate 7, then Gate 5, go around the meadow to the temporary fencing and then back around. He agreed that his route would have been Gate 7, then gate 5 then across Priory Meadow 2 then through Gate 4 and across Priory Meadow 1 then over Stile 2 or Gate 3 (if open) and then from Q to P even though there were building works going on and some of the Land fenced off. As far as he could remember he could also go onto and around the Land, but it would be unusual to do a detour across the Land. He would usually exit from Gate 1 or Stile 1 and go back up around Priory Road. He only recently used the Land as he had an elderly Basset hound that liked to smell every blade of grass. He was not intimidated by Mr Gray and still used the footpath from P-Q even if there were animals on the Land. He had not seen sheep on the Land. He could not remember whether there were ponies on the Land when sometimes he entered via P he thought they were usually down the back by the fish pond on Priory Meadow 2. When he was working he would take a walk either early in the morning or early evening. He had heard that one of his neighbours at the time once had an altercation with Mr Gray. The principal activity that he has seen was walking (with and without dogs) but since Bowman Mews was built, he has seen people playing football on there.

(8) Kathryn Longbone [AB 86, 325-332]

In Evidence in Chief, she confirmed that she lives in Adelaide Street and had lived in Stamford for 37 years, starting in St George's Square then Waverley Gardens

and then Queen Street. She has known the Land since she lived here. When she moved here, she did a lot of exploring of the Priory etc. She had a rescue dog at the time so the Land was a nice, useful, enclosed area where he could run around without ending up in the river or on a road. It was how she found the Land in the first place. Later in she used the Land with her children. She then moved to Adelaide Street in 2013 and used the Land daily because she had a cocker spaniel. She used the Land quite a lot when living in St George's Square. From Queen Street she would use the Land quite regularly but at varying times. She would mainly get access from Gate 1 and Stile 1. Gate 1 was always open. Sometimes she would use Gate 2 if coming from her children's friends' homes. She would also approach from St Leonard's Street via the Priory if coming from that direction. She usually visited the Land during the morning but sometimes in the afternoon after work. She often saw people on the Land walking dogs or just walking. It was unusual not to see anybody. She could not recall any signs forbidding access or any permissive access signs. She did not force entry. She did not know who owned the Land. She had seen ponies on the Land when Mr Gray had his grazing licence from 1999-2010. She saw two – a bigger one and a scrawny one. They were normally up by Gate 6 on the Priory end. She did not know who Mr Gray was. The ponies were in an awful condition. She did not feed them on a regular basis, but she knew people who did. When she had young children, they would run around on the Land and play ball and meeting friends. It was useful because the dog was away from the road and the fact that the Land was away from the river helped a lot.

In Cross-Examination by Mr Laurence KC, she agreed that Queen Street was just outside St Mary's Ward. She was in St George's Square in 1985 when she moved to Stamford and then moved to Waverley Gardens in 1986 on the other side of town and then moved in 1992 to Queen Street. She used the Land less often when living in Waverley Gardens. She used the Land frequently when in St George's Square. Once in Queen Street she used the Land occasionally. Once she moved into Adelaide Street in 2013, she used the Land almost every day. She would use it because it was away from the river and road. Her youngest child was born in 2000 so it was little used by her at that time, but her eldest daughter

had a friend living in Priory Gardens and they used to play there. She was uncertain about the time when part of the Land was fenced off, but she did remember the building materials. She thought the whole area was public and remembered the arrow post. As far as she was aware the whole of the area was used by people including Priory Meadows 1 and 2. She did not know Mr Gray. She did not remember sheep on the Land. She accepted that it was quite a long time ago when the sheep were on the field and her use then was only occasional so that she might have easily forgotten anything about the sheep.

B. The Objector's Evidence

Oral Evidence

(1) Jeremy Dawson [OB Tab 4 12-185]

Mr Dawson provided a detailed witness statement supported by 23 exhibits. He is a Senior Director of Strutt & Parker. He has lived in and around Stamford for most of his life and has known the Land in both a personal capacity since the mid-1980s and in a professional capacity since 1996. His firm acts for the Objector and he is the agent for the Cecil Estate Family Trust. His witness statement contains a detailed description of the Land and its wider context [OB Tabb 4 12-15]. Furthermore, a detailed description of the access through the Land, and the background to, and import of, the 1992 (confirmed in 2019) Definitive Map Modification Order was also provided [OB Tab 4 16-18]. It is also important to note that Mr Dawson gave evidence in a personal capacity [OB Tab 4 18] having lived between April 2001 and October 2003 at 4 Priory Road. However, much of his witness statement was taken up with evidence provided by him in his professional capacity [OB Tab 4 19-40]. In his witness statement Mr Dawson provided his general observations including his professional involvement with the Land, the grazing licences and land management between 1999-2010. He provided evidence regarding the presence of large persistent blackberry bushes on the northern boundary of Priory Meadows 1 and the town council allotments. He also confirmed that there was no specific written

obligation in Mr Gray's tenancy agreements to prevent trespass off the 'Speculative Path' onto the Land but that his office had received complaints from members of the public about Mr Gray's 'aggressive confrontations with members of the public' which necessitated him having to speak to Mr Gray about this. In Mr Dawson's view and based on his conversations with Mr Gray and on the aerial photographs at JD5, Mr Gray had been effective in challenging people who strayed off the Speculative Route and there was no evidence of any circular routes around the perimeter of the Land between 1999-2006. His witness statement also included evidence in relation to the construction compound. He confirmed that the area demised to Allison Homes had left open a gap between the Heras fencing and the chain link fence to the Car Park Field to ensure that the Speculative Path remained unobstructed and open for public use. In paragraph 55 of his witness statement, he stated that he accepts 'that numbers of people might well have steered off the Speculative Route onto the [Land] once they got to the south-east corner of the Heras fencing'. His statement then covers the issue of land management of the Land from 2010 onwards when Mr Gray's occupation of the Land had ceased. This was supplemented with several photographic exhibits. He acknowledged that from about 2015 onwards he became aware from the worn grass shown on some of the photographs at JD5 and JD16 that there was a regular pattern of walkers straying off the Speculative Path and walking along a very specific route around the perimeter of the Land. Mr Dawson provided a detailed analysis of the Evidence Questionnaires followed by his observations on the statements made in the Application Form [OB Tab 4 28-40] together with an Evidence Form Usergram as exhibit JD12.

