APPENDIX C

In the Matter of

Application 2010/1 to Register

Land adjacent to Kestrel Way and Pastures Way

as a Town or Village Green

REPORT OF THE INSPECTOR

Miss LANA WOOD

22nd November 2010

Luton Borough Council

Legal Services

Town Hall

Luton

LU1 2BQ

Ref: Mr Richard Stevens, Head of Legal Services

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MISS LANA WOOD

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The Applicant failed to prove on the balance of probabilities that there had been recreational use of the application land throughout the whole of the relevant period which was more than trivial or sporadic, and which was not referable to use of the public right of way across the land.

The Applicant failed to prove that either of the neighbourhoods on which he relied in the alternative was a neighbourhood within the meaning of the statute.

The Applicant failed in these respects to meet the test for registration, and accordingly I recommend that the application should be refused.

APPENDIX C

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REPORT OF THE INSPECTOR

Miss Lana Wood

08 December 2010

1. The Application

1.1. On 26th January 2010 Luton Borough Council, as Registration Authority, received an application dated 25th January 2010 from Mr Keith Watson Mason of 32 Buzzard Road, Luton, LU4 0UF to register land known as "The Field", located adjacent to Kestrel Way and Pastures Way, but excluding the existing cycle path, as a town or village green[1]. The land the subject of the application was shown cross-hatched on the map attached to Mr Mason's statutory declaration.

1.2. The application was made under subsection 15(2) of the Commons Act 2006. The applicant did not rely on subsection 15(6). The locality or neighbourhood within a locality in respect of which the application was made was Lewsey Electoral Ward.

1.3. The applicant's summary of the case for registration stated that the land had been used by inhabitants of the locality for at least 20 years (and continued to be used) for lawful sports and pastimes as of right and in the belief that the land was and is a village green, without let or hindrance. A significant number of the inhabitants, past and present, had used the land for a range of sports and pastimes.

1.4. The applicant stated that evidence as to the lawful sports and pastimes enjoyed was set out in the statements accompanying the application. In part 11 of the form, any other information relating to the application which should be brought to the attention of the Registration Authority, the applicant stated that the Council had agreed to dispose of the application land, subject to planning, to Aldwyck Housing Group.

1.5. The application form was supported by a statutory declaration in prescribed form declared by the applicant on 25th January 2010[2]. The applicant also

[1] A1
[2] A8

provided 23 written statements in support of the application with the application form[3].

2. The Objections

2.1. The Registration Authority publicised the application. Two written objections were received.

Luton Borough Council's Objection

2.2. Luton Borough Council sent a letter signed by Mr Michael McMahon, the Head of Housing Strategy and Private Sector, the Office of the Corporate Director, on behalf of the Council, and dated 7th April 2010[4] objecting to the application. The grounds for its objection were (in summary):

(1) The Council was the freehold owner of the application land.

(2) The applicant relied on Lewsey Electoral Ward as the locality to which the application related, however all 23 of the evidence statements provided with the application had been completed by persons living in the streets in the immediate vicinity of the land, rather than by persons living in the Locality as a whole. Luton Borough Council submitted that in the absence of evidence demonstrating that use of the land had been enjoyed by the entirety of the locality, rather than just by those living closest to the land, the Registration Authority could not be satisfied that the registration of the land was justified, and the application should be rejected for this reason.

(3) The applicant had provided 23 evidence statements in support of the application. Lewsey Electoral Ward, according to the Office of National Statistics, has 12,654 inhabitants. Luton Borough Council submitted that in the context of this number of inhabitants, 23 evidence statements, of which only 13 claimed knowledge for the entirety of the 20 year period relied upon, could not be sufficient to establish that the land had been used for lawful sports and pastimes by a significant number of the inhabitants of the locality throughout the relevant period, and the application should be rejected for this reason.

(4) The only evidence of use provided was 23 evidence statements. No photographic evidence or other supporting documentary material had been provided. The evidence statements themselves were extremely limited in their extent, for instance, they did not state how often or regularly the witness had engaged in sports and pastimes on the land. Luton Borough Council submitted that the application contained insufficient evidence of use of the land for lawful sports and pastimes to justify registration, and the Registration Authority could not be satisfied that the registration of the land was justified.

[3] A11-33
[4] O1/1

(5) Luton Borough Council requested, in the event that the Registration Authority decided not to dismiss the application at an early stage, that the Registration Authority should hold a public inquiry at which the Council could appear and make representations as to why the application should be dismissed.