In Evidence in Chief, Mr Dawson was asked to confirm certain minor points and he was then tendered for cross-examination.

In Cross-Examination by Mr Maddox, Mr Dawson accepted that there was a difference between a licence to do something on land, renewed annually with no right of renewal and a tenancy of that land. Mr Dawson explained that a licence was preferable over a tenancy because an agricultural tenancy could convey a lifetime interest and succession rights and that is not in the landowner's interest.

He agreed with Mr Maddox that there was a huge distinction between the two arrangements. He agreed that Mr Gray could only use the land to graze and use the Land in connection with grazing. However, he did not accept that the landowner still retained overall control of the land. In his opinion the purpose of the licence arrangement was to protect the landowner from the tenant claiming security of tenure. In practice, Mr Gray was there to keep his livestock and he could do as he saw fit to protect those livestock from people straying off the footpath. The grazier was very involved in managing access to the Land albeit this was not written into the agreement. He accepted that Mr Gray's notice did not say 'No Trespassers' and that his firm (Strutt & Parker) did not put up such signs but this was due to the existence of the Speculative Route. No one knew at the time that the footpath did not legally exist. He accepted that there had been no secretive access and, apart from the travellers, there had been no evidence of forced entry. He also explained the change in approach by the Objector (as landowner) following Mr Gray's departure in 2010 when much of the land was no longer used for any particular purpose. He said that they could see from about 2014/15 an impression on the ground of a circular route around the perimeter of the Land and the Objector maintains that, by allowing this to continue to take place, this amount to implied consent to use the Land.

(2) Ross H B Thain FRICS [OB Tab 8 245-751, 259A-259B]

Mr Thain is a Fellow of the Royal Institution of Chartered Surveyors, Building Surveying Division. He moved to the area in 1991, establishing a surveying and architectural practice which operates in and around the area. He is a past chairman of Stamford Rugby Football Club and a member of other local sporting clubs. Mr Thain was introduced by Mr Laurence KC and confirmed that he understood that the extent to which the St Mary's Ward comprised a "locality" for the purposes of section 15(2) of the Act was a question of law for the inspector to provide advice to the RA. Mr Thain produced a report and a supplemental report dealing with the 'locality' issue. His report was based on several sources including historical, photographical, and legal documents and maps showing the various historical boundaries of St Mary's Ward and what he

considered to be the characteristics of the ward. These documents were appended to his report. In section 9 of his report, he confirmed that he understood and had prepared his report in line with his professional duty and that it represented his own independent view. In section 7 of his report, he explained his assessment of the ward as a locality for the purposes of section 15(2). He concluded at paragraph 8.1 that St Mary's Ward is a legally recognised administrative unit but that it lacked its own characteristic or identity. Mr Thain's report was taken as read and he was then tendered for Cross-Examination.

In Cross-Examination by Mr Maddox, he confirmed that he had struggled to find clear evidence that St Mary's ward had the characteristics of a recognisable community. He agreed that Northfields in Stamford was a different community. He did not agree that St Mary's Ward had not changed in the last 100 years and that it was part of the old mediaeval street lanes. In his opinion, because enclosure took place in 1870, that was when the development of Stamford occurred outside the walls because all the land inside the walls was built up. The street pattern was not developed until 1920. In response to a question from me regarding his view that Northfields was a different community, Mr Thain replied that Northfields was constructed as an area at about the same time and the streets were similar – probably built around 1900-10 in the same architectural genre and of similar size. It is primarily residential with a few shops. He was then asked about the medieval community, he stated that priories and friaries were outside town walls for a good purpose as they needed land around them. Prior to the mid-19th century there were very few buildings outside the town walls. Some buildings beyond St Clements Gate, Scotgate and Rutland Terrace were the first big developments outside the town walls. There then followed a discussion on house styles and prices.

(3) Paul Gibbons [OB Tab5 186-189]

Mr Gibbons read out his Witness Statement [OB Tab 5 186-187] and was tendered for Cross-Examination.

In Cross-Examination by Mr Maddox, it was put to him that the old Bowman's building did not have windows or visibility of the Land and the windows were painted black, he said that it was not all solid at the southern end of the site and that the footpath was visible. He accepted that the site had a lot of building supplies on it. He could not recall speaking to Lesley Battley and he did not remember the police being called but he did not agree that his comment about being worried by walkers on the Land during the daylight hours was an overreaction. His employers did not erect any signs. Apart from the forced access by the travellers, no one had forced access onto the Land as you did not need to force access. In response to questions from me, Mr Gibbons confirmed that until 2009 Bowman's site had been a builders' yard and that the boundary between it and the Land was a chain-link fence and then some of the buildings where there were windows, but they were obscured although there would be some light from the windows in the workshops. In 2009 the company moved to Welland House which is physically further away from the Land, so visibility was diminished. The general working hours were 7am-5.30pm 5 days a week (occasionally 6 days and very rarely 7 days).

(The relationship of the Land to the Bowman's builders yard, the footpath, the pylon (P1), the gates and stiles and Welland House can be seen on the aerial photographs produced by Mr. Gibbons at OB Tab 5 189.)

In Re-examination by Mr Laurence KC, Mr Gibbons confirmed that the wall of the builder's yard was not a continuous wall, and it was possible to get a good view of the Land but he would not always be looking at the Land. He confirmed that the company was very nervous of people around the yard. It was constantly manned, and people were acutely aware and if they thought they saw or heard anyone on the Land they would have gone and had a look. It would have been peculiar to have seen children. He had been there for 20 years, so he was certain that he had not forgotten about people using the Land.