Aldwyck Housing Group's Objection

2.3. Aldwyck Housing Group ("Aldwyck") sent a letter signed by Mr Peter Salsbury, Project Manager, and dated 7th April 2010[5] objecting to the application. The grounds for its objection were (in summary):

(1) Aldwyck was in negotiations with Luton Borough Council to acquire land of which the application land formed part. Aldwyck had acquired planning permission to develop the land, including the application land, for the provision of Affordable Housing, and intended to develop the land for this purpose. If the application were to succeed, this opportunity would be lost. Aldwyck had incurred significant expenditure in connection with the scheme which it did not want to see wasted. The scheme had been carefully designed so as to preserve as much amenity value as possible and Aldwyck considered it would be a positive enhancement and benefit to the locality. The scheme would be of positive benefit to Luton Borough Council as it would assist them in their delivery of affordable housing provision.

(2) Aldwyck stated that, to the extent that the application land had been used as claimed, this use had been with the permission of the Council as landowner, in that the land had been maintained by the Council as open space, and hence was available for use by members of the public. Aldwyck submitted that this precluded a successful application for registration.

2.4. Mr Mason was given the opportunity to respond to the objections, which he did by letter dated 27th April 2010[6].

3. Consideration by the Registration Authority

3.1. The application was considered by the Registration Authority's Regulation Committee on 27th April 2010. The Head of Legal Services provided a report to the Committee in which the officer responsible recommended that, in view of the clear conflict between the Council's position as Registration Authority and as land owner and objector, the authority should appoint an independent legal expert to conduct a non-statutory public inquiry into the factual position, to make findings and to produce a report and recommendation to the authority. She proposed that the Committee should authorise the Head of Legal Services to appoint an independent legal expert to hold a non-statutory public inquiry and to produce a report and recommendation to be brought back to the Committee. This recommendation was accepted by the Committee.

[5] O2/1
[6] A34

4. The Public Inquiry

4.1. I was instructed by Luton Borough Council, as Registration Authority, to hold a non-statutory public inquiry into the application and to report in writing with my recommendation as whether the Registration Authority ought to accept or reject the application. I gave directions for preparation for the inquiry on 15th July 2010. I held the public inquiry at The Town Hall, Luton, LU1 2 BQ on Monday 20th September 2010, Tuesday 21st September 2010 and Wednesday 22nd September 2010. I held an evening session on Monday 20th September 2010 to enable those whose work commitments meant they could not attend during the day to attend and give evidence to the inquiry.

4.2. The Applicant, Mr Keith Mason, appeared in person. Luton Borough Council was represented by Mr Alexander Booth of Counsel, instructed by the Council. Aldwyck was represented by Mr Richard Ground of Counsel, instructed by Perrins Solicitors.

4.3. I am grateful to Ms Mary Cormack, who made the arrangements for the inquiry, and provided me with support during the inquiry.

5. The Applicant's case

5.1. I heard oral evidence from the 6 witnesses called by the applicant, including the applicant himself. The applicant relied on the written witness statements of a further 34 witnesses who did not give oral evidence to the inquiry. The evidence of those witnesses who gave oral evidence at the inquiry was tested by cross-examination and is therefore of substantially more weight than the evidence of those witnesses who provided written statements only. The evidence of those who provided written statements only must nevertheless be taken into account in evaluating the evidence as a whole. I have summarised the evidence of those who provided written evidence only in a table appended to this report.

Witnesses who gave oral evidence in support of the application

(1) Mr Keith Mason
32 Buzzard Road, Luton

5.2. Mr Mason is the applicant. He declared the statutory declaration in support of the application and provided a written statement dated 25th January 2010 which was sent to the Registration Authority with the application[7]. He also completed an evidence questionnaire dated 26th August 2010 and provided a written statement dated 4th September 2010.

5.3. Mr Mason stated that he had known the land since 2006, and had made use of the land continuously since that date for walking with his dog, and for exercise. The land is open, and he gains access to it from many points along either Pastures Way or Kestrel Way. He has been to a community picnic "the Big

[7] A11

Lunch" on the application land, which had taken place in 2010. His wife also regularly walks their dog on the application land.

5.4. Mr Mason had spoken to other users of the application land who had provided witness statements. He had been told that the application land had been used for a D-Day celebration in May 1995 and for several Guy Fawkes bonfire nights. He stated that he had also, over the years, witnessed others using the land for activities such as children's play, berry picking from the hedgerow, exercise, dog walking, walking, informal cricket and football games, bird watching, picnicking and bicycle riding. No organisations use the land for sports or pastimes.

5.5. During the time Mr Mason had used the land the general pattern of use had remained the same, although the use had increased during school holidays, weekends and evenings.

5.6. Mr Mason said that he had excluded the cycle path which runs along the edge of the application land from the land the subject of the application because he believed that a right of way by prescription existed over that path.

5.7. Mr Mason stated that he had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.8. Mr Mason appended four photographs taken in July 2010[8] and two photographs taken in October 2010[9] to his statement.

5.9. In oral evidence Mr Mason said that Luton Borough Council had commissioned a report in 2008 on the green areas in Luton and South Bedfordshire from the HALCRO group. The report concluded that the application land was high value but low quality amenity space. The same report said that the land was a green corridor of high value. However, when it came to the planning application, the land was described by the Council as a large embankment separated from the cycle path and the road. Mr Mason asked me to note how the language had changed: when looked at from a planning perspective the Council had described the land in a way which made it appear low quality, but the same Council in 2008 when considering green areas had described the land as of high value to the community.

5.10. Mr Mason said that his main use of the land since moving to his current address in 2006 has been for dog walking, which both he and his wife do. He did not know the land before 2006. He organised the Big Lunch event on the land which took place in July 2010 (shown in the photographs at A69A). He said that people walk their dogs on the land throughout the day. Children play on the land in the evenings and in school holidays, (he gave as an example a boy who he had seen flying a kite there in recent days), although at certain times of the day, one might go to the application land and see nobody.

[8] A69A-B
[9] A69C

5.11. The land is easily accessible from the road and from the cycle path. The cycle path was created in 2005. Mr Mason referred to the aerial photograph[10] which shows a worn path on the application land. He said that, in his opinion, the photograph also shows other wear. He believes that people who live in Gelding Close use the part of the application land which is opposite the end of their road. Every Saturday there is an informal game of football there.

5.12. The witnesses in support of the application mentioned the VE day celebrations in May 1995, and photographs of that event are in the bundle.

5.13. When he is walking the dog, Mr Mason throws balls for the dog. He is normally interrupted three or four times by people cycling or children playing. He said that it is very rare not to see anyone else, especially at the weekend. The general walking is especially the older residents. A lot of people teach their children to ride bikes on the land, as it is away from the main road.

5.14. Mr Mason said that had the Council monitored the land at weekends, it is most likely that they would have seen people using the land.

5.15. Mr Mason said that the Second Objector had raised the question of fencing and he wanted to deal with that. Last September 2009, on his return from holiday, he had found five or six areas where there had been digging on the site. The sites are about 1 metre square. They are the patches which are not cut at present. There was no sign as to why these areas had been dug. He said that he accepted that the holes might have been fenced when they were being dug, but said that that did not prevent people from using the land. He was away all the time the holes were being dug. He agreed that there was plastic netting with metal spikes holding it up. All of that had vanished, the last by February 2010. Some of it lay on the ground and people walked around it.

5.16. In reply to questions in cross-examination on behalf of the First Objector, Mr Mason said that he had typed up the witness statements from the questionnaires that people had filled out, then the witness went through the statement and reviewed them and signed them. If they were happy with their statement, they signed it. There were a few which were amended, and signed after amendments.

5.17. Mr Mason was asked about the photographs on A246: he said that he understood that the ladies shown were from Michelle Paul's family. Michelle Paul was away on holiday at the time of the inquiry. She lives on the corner of Gelding Close. She did not fill in a questionnaire, but dropped the photographs in to Mr Mason. Mr Mason said that he thinks that Mrs Paul's husband filled out a questionnaire in connection with the original application. He could not name anyone else in the photographs without circulating the photograph. He said that there were other Gelding residents who still lived there, and he thought they might know who the other people were. He thought the people shown were other Gelding residents. The photograph on A247 shows Mrs Paul's daughter at the same event.