(4) Gary Gray [OB Tab 6 190-215]

Mr Gray's statement was read out. Between the mid-1980s and March 1999 and then April 2005 to March 2010 he grazed his livestock on the Land and Priory Meadows 1 and 2. He gave up grazing sheep before 1999 and just grazed between 5 and 6 horses on the three fields. In his statement he refers to the travellers trespassing onto the Land in 2002 and produced an extract from the Stamford Mercury at the time. He also referred to the winter flooding at the bottom end of the Land and the presence of overhead power lines. He also confirmed the signs that he had erected warning dog walkers about the poison and that the purpose of the sign had been to deter people from deviating off the public footpath. He also appended to his witness statement copies of his grazing agreement with the Objector dated 25 April 2005 and one between the Objector and Mr Anderson dated 25 April 2001. These agreements showed the extremely limited nature of the rights enjoyed by him and Mr Anderson over the Land.

In Cross-Examination by Mr Maddox, he confirmed that between 1999-2010 he was living in Pembroke Road, Stamford. He was working as a self-employed builder working all around the area. He was then asked about his grazing licence. It was not the most generous of terms – he was responsible for maintenance but was not able to take berries etc off the Land as they belonged to the landowner. However, there were no berries on the Land because he would cut them down and spray them out. With regard to the rear walls of the houses on Priory Road that faced on the Land it was his view, as a builder, that when he was there the walls were in good condition. The landowners did not erect any prohibitive notices. There then followed a discussion between Mr Maddox and Mr Gray regarding the alleged physical condition of the ponies. In my view it is not necessary to record the details of that discussion as it is not relevant to the legal framework for determining the Application. The only relevant part of this discussion was regarding the times and regularity of Mr Gray's attendance on the Land. He stated that he had been there mornings between 8-9 am and in the evenings from 6pm onwards. Mr Gray did not recall Mr Thorpe or any of the other witnesses who had attended the inquiry for the Applicant.

Findings and Conclusions

52. It is useful to recall the observation of Sullivan J in the *Staffordshire County Council* case referred to in paragraph 37 above that it is difficult to obtain first-hand evidence of events over a period as long as 20 years and that often inspectors and registration authorities are left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period. This is certainly the case with this application. My overall impression was that all who appeared on behalf of both parties did so sincerely and honestly and they also recognised the limitations of their respective memories.

53. However, in the light of the oral evidence heard at the inquiry, all the supporting documents including the Evidence Questionnaires and the parties' submissions, I make the following findings:

(1) There was no dispute that an area of the Land had been used for a period of approximately 2 years as a builders' compound during the construction of the Bowman Mews residential development. This area was agreed to amount to some 7% of the Land. Any village green use of that area of the Land would have been prevented during the time that it was fenced off. Thus, its use has been interrupted during the relevant period and it follows that this area of the Land must be excluded from registration, and I so find;

(2) I also find that there is no evidence that the public gained access to the Land either secretively, by force (in the sense of physical force or in defiance of suitable notices) or with the express permission of the landowner. Indeed, given the confused status of the Speculative Route all involved genuinely believed that access to the Land via Gate 1 along the Speculative Route was permitted in accordance with its assumed status as a public footpath. Similarly, the Objector, as landowner, did not object to the public accessing the Land, and walking along the Speculative Route because it believed that people on the path were using it as a public footpath. Indeed, the evidence

was clear that when the builder's compound was erected and a section of the Land fenced off, the Objector (and the developer Kier/Allison Homes) took steps to ensure that access via the public footpath was maintained. It must also be remembered that the use of a public footpath is a public right, and that right is not limited to people residing within a defined or legally recognised area i.e., the locality. To an extent, this contrasts with the establishment of wider village green rights under section 15(2) which requires use to be by a significant number of inhabitants from a defined locality or a neighbourhood within that locality. Therefore, in terms of use 'as of right', I find that use has not been by secret or by force (in the physical sense only) or with the express permission of the Objector as landowner. However there remains the questions of whether use was with the implied permission of the Objector or was otherwise contentious (and therefore by force) which I address below. These are subtle, distinct, and crucial legal issues; and

(3) Whilst it is always prudent to apply a degree of caution to aerial photographs, I find that the Objector's assertion (as supplemented by the aerial photographs) that they do not show any circular track on the Land until after 2015 is correct. In my opinion this also accords with the oral evidence. I do not doubt that some witnesses may have used a circular route when on the Land, but such use was not widespread. I shall address the importance of this finding below.

54. It follows that my findings narrow down the remaining issues arising out of the criteria set out in section 15(2) with the result that the following remaining questions need to be addressed:
    (i) Is there a defined 'locality' for the purposes of section 15(2) of the Act?
    (ii) Was the use of the Land contentious and therefore 'by force'?
    (iii) Was any use with the implied permission of the Objector as landowner?
    (iv) Has any use of the Land been for lawful village green uses?
    (v) Has any use of the Land been by a significant number of inhabitants of the locality?

The Locality issue

55. The Objector raised as an issue the question of whether the locality relied on in this application – St Mary's Ward – is in law and fact a locality within the meaning used in section 15(2) of the Act. In my view, this issue is a fundamental one. Were it to be decided that the locality relied on was not, as a matter of law and fact, a locality then the application would have to be rejected. The Objector's argument was contained in the supplementary objection statement dated 2 February 2023 [OB Tab 3 6-11) and in the Skeleton Argument and Legal Submissions dated 17 February 2023 [OB 11A-11J]. The Applicant was provided with an opportunity to consider this argument and, in so doing, sought and obtained the written opinion of Mr Cain Ormondroyd of counsel [AB 16A-16M]. The Objector also referred to this argument in closing. I note, however, that in his written opening remarks to the inquiry, Mr Laurence KC acknowledges at paragraph 20: "The fact that nobody [save for himself in the *Mann* case] has previously sought to argue as we do in this case does not make our submission a bold one: it merely means that the hitherto-accepted version has not previously been challenged".