[10] A245A

5.18. The photographs at A248-251 were provided by Nicholas Smith. A249-251 shows a friend of Nicholas Smith.

5.19. The photographs on A251A are of the Big Lunch in July 2010. The entrance to Buzzard Road is in the background. That was the first community picnic Mr Mason had organised. Before that day he knew 4 or 5 of the people visible in the photographs, and he knew other local residents from getting them to sign the statements in support of the application. There are some village green supporters visible amongst the people in the photographs, but the majority of the people shown were people who just turned up on the day and introduced themselves. Mr Mason said that he did not organise the event with an eye on the application: he had heard an advertisement on the radio about the idea of a Big Lunch, to bring communities together. Most people had to get council permission to close their road, but the residents involved in his Big Lunch event had been able to use the land. He said that a small amount of the conversation at the event was about the village green. It was not a meeting to discuss the village green application in any sense.

5.20. Mr Mason said that the photograph at A251B shows Mr Colin Nye's granddaughter. Mr Nye was to have attended the evening session but would not be able to do so because he had been injured at work. The photograph was taken on the same day as the Big Lunch, and effectively during the Big Lunch, although before Mr Nye attended that event.

5.21. A251C was taken from the mouth of Buzzard Road looking over Kestrel Way and was taken by Mr Mason. The people visible in the photograph were picking blackberries.

5.22. A252 is a photograph taken by Mr Charbonne, of 273 Pastures Way. His house is two houses to the north of the entrance to Gelding Close. He is not giving evidence. The two photographs are photographs of the same informal football match, being played in September 2010.

5.23. The photographs of people picking blackberries on A253, 254 and 255 are also Mr Charbonne's photographs. Mr Mason said that he understands that they were taken on the land adjoining Pastures Way.

5.24. Mr Mason was asked about his own use of the application land. His use is primarily a dog walking use, as is his wife's. Mr Mason said that he had read the Council's evidence and had seen the activity that the Council's officers had observed on the land. It was put to Mr Mason that people did go onto the land, but to walk and cycle, and the vast majority of that activity happened on the tarmac. Mr Mason said that if one removed the cyclists, most people using the land would not be coming from A-B. Since the cycle path was added, there is an increased amount of people using the land for that purpose, but otherwise there would be a lot of informal use of the land. Mr Mason said that, during the working day, 25% would be passing through, and 75% would be using the land for activities other than cycling from A-B. In the rush hours a lot of people cycle through to the train station. In the evenings there is informal use, people

walking through, dog walkers, children playing on the grass, children playing football. There are not many cyclists at that time. The Council's evidence of the observations on the weekend showed people walking dogs and children playing, whereas in the week, there were people cycling.

5.25. Mr Mason was asked to consider what extent the activity he had seen on the land were carried on on the tarmac path. It was put to him that the Council's monitoring showed the vast majority of activity involved people passing up and down the tarmac route. Mr Mason disagreed. He said that on the occasions when the Council monitored they saw people using the tarmac path, but none of the witnesses were asked what they were doing. The mother with children observed by the Council officer was not asked whether she was walking from A-B or whether she was enjoying the land.

5.26. Mr Mason was asked again whether it was right that the majority of users were just on the tarmac: he said that he did not think that was the case. The majority of cyclists and people with pushchairs would not be off the path, but children playing and dog walking takes place on the grassed area.

5.27. It was suggested to Mr Mason that he was exaggerating the activity that he saw off the tarmac. He did not accept that, and said that the football and cricket take place off the tarmac. The dog walkers might walk along the tarmac, and let the dog run free. If someone is coming, the person would retrieve the dog from the grass. If the grass is dry Mr Mason walks on the grass, or even sits on the grass, on the weekend, and throws the ball for the dog to retrieve. Mr Mason was referred to his evidence that his dog walking was interrupted by cyclists. He said that was not because he was on the tarmac, but because the dog's attention would be attracted by the cyclist, and as a conscientious dog owner, if a cyclist was approaching, he would retrieve the dog and put it on the lead.

5.28. Mr Mason had seen informal games of cricket, bat and ball with cricket stumps, and football, using two yellow cones on the application land: they were informal children's activity, not formal games. It was put to Mr Mason that the sensible place to play such games would be on the Pastures Way section of the land. He said that is where the football takes place. The only times he had seen cricket, on two occasions that he recalled, that was on the Kestrel Way part. The gypsy mound protects the grassed area from traffic.

5.29. In reply to questions in cross-examination by Mr Ground on behalf of the Second Objector, Mr Mason said that he has worked since 2006 in central London, between Monday-Friday. He leaves at 7.45 a.m. and returns at about 6.15-6.30, except on one night a week when he has been attending college, Mondays and Wednesdays in the last academic year, when he would get back later, and on Tuesdays the previous academic year. The previous academic year he got home for an hour or so in the afternoon and took the dog out on a Tuesday before leaving for college at about 3.30 p.m.

5.30. Mr Mason was asked about the percentage uses he had given for use of the application land during the working day and he was asked whether that was from his observations on Tuesdays. He said that he has five weeks a year

holiday, one of which might be a holiday abroad, but the other four of which he would spend at home. He has to study for his exams during his holidays.

5.31. Mr Mason was asked to look Mr Burstow's statement[11]. He said that he did not contend that Mr Burstow was lying about his visits, but said that they were an hour at a time. Mr Mason said that the site is used heavily by schoolchildren and he was very surprised that Mr Burstow had not seen any schoolchildren on his second visit between 3 and 4 p.m., because he believes the school finishes at 3.30 pm. Mr Mason said there is a school just off the roundabout and the majority of children from there walk back across the application land.

5.32. Mr Mason was asked to look at Mr Newberry's statement[12]. Mr Mason said that it appeared Mr Newberry had passed the site, but it seemed that he had been driving past. Mr Mason said if he were driving he would pass the site in a matter of seconds, and he doubted that driving through a residential area, much of his attention would be on the land. Mr Mason was asked to consider Mr Newberry's 10 visits to the land. He said that he was there for 10 minutes, and perhaps if he had been there for longer he would have seen people there. Mr Mason accepted that Mr Newberry had seen what he said he had seen on the occasions he was there, in the 10 minutes he was there for.

5.33. Mr Mason was asked about his witnesses' evidence that use had increased over time. He said that the increased use he had seen was in the evenings and weekends. He agreed there had definitely been an increase in the use since 2006.

5.34. Mr Mason was asked to look at Mr Salsbury's statement[13] and at his evidence of his seven visits. It was put to Mr Mason that on each occasion all Mr Salsbury saw was people using the tarmac path. He said they were all short 10-minute visits. He accepted that Mr Salsbury was not picking the times of his visits to find a quiet patch, but going when it suited him as project manager. Mr Mason suggested that Mr Salsbury's visits prior to the submission of the planning application would have been during working hours.

5.35. Mr Mason was asked to look at Ms Kelly's statement[14]. Mr Mason said that Ms Kelly's home is half a mile from the site. He said that it was not clear how often she had visited the site. Mr Mason said that Ms Kelly is also an employee of the Second Objector. Mr Mason agreed that you can see the land quite well if you are driving, but he said that he would not expect someone driving along that residential road, and across the roundabout, to be looking to the left out of their car window.

5.36. Mr Mason agreed that Ms Kelly's evidence about the park's facilities is correct. The squash courts are now closed, but the rest still exists as far as he knows. The pavilion is now closed, and there used to be a snooker club in the adjacent building which is now closed. There are football pitches in the park which are

[11] O2/6
[12] O2/31
[13] O2/43
[14] O2/77

used by local teams, and informal green spaces where you could walk a dog. There are allotments. You cannot walk with a dog into the allotments themselves, but you can walk around the back of them. It is quite a long walk. Mr Mason has done it himself.

5.37. It was put to Mr Mason that if you wanted a destination for any sort of recreation you would be able to find it at Lewsey Park. He said that the land serves a purpose for the local community, but the park is half a mile from his home, and if he is dog walking he would be likely to interrupt a formal game of football there, with people in strips and a referee. He did not deny that the park was a nice space, but people use the area of land near their homes. He did not agree that Lewsey Park or the informal area near the motorway would be better. He said that he can walk out of his home onto the application land. The other areas are not better, or he would have used them instead. He walks his dog for 30 minutes, morning and evening, in the week. Mr Mason said that he does not need to go for a long walk, because he cycles to the station. He walks on the land and goes home, throwing a ball for his dog. The dog is a Staffordshire Bull Terrier. He does not take him to the land near the motorway. He throws the ball for the dog, sitting on the gypsy mound. In the winter he does not sit on the land if it is wet, in those circumstances he puts the dog on a lead, and the dog can run around. They do not confine themselves just to the application land, he also goes to the field near the electrical sub-station. He does not go on the land towards the motorway: he said that as you walk up there the land gets narrower, and you have to have the dog on a short lead. By the time he got to the land near the motorway it would be time to turn around and come back.

5.38. Mr Mason never goes to Lewsey Park. He agreed it would possibly be 10 minutes' walk to the swimming pool from his house. He said that he had walked down there to see where Ms Kelly's house was. It was put to Mr Mason that with the more attractive areas to recreate nearby, people only rarely go off the footpath on the application land. He disagreed.