56. Whilst I do not intend to set out in detail the respective arguments of the parties on this issue, for the benefit of the RA I shall endeavour to summarise their main points. In the supplementary objection statement, the objector states, at paragraph 5, that "it is not the case that an area with legally significant boundaries is, ipso facto, a locality. If that were the law, the unanimous decision of the CA in *Paddico* on this point would have gone the other way". In paragraph 6 the Objector then submitted "that it is a necessary, but not sufficient, condition of an area being a locality that it should possess legally significant boundaries. A conservation area and an electoral ward both possess such boundaries, but neither can be found to be a locality unless it also possesses the necessary qualities of community and cohesiveness". It is in relation to this issue that the Objector relied on the evidence of Mr Thain.

57. In response, the Applicant relied upon the written opinion of Mr Ormondroyd. In paragraph 3 he describes the Objector's argument as "misconceived". He disputes the reliance of the Objector on the passage from Gadsden at 15-44 and notes that there is no reference in Gadsden to any requirement to demonstrate with evidence that the so-called 'Necessary Characteristics" exist in relation to any of the categories of locality set out in 15-39. Furthermore, in paragraphs 6-11 of his opinion, Mr Ormondroyd sets out the legislative background to the changes brought about by the Countryside and Rights of Way Act 2000 and taken forward into the Commons Act 2006 which gave rise to alternative areas i.e., a "locality" or a "neighbourhood within a locality" thus providing "two distinct routes to registration". Significantly, and in my view rightly, Mr Ormondroyd makes the point, in paragraph 10, that the "Objector's approach to locality would cut across this feature of the statutory scheme. Any applicant would always have to make a factual demonstration of cohesion/community…" and "this would make the "locality" route to registration practically redundant, as an applicant could rely on the same area as a "neighbourhood" in any event.

58. Mr Ormondroyd also questioned the Objector's interpretation of the Court of Appeal's decision in *Paddico (267) Limited v Kirklees MBC* [2012] EWCA Civ 262. Furthermore, he also challenged the Objector's arguments arising from the older authorities – see paragraphs 20- 33 before concluding with reference to the Commons Registration (England) Regulations 2014, Sch4 para 9 (c)(i) which provides that an application under section 15(1) must contain a description of the locality or neighbourhood relied upon by reference to, inter alia, "(i) the name of any parish, electoral ward or other local administrative area with which it is coextensive". Thus, he argues, secondary legislation treats an electoral ward as a "local administrative area" with boundaries of sufficient legal significance to constitute a locality. I note that this also accords with the view of DEFRA. Mr Ormondroyd also supplemented his argument with a review of the applicable statutory scheme at the material times.

59. Mr Laurence KC responded to Mr Ormondroyd's opinion in his closing submissions to the inquiry – see paragraphs 17-22 and he expanded on his analysis in paragraphs 69 -81.

60. In my opinion, Mr Ormondroyd's argument is correct. I therefore reject the Objector's argument on this point. Further, it is my view that it seeks to place an impermissible gloss on the clear wording of the statute. Moreover, as Mr Thain's evidence demonstrates, it introduces a considerable element of subjective judgment on what constitutes an area's necessary characteristics. This is not a criticism of Mr Thain's evidence. I found it to be very informative, but it does highlight the many difficulties that could be involved by introducing this additional 'requirement' which requires a considerable degree of subjective opinion and I do wonder whether the value and relevance of this evidence would be better used in connection with any future boundary review.

61. In conclusion on this issue, I reject the Objector's argument and find that the locality relied on in support of this application – St Mary's Ward – is a locality for the purposes of section 15(2) of the Commons Act 2006. I also do not find that the notes to section 6 of the Form 44 are misleading and wrong. They correctly state the law as it is.

<u>The contentious use issue.</u>

62. It has been a consistent assertion by the Objector that the use of the land by local inhabitants has not been "as of right" for two reasons. First, as was made clear in paragraph 5 of the letter of objection dated 11 December 2019, there had been challenges to the use of the Land and, second, that the use of the Land had been with the implied permission of the landowner.

63. The first reason – the contentious use – relies upon evidence that there had been altercations between Mr Gray and certain people on the Land, recorded in the evidence. Mr Gray was not challenged on this point. Further, Mrs Battley told the inquiry of her encounter with Mr Gray and her clear wish not to have him "shoot

her dog". She also indicated that some were deterred from going onto the Land whilst others continued to do so in defiance of Mr Gray. Mr Thorpe also confirmed in cross-examination that his neighbour had told him that she had had an altercation with Mr Gray.

64. I also note that in two of the Evidence Questionnaires there are references to Mr Gray's challenges – e.g., by Martin and Dawn Aspinall [AB 113] who referred to the tenant farmer and Sarah Baker [AB 120] who referred to the "tenant putting unpleasant signs".

65. It follows from this that there was sufficient oral and other evidence that Mr Gray did challenge some members of the public. I appreciate that it is unclear as to precisely where those challenges took place e.g., on the Land or on Priory Meadows 1 or 2 or on the footpath and in relation to which area of land, bearing in mind the extent of the land covered by the exhibited tenancy agreements of 7 June 2005 – see OB Tab 6 197-203 or the one to Mr Martin Anderson of 25 April 2001 [OB Tab 6 204-210] but they clearly had a right to graze animals on the Land and it is reasonable to conclude that these challenges related to the Land, even if they may have extended to the other areas covered by those tenancy agreements. Furthermore, the evidence contained within the Evidence Questionnaires clearly relates to the Land as it is accompanied by a signed copy of a plan/aerial photograph of the Land and so it is reasonable to conclude that the references to challenges by Mr Gray were taken to include, if not exclusively relate, to the Land.