5.39. Mr Mason was asked where he would he say he lived. He said the Bird estate, Lewsey Farm. To the west of the land is Lewsey Farm, and to the south is the new Bird estate. Gelding Close falls into Lewsey Farm. Buzzard and Bunting Road are known as the Bird Estate, and collectively it is known as Lewsey Farm. If he were ordering a takeaway they would say "oh yes, Lewsey Farm", but a resident would say the Bird estate, because the whole estate is named after Birds.

5.40. Wheatfield Road would be in Lewsey Farm. The dividing line is Pastures Way. The plan on A/37A shows the entire Lewsey Farm estate. Leagrave High Street is within the Lewsey Farm estate. Mr Mason said that he believes that the area the other side of the red line running along Poynters Road is Dunstable. That is where the boundary is marked. Everything inside the red line is the Lewsey Farm electoral ward, and Mr Mason believes is all the Lewsey Farm estate. The majority of the Lewsey Farm estate was built in the 1960s, and the Bird Estate, later, in the 1980s. Mr Mason was asked about the roads in the south named after various poets. He said from recollection that was one of the earlier parts of the estate.

5.41. The area shown in orange on A/37B is the claimed neighbourhood. Linnet Close, Sparrow Close and Finch Close should be coloured. This is the area which he thinks the people who use the land come from. The other roads not included open up into the other areas of green around the estate. Mr Mason said that there was is not anything else which he could think of which distinguished the claimed neighbourhood.

5.42. Mr Mason gave further evidence in relation to the issue of neighbourhood on the final day of the inquiry. Mr Mason said that he had been considering overnight what united the properties in the neighbourhood which he had identified. He said that he had thought that there was a doctor's surgery and that the children go to the same school. He then went onto the internet to look for further information. He had discovered that his claimed neighbourhood was within the neighbourhood known by the Office for National Statistics website as Luton 009A. Mr Mason produced a map printed from the ONS website showing Luton 009A[15].

5.43. Mr Mason explained that the electoral ward is known on the ONS website as Luton 009, and the electoral ward is split into neighbourhoods, each given an identifying letter. He said that the ONS website does not say on what basis the neighbourhoods within the ward have been identified, but it provides the statistics for that neighbourhood, including resident numbers, homes in the area, and whether or not the area has a doctor's surgery. Mr Mason said that the ONS site says there is no doctor's surgery within the neighbourhood, but in fact the building which is the doctor's surgery is split by the green line on the western edge of the area identified as Luton 009A. The schools Mr Mason had been thinking of were the junior and primary schools which are in the process of merging, which are to the south of Luton 009A, within Luton 009D. The local shop is at the junction of Pastures Way and Ravenhill Way, within Luton 009E.

5.44. The schools shown on the Hertfordshire AA Street Map to the west of Pastures Way, Southfields J & I and Chantry J & I, are the schools which Mr Mason thinks have merged into one school. The other school in the vicinity is a Catholic junior and infant school called St Martin de Porres. Mr Mason agreed that the children who attended those schools would come from both within and outside the Luton 009A neighbourhood. The doctor's surgery on Wheatfield Road serves patients both inside and outside the Luton 009A neighbourhood.

Evaluation of Mr Mason's evidence

5.45. I was satisfied that Mr Mason was an honest witness, and that most of his evidence was reliable. His evidence in relation to the comparative use made of the land by people using the cycle path and people using the remainder of the application land became confused, I think because he was seeking to distinguish between people making a right of way type use of the land and those using the land for informal recreation, which was not the question he was asked to address.

[15] A37C

5.46. I am satisfied that Mr Mason has regularly walked his dog on the application land between 2006 and the end of the relevant period and that his dog walking has included recreational use in that he has meandered over the land, not along the tarmac path, enjoying the land apart from the path and has on occasion at the weekends when the grass is dry sat on the grass and thrown a ball for his dog to retrieve.

5.47. I accept Mr Mason's evidence that he has seen children playing football on that part of the application land which adjoins Pastures Way, regularly on a Saturday, and that he has on two occasions seen a game of bat and ball with cricket stumps on that part of the application land which adjoins Kestrel Way.

5.48. The Big Lunch event which Mr Mason organised was after the end of the relevant period.

5.49. I prefer Mr Salsbury's evidence as to when the trial pits surrounded by orange plastic netting were dug to Mr Mason's evidence on this point.

(2) Mrs Sarah Cox
21 Buzzard Road, Luton

5.50. Mrs Cox provided a written statement dated 4th September 2010[16] and an evidence questionnaire dated 27th August 2010[17]. Mrs Cox stated that she had known the land since October 2007, and had used it since that time. The general pattern of use of the land had remained the same during the time she used it. She accessed the land by crossing Kestrel Way from the end of Buzzard Road. She used the land three to four times a week to walk her baby (who was 5 months old at the time of the inquiry) in his pram, for the occasional picnic, for jogging and dog walking. She has taken part in walking, recreation and occasional picnics. She gains access to the land by walking to the end of Buzzard Road. Her immediate family used the land to walk the dog and to walk the baby in his pram.

5.51. Mrs Cox knew of one community activity which had taken place on the land: a meeting for local residents in support of the land being registered as a village green. She had participated in that meeting. She did not know whether any organisations used the land for sports and pastimes.

5.52. Mrs Cox said that she had seen the following activities taking place on the land: children playing, informal football games, picnicking, dog walking, kite flying, team games, people walking, blackberry picking and bicycle riding and for commuting: people walking to the station for work.

5.53. She had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.54. In oral evidence Mrs Cox said that the first time she was aware of the land was when she came to view the house she and her husband now own. They were

[16] A46
[17] A47

early, and sat and ate their packed lunch on the land. That gave them a good feel for the area, and it was one of the reasons they bought the house. Mrs Cox occasionally uses the local park, but the difference between the park and the application land is that she uses the application land to get the baby to sleep: she walks him across the grass and then up and down the path. If she were to go to the park, she would have to cross the crooked paving slabs which might disturb him, and when she gets there she would have to push the pram over the grass, and also the roads are busier, with more car fumes.

5.55. In cross-examination on behalf of the First Objector, Mrs Cox said that her baby was born in April 2010. The baby-pushing has been since that time. She said that she occasionally goes to Lewsey Park, but does not generally go there. She uses the tarmac path on the land because it is very smooth.

5.56. Mrs Cox was asked about the jogging she had referred to in her written statement. She has not jogged since she had the baby. Before she had her son, she used the land for jogging. The cycle route was there, and she sometimes came onto the L shape from the end of her road, along the path up to the point of the motorway and back. If she was feeling energetic she would do a circuit round the allotments, along the path to the motorway, right to the allotments, and round the block of the Bird Estate. She would do the shorter route more frequently.

5.57. Mrs Cox was asked about the dog walking she had referred to in her written statement. She does not have a dog herself, but her sister and mother do and visit regularly, at the moment once a week or once a fortnight, because she has just had the baby. She goes walking with them. They walk down the path with the dog running around, although they do not always take the same route. Sometimes they walk under the motorway bridge, and once they get onto the land they can let the dog off the lead, other times they might throw the ball on the land. Once recently they walked all the way to Haughton Hall Park. Most of the time it is just a quick walk to toilet the dog.

5.58. The picnics she referred to in her written statement were the Big Lunch, and the picnic when she came to view the house in August 2007. At that time she and her husband were living in Wales, having met at university there. They did not know the area when they moved, but were looking for a house they could afford in a nice area because she had got a job with the Probation Service in St Alban's. They came down one Saturday and viewed about 10 houses in one day. Mrs Cox said she was also considering using the land for a picnic in connection with her son's Dedication at the local church, because her garden is not that big, and it would be cheaper than hiring a hall.

5.59. Mrs Cox was asked about the Big Lunch. Mrs Cox agreed that she had filled in the questionnaire and Mr Mason had typed up her statement from the information in the questionnaire. Mrs Cox said that she had only heard about the Big Lunch from a neighbour. She read that event as being partly to find out what was happening in relation to the land and partly an opportunity to get the community together. Mrs Cox was referred to her answer to question 18 in her questionnaire where she had stated that there was a meeting for local residents

in support of the land being classed as a village green. That was a reference to the Big Lunch. She said that she supposed she could have written a meeting for people to have lunch instead.