66. I therefore find that there is sufficient evidence to demonstrate that the use of the Land was contentious and that Mr Gray's opposition to people straying off the footpath was well-known. Therefore, I accept the Objector's argument on that basis and find that the use of the Land was contentious during the years that the Land was let on grazing licences (1999-2010) and I recommend that the application should be rejected on this basis.

67. Even if I were wrong on this point, the evidence of Mr Dawson at paragraph 66 of his witness statement exhibited two letters dated 29 January 2019 to the

occupiers of nos. 14 & 15 Bowman Mews regarding the unauthorised gate installed in the fence to the Land. The wording of these two letters made clear that the Objector wished "to put on the record that we do not grant you nor are there any existing rights of access through the gate onto and/or across our client's land". Whilst the letters do not specifically refer to village green uses, and concentrates more on access, it is difficult to see how any village green uses could be enjoyed without access to or across the Land from the gate. This letter was sent just three months before the expiration of the relevant 20-year period and thus evidences a challenge by the landowner sufficient to undermine any argument that use of the Land had been "as of right".

The implied permission issue.

68. The second reason relied on by the Objector in support of the argument that use of the Land was not use "as of right" but with the landowner's implied permission is more complicated. This is set out in the Objector's Skeleton Argument at paragraphs 14 – 19 [OB 11H-11I] and paragraphs 58-67 of the Objector's closing submissions.

69. The evidence on this issue cannot be in dispute. It was accepted by all that an area of the Land (approximately 7%) had been enclosed with Heras fencing for approximately two years for use as a compound in connection with the construction of Bowman Mews and thereafter it had been re-seeded, restored and re-incorporated into the Land. I received no evidence to suggest that anyone had challenged the right of the Objector to fence off this area of the Land. I also note that Mr Dawson was not challenged about the telephone calls that he received from members of the public about Mr Gray's behaviour (see paragraph 44 of Mr Dawson's witness statement) and many of those completing Evidence Questionnaires did so with knowledge of the identity of the owner of the Land. It follows that many people using the Land understood the Objector was the owner of the Land.

70. The Objector argued that, notwithstanding the contentious use issue, use of the Land between 2011 and 2013 became "by right" as opposed to "as of right". This legal distinction is critical. The Objector set out this argument in paragraphs 15-

18 of section B of its supplementary objection dated 2 February 2023 [OB 11], paragraphs 14-17 of section D of its Skeleton Argument dated 17 February 2023 [OB 11H-I] and paragraphs 24-28 of its Opening Remarks to the inquiry [OB 11N-O] and I was invited to treat those paragraphs as incorporated in the Objector's Closing Submissions. I accept that invitation. I will not set out the details of those submissions but will attempt to summarise them as succinctly as possible.

71. Reference is made to paragraph 6 of the original letter of objection dated 11 December 2019. This refers to the erection of the Heras fencing to provide a compound whilst Bowman Mews was under construction. As mentioned above, there can be no dispute that, as a matter of fact, this happened. It is the consequences that flow from this action that now must be considered.

72. In short, it was argued that during the period 2011-2013 when the compound was in place, the remainder of the Land continued to be available for use, and was used, by local people. In terms of the evidence, this was undoubtedly the case. The Objector argues, however, that use of the remainder of the Land during that period by local people was pursuant to an implied permission and that the use of the entirety of the Land after 2013, once the compound had been removed, was also pursuant to an implied permission.

73. The legal basis for this argument can be found in paragraphs 4 & 5 of the opinion of Lord Bingham in the House of Lords decision in *R (Beresford) v Sunderland City Council* [2003] UKHL 60. In paragraph 5 Lord Bingham said:

> "I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and makes it plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

74. Mr Laurence KC referred to other authorities to support his argument that the use of the Land after 2013 had been with the implied permission of the Objector.

In particular, he relied on the judgment of HHJ Owen (sitting as a judge of the High Court) in *R (Mann)v Somerset County Council* and he quoted extensively from the judgment in paragraphs 60 – 63 of his written closing submissions. There is no need for me to repeat those passages in this report. However, it is important to caution against reading too much into the judgment in *Mann*. The Court of Appeal recognised its limitations in its decision in *T W Logistics Ltd v Essex County Council* [2018] EWCA Civ 2172 – see the judgment of Lewison LJ at paragraphs 86-100. Further judicial caution can be found in the majority judgment of the Supreme Court in *R (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58 at paragraphs 36- 41and the decision of the decision of Sir Wyn Williams in *R (Cotham School) v Bristol City Council and others* [2018] EWHC 1022 (Admin). It follows that as the judge in the *Cotham School* case made clear "in making a judgment about whether it is proper to infer that the use of the land by local inhabitants has taken place with the permission of the landowner the facts are all important." The judge also recognised that "*Mann* is a case which turns very much on the facts found by the Inspector and the inferences drawn by him." Finally, as was emphasised by the Supreme Court in the *Lancashire CC* case, when referring to the conclusions of Lord Walker in the *Beresford,* case 'passive acquiescence' could not be treated as "having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct)".

75. With those words of caution in mind, it is now necessary to turn to the facts of this application as established in the evidence and to assess, on an objective basis, whether the evidence supports the argument that the use of the Land by local inhabitants was from, at least, 2011 with the implied permission of the landowner.

76. In my opinion, the following facts are central to this issue:

    (a) Between 2011- 2103 a significant part of the Land (amounting to 7% of the total area) was enclosed behind a Heras fence and used as a compound in connection with the construction of Bowman's Mews. As can be seen from the

photographs exhibited at JD17A this was, in visual terms, a sizeable area of land.

(b) There was no evidence produced to show that anyone objected to the landowner fencing off this Land in this way.

(c) The landowner, in recognition of the need to maintain public access along the Speculative Route (which all parties believed at the time to be a public footpath) took steps to ensure that footpath access was maintained – see paragraph 55 of Mr Dawson's witness statement.

(d) The evidence of Mr Dawson, given in his professional capacity, was largely unchallenged. In his witness statement he gave direct evidence about his involvement with the Land over three period: 1998 – 2007, 2007 – mid 2015 and mid 2015 – 2019 (see paragraphs 34- 72).

(e) Mr Dawson states at paragraph 37 that he could recall a number of instances where residents had contacted him in order to address certain issues with the Land including requests to cut back vegetation in the access way leading to Priory Road – see in particular exhibit JD15. Strutt & Parker were swiftly contacted by residents of Priory Road when the travellers broke onto the Land. In paragraph 44, Mr Dawson refers to a number of complaints made to his office about Mr Gray's tone. He had spoken with Mr Gray about users of the footpath (and their dogs) who strayed off the Speculative Route.

(f) Mr Dawson set out in paragraphs 49 – 52 the steps taken by his firm to clear the access way between numbers 16 & 17 Priory Road.

77. In my view, the evidence has shown two apparently contradictory approaches by the Objector regarding its management of the Land whilst the Bowman Mews construction works were being undertaken that are relevant to the issue of implied permission. In relation to the Speculative Route, it took steps to ensure that there was always public access along that footpath in the belief that the public were using it "as of right" (i.e., exercising public footpath rights). For that reason, the Objector never sought to challenge any use of the footpath across the Land. However, an apparently contradictory stance was taken by the Objector in relation to the builder's compound. It permitted Allison Homes to fence off an area of land (see the aerial photograph and plan at OB Tab 7 238) for a period of

two years to facilitate the construction of Bowmans Mews. The Land had, and has, clear and distinct boundaries. The area fenced off was, until 2011, an indivisible (both physically and visually) part of the Land. In fencing it off, the landowner deprived local inhabitants of the opportunity to access the enclosed area of land. This was an overt act on the part of the Objector and inconsistent with the concept of local inhabitants enjoying access to the fenced off land "as of right". Further, as mentioned above, I saw no evidence that anyone objected to this happening.

78. However, this contradiction is more apparent than real. The Objector's approach with regard to the footpath was a reflection of the generally accepted view at the time that the Speculative Route was a public footpath and therefore the Objector was in no position to prevent public passage along the footpath whereas the enclosure of a section of the Land was a clear indication that the Objector was exercising the right, as landowner, to prevent access to, and use of, that area of the Land.

79. The evidence was clear that many local inhabitants knew who owned the Land and contacted Mr Dawson (or his office) from time to time about land management issues. The subsequent re-seeding of the Land and its restoration as part of the Land is consistent with the actions of a landowner permitting local inhabitants to access the Land for recreational purposes. It is not insignificant that the Land is visually self-contained and with clear boundaries. I therefore consider that on the facts of this case the comment of HHJ Owen in *Mann* at paragraph 73 are relevant.

80. Bearing in mind the words of judicial caution set out above, it is my view that the exceptional facts of this case show that from at least 2011 (when the compound was first created), the Objector took several overt and significant steps to demonstrate that any use of the Land by local inhabitants was with the landowner's implied permission. The enclosure, without protest, within Heras fencing of a not insignificant (and previously indivisible) part of the Land for two years, coupled with the steps taken to ensure that public access along the

Speculative Route was maintained, gave the outward appearance that the landowner was exercising its right to manage its land and restrict access. This was inconsistent with any public perception that the Land was subject to any village green rights. The re-seeding, restoration, and reincorporation of that area within the Land further supports the notion that the continuing use of the Land was with the implied permission of the landowner.

81. The facts as they appeared at the inquiry support the view that the Objector approved of the actions of Mr Gray (and Mr Dawson admits that he spoke to him about his tone) after being contacted by local residents. He was, in effect, bringing any wider village green use of the Land into contention and with the full knowledge and approval of the Objector as landowner. The actions also taken with regard to clearing the entrance to the Land to the rear of numbers 11-20 Priory Road in response to the letter of 10 June 2002 from Mr Baker of 16 Priory Road [exhibit JD15 and see also paragraphs 37 & 38 of Mr Dawson's witness statement, also gave the firm impression that the local inhabitants knew the identity of the landowner and that the landowner sought to maintain a good relationship with the neighbours to the Land but, at the same time, was content for Mr Gray to challenge people who strayed off the footpath and onto the Land. It is my conclusion that these two actions together provide evidence that the Objector, as landowner, had approved the actions of Mr Gray in challenging those users who strayed onto the Land and, in responding to concerns expressed via his office about this and other land management matters, the landowner was giving implied permission for users to be on the Land provided that they complied with Mr Gray's requirements. Furthermore, the evidence demonstrates that there was much more than "passive acquiescence" on the part of the Objector.

82. Therefore, I recommend that the application should be rejected on this basis alone. The evidence was such that it showed that up until Mr Gray's departure the use of the Land was with the implied permission of the Landowner on the condition that users complied with Mr Gray's requirements (in the interests of livestock welfare). If they did not, then Mr Gray's warnings were sufficient to amount to a challenge to their use and therefore the use became contentious.

After Mr Gray's departure, the attitude of the Objector changed to one of implied permission (there no longer being any grazing on the Land) and the enclosure of part of the Land without protest in 2011 and the subsequent restoration as paddock land and its reincorporation into the Land reinforces this point.

The Village Green Uses issue.

83. On one level this issue is simple to address. It was clear to me from the evidence that I heard, and from the documentary evidence submitted by both parties, that those using the Land claimed to do so for what are usually considered to be "lawful sports and pastimes". This is illustrated by the activities claimed in the Evidence Questionnaires and witness statements where numerous people stated that they had either taken part in, or observed others engaging in a wide range of activities including walking (with or without dogs), picking blackberries, drawing and painting, bicycle riding, kite flying, football, bird and wildlife watching, frisbee, paying cricket, yoga practice, sunbathing, drawing and painting, picnicking, rounders etc. However, there was a marked absence of supporting evidence for many of these activities. Often village green applicants can produce evidence from witnesses such as photographs and video footage of such activities (even if limited to small groups of people or families). Whilst I do not doubt that those completing the Evidence Questionnaires did so with genuine intent, I consider that some may have been influenced by the box-ticking nature of Question 34. For example, I do doubt that there has been any more than very occasional flying of kites on the Land given the presence of overhead power cables. (This is not a criticism of the Applicant or Mr Maddox or those completing the Evidence Questionnaires, but it does demonstrate the need to approach these forms with a degree of caution. I also do not wish this to be taken as a criticism of the Open Spaces Society because these forms are helpful to applicants in marshalling evidence. Nevertheless, the forms and the questions do have their limitations which it is important to recognise).

84. Whilst all the claimed activities do, of themselves, amount to the pursuit of lawful sports and pastimes, I find that the predominant use of the Land was for walking (with or without dogs).

The Significant Number issue.

85. There is a further aspect that needs to be considered, and that is whether the level of use of the Land has changed during the relevant period. It is my view, having heard the oral evidence of both parties, and examined the aerial photographic evidence, that the level of use of the Land increased following the construction and occupation of Bowman Mews. I found no documentary or photographic evidence that the circular route around the perimeter of the Land existed prior to the aerial photograph circa 2016 (exhibit JD5). There is no circular path on the aerial photograph circa 2006 and on the aerial photograph circa 2005 does show clear tractor lines. The clearest indication of a circular path can be found on the aerial photographs circa June 2018 which also show quite clearly the track from No.15 Bowman Mews to the circular route on the Land. I also note the evidence of Mr Dawson at paragraphs 56 – 67 of his witness statement is consistent with the evidence that was submitted with the Application and with that heard at the inquiry. I should add that I found the Applicant's witnesses to be most helpful and fair when dealing with the issue of uses undertaken on the Land. I therefore find that the level of use of the Land increased since the departure of Mr Gray and the construction of Bowman Mews. Nonetheless, that use remained predominantly walking (with or without dogs). I also find that the pre-dominant use of the Land has been for walking (with or without dogs). I would also include within this category those that have jogged on or around the Land.

86. The evidence demonstrated that the other claimed uses such as picnicking or playing ball were, at best, sporadic and minimal. I do not doubt that these other uses may have been undertaken on the Land, but they were not done so an any regular basis or to a sufficient extent as to give the impression, whether to the Objector or the public at large, that the users did so pursuant to any village green right. In short, those uses were trivial and sporadic and were not carried out by a significant number of inhabitants. I therefore find that most of the claimed uses were not undertaken by a significant number of inhabitants of the locality.

87. Whilst walking (with or without dogs) can amount to a village green use, it is extremely important to further consider whether these walking activities were undertaken by a significant number of inhabitants of the locality[5] (but discounting the use by walkers from outside the locality (see paragraph 37 above)) and whether those walking activities were undertaken in pursuit of a claimed village green right as opposed to the exercise of footpath rights given the status of the Speculative Route (see paragraph 43 above).

88. It is also important to recognise that as Lightman J held in the *Oxfordshire County Council* case (see paragraph 43 above) that the evidence of use must be such as to suggest to a reasonable landowner that the use was in pursuit of a right to indulge in lawful sports and pastimes across the whole of the Land and, if the position is ambiguous, the inference generally should be drawn that the exercise is of the less onerous right (the public right of way) rather than the more onerous village green right.

89. Bearing in mind that it is for the Applicant to establish the case for registration, I conclude from all the evidence that I received and heard that, on the balance of probabilities, it has <u>not</u> been demonstrated that the use of the Land throughout the relevant period was by a significant number of inhabitants of the locality. Whilst the numbers of Evidence Questionnaires suggest that a not inconsiderable number of residents of the locality had been on the Land, there is considerable doubt that such use was for the entire 20-year period or that many of those seen on the land were from the locality or that the use of the Land was such that it would suggest to a reasonable landowner that those on the Land were doing so pursuant to a right to indulge in lawful sports and pastimes across the whole of the Land.

90. I also find that there was insufficient evidence to support the argument that the number of people that were using the Land constituted a "significant number" of

[5] Which I have already found as comprising the 4,500-5,000 or so inhabitants of the electoral ward of St Mary's.

local inhabitants or that the use of the Land by those people was for village green purposes as opposed to use as a public right of way. The presence of County Council public footpath signs will have encouraged such use, and there was considerable evidence, both oral and documentary (including the Evidence Questionnaires) that pointed to many users crossing the Land as a footpath, often as part of a much longer route either to and from the Priory or down to the riverbank. There was no dispute that the Land was openly accessible on foot from several points most notably, but not exclusively, Gate 1 and Stile 1. Furthermore, there was clear evidence that many of the users accessed the Land as part of a longer walk. I note that the Applicant's supporting photographs [AB 10] shows several people walking on the Land during May 2019 and whilst this can only provide a recent snapshot of usage in the month the application was submitted, it is entirely consistent with the oral evidence and with many of the replies contained within the Evidence Questionnaires. Based on the oral evidence alone (including replies to cross-examination), I gained the clear impression that when some witnesses referred to the "land" they were referring to a larger area including not just the Land but also Priory Meadows 1and 2 and the Priory – see, for example, the answers given by Chris and Margaret Emerson. The evidence also suggested that the level of usage had increased since Bowman Mews was constructed and occupied.

Recommendation and Reasons

91. In conclusion, I recommend that the application for registration of the Land should be rejected for the following reasons:
    (1) The burden of proof in establishing the case for registration rests with the Applicant on the balance of probabilities. The law requires that each of the criteria for registration set out in section 15(2) must be "properly and strictly proved".
    (2) I received no evidence to suggest that the Applicant or the application was not made with genuine intent or that any of those providing evidence (whether orally or in writing including the Evidence Questionnaires) did so insincerely or misleadingly. On the contrary, the application and supporting

evidence was prepared diligently and conscientiously. Nevertheless, bearing in mind the burden of proof, it is essential to scrutinise the evidence with great care. In this respect, the inquiry and the contributions made by both parties, assisted me greatly in this process.

(3) For the reasons set out above, I reject the Objector's argument in relation to the locality. I find that the locality was correctly identified by the Applicant as St Mary's Ward.

(4) I find that access to the Land was not secretive or by force (but in the physical sense only). For all the relevant 20-year period (and a substantial time before then) the general perception was that the Land was crossed by the Speculative Route which was a believed to be a public footpath. It was signposted as such. Thus, public access along the Speculative Route was open and unchallenged and believed to be lawful by both parties. Consequently, it is no surprise that the Objector did not challenge people walking along that route.

(5) Whilst at times users may have strayed off the Speculative Route, there was very little evidence to support the argument that the Land had been used regularly other than as a route for walking with or without dogs along the Speculative Route.

(6) I find that the use of the Land was contentious up to the time that Mr Gray left the Land. There was ample oral evidence to support the view that Mr Gray had challenged the right of people to stray onto the Land and that this was known within the locality. He did have a degree of control over the Land through his grazing licence. Therefore, the evidence suggests that use of the Land during Mr Gray's period was by force in the sense that use was challenged. I saw no evidence to suggest that anyone using the Land had questioned his right to challenge them. I also find that Mr Gray's challenges were with the knowledge and approval of the Objector. Separately, I also find that the letters of 29 January 2019 also amount to a further challenge to any use of the Land for village green purposes.

(7) It is significant that during his occupation of the Land, some local inhabitants had complained to the Objector, as landowner, about Mr Gray's tone. Mr Dawson explained in his evidence about how he reacted to this and how he

approved of Mr Gray's measures and had told him so – see paragraph 44 of his witness statement. He was not challenged over this. Thus, the landowner's right to manage the Land was clearly recognised by local inhabitants but not questioned and therefore the use of the Land was contentious during Mr Gray's occupation of the Land for grazing his livestock.

(8) Furthermore, following Mr Gray's departure the approach of the Objector openly changed, especially during the period of 2011-2013 when the public were excluded, without protest, from using a significant (in terms of both visual impression and extent) part of the Land by Heras fencing. Once Bowman Mews had been constructed the land was reseeded and restored as part of the clearly defined paddock that formed the Land. In these circumstances, it is reasonable to conclude that these actions amounted to an overt indication that the public were using the Land with the implied permission of the landowner i.e., "by right" as opposed to "as of right".

(9) I saw no reason to doubt that the Land had been used by local inhabitants for a variety of lawful sports and pastimes, but it was clear from the oral evidence that the pre-dominant use of the Land was as a route for walking (with or without dogs and including those jogging or running). The evidence produced did not support any assertion that the level of use for the other claimed activities was other than trivial and sporadic.

(10) Whilst the use of the Land for walking itself constitutes a lawful sport and pastime, the evidence did not show that this use was not in pursuit of genuine and widespread belief that they were exercising public footpath rights. In fact, many witnesses confirmed that the Land was often traversed as part of several longer walking routes and many of the Evidence Questionnaires also bore this out. Therefore, the application failed to identify, and discount, those users of the Land who were exercising the more limited footpath rights as opposed to the wider and more intrusive village green rights. In my view, this is a fatal defect in the application and one which the evidence given to the inquiry highlighted. In my opinion, the application could be rejected on this basis alone. The application and evidence also failed to demonstrate that those walking across the Land were residents from within the locality.

(11) The evidence also indicated that the use of the Land by walkers increased during the relevant 20-year period, particularly after Bowman Mews was constructed.

(12) Given the points made in (10) above, in my view, the application fails to demonstrate that the use of the Land was by a "significant number of inhabitants" of St Mary's Ward. Whilst the evidence of Mr Dawson in exhibit JD11A suggests that those providing Evidence Questionnaires came from a distinct part of the Ward, I remind the RA of the judgment of Patterson J in the *Allaway and Pollack* case (see paragraph 38 above) about there being no need to demonstrate a spread of users from across the locality. However, given the lack of evidence that separates those exercising footpath rights across the Land from those using the Land as a village green, and the lack of evidence that separated those walkers that lived within the locality from those that did not, it is impossible to show that those using the Land for lawful sports and pastimes amounted to a "significant number of local inhabitants". This is an evidential failing that, of itself, would justify rejecting the Application.

92. Therefore, I recommend that the application should be rejected because the Applicant has not shown on the balance of probabilities that, for the purpose of section 15(2) of the Act that the use of the Land had been "as of right" and by a "significant number of inhabitants".

MARTIN EDWARDS
Cornerstone Barristers
21 September 2023

ADDENDUM

In August 2023, at my direction, the RA sent a draft copy of this report to both parties for comment. I am grateful to them for the points that they have made, and I have made the typographical and minor drafting amendments as necessary. In a letter dated 15 August 2023 Mr Maddox raised several points arising out of my report and conclusions. Whilst none of these points affect my conclusion (and many of them are based on matters already considered in my report) nevertheless it is my recommendation that the members of the RA determining this Application

should be provided with a copy of Mr Maddox's letter so that they may be fully informed as to their nature and content and can take them into account when making their final determination. However, I repeat that, in my opinion, none of these points affect or would cause me to alter my conclusions and recommendation regarding this Application. I should also add that the issue of what weight to be given to any relevant consideration is a matter for the decision-maker to determine at the time and that, in my opinion, I have given what I consider to be the appropriate weight to all the relevant considerations when coming to my conclusion and recommendations.

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