5.60. Mrs Cox was asked about the activities she had seen taking place on the land. She was asked whether the football took place on the Pastures Way part of the land. She said that she does not take much notice of what the children are doing, but thought she had seen games on the part of the land along Kestrel Way, maybe rounders. It was put to Mrs Cox that for the most part people are on the tarmac. She said she did not know: you cannot really confine children or dogs to tarmac, but people walking from A-B would be on the tarmac, because that is the easier way to go. Her predominant use is on the tarmac, but that is not to say that she does not use the grassed area. She has chickens in her garden, and often goes onto the grassed area to pick the grass for her chickens. She got the chickens she thought in the summer of 2009, but she was not sure: it may have been in the summer of 2008. It was one of those years. She picks grass about once a month. In the summer months people give her grass in bags when they mow their lawns. She goes on the application land more in the winter to pick grass, because then people do not give her grass. Recently the grass was mown and she went and picked it up off the land. Sometimes she will go and pick up clumps of grass. The jogging would have been on the tarmac. She thought the use she had seen was 50/50 on and off the tarmac. People picking blackberries would be on the verge, not on the tarmac. The children would be on the grass. She said it was difficult to assess what proportion of the use was on and what off the tarmac. She sees a mixture.

5.61. Mrs Cox said that a neighbour, Lillian Dujardin, had asked Mrs Cox to say that she uses the land because she has had a stroke recently, and cannot get to the park. It makes her feel like she is in the countryside because of the views. Ms Dujardin has put in a written statement.

5.62. In cross-examination on behalf of the Second Objector, Mrs Cox said that she had not read the Second Objector's bundle. She had heard the questions Mr Ground had asked Mr Mason. She accepted that the people who had made statements were telling the truth as to what they had seen on the site. She had not read the statements, but understood that they said that the majority of use was along the path. She was asked whether when she was on the site she mostly saw people walking from A-B. She said people walking their dogs did not walk from A-B: they just used the land, as did people picking blackberries, as she did with the pram. She goes up and down the path, and goes back home. Broadly people do what she does, apart from the children playing. She was asked what age-group the children fall into. She said she does not really look at the children, but they are 8-13ish, young, not youths. The children are generally without adults, but she does not really look. As she is driving past she might see a group of children playing or sitting on the grass or flying a kite a few times. She does not really look at them because she is driving past. If she is on the land, she might see a few children occasionally. She does not feel that there is a danger that she or the pram might be hit by a ball, although she said that sometimes she might be in danger when people are throwing dog balls. It was put to Mrs Cox that a 10 or 11 year old could easily kick a ball onto Kestrel

Way. She said there is a dip in the land. Potentially they could, but she had never seen that happen. She agreed that Kestrel Way is very busy at certain times. It was put to her that you would have to be careful not to kick a ball onto the road. She said that the application land is not that narrow, so you would not have to be that careful. She cannot remember an occasion when she was on the land when there was a game of football taking place, but said that she had seen games of football when she was driving past. She had not seen one when she was walking on the land.

5.63. In re-examination Mrs Cox was asked when she used the land: she said that she uses it any time of day when her baby cannot sleep, morning nap or in the afternoon, during the working day. The driving past she had referred to would have been in the evening before she had the baby, but she does not drive past often in the evenings now, as she hardly goes out in the evening. She also uses the land at the weekend. She also uses the land a lot to meet friends, as there seems to have been a baby boom on the Bird estate: there is a group of friends, two in her road and one on Osprey Walk, all of whom have babies about the same age as hers, and they meet on the land.

Evaluation of Mrs Cox's evidence

5.64. Mrs Cox was an honest witness. She made two types of use of the application land between August 2007 and the end of the relevant period: she jogged across the land on the tarmac path, as part of a longer route, and she picked grass from the application land to feed her chickens. I am satisfied that the jogging was a right of way type use rather than a village green type use. I accept Mrs Cox's evidence that other people, apart from the children playing on the application land, use the land in broadly the same way as she now does: they use the path, but only that part of the path which crosses the application land.

(3) Ms Sue Bowen

5 Bunting Road, Luton

5.65. Ms Bowen provided a written statement dated 23rd January 2010 which was sent to the Registration Authority with the application[18], a written statement dated 5th September 2010[19] and an evidence questionnaire dated 29th August 2010[20]. Ms Bowen has lived at her present address since 1990, and moved there from elsewhere on the estate.

5.66. Ms Bowen stated that she had used the application land since 1988 (1990 in her later statement) for exercise, dog walking, wildlife watching and feeding the birds that nest in the hedgerow. She accesses the land from various footpaths. She uses it every day. Her immediate family (her grandsons) use the land for picnics and family walks, and they also play football on the land.

5.67. Ms Bowen stated that the land is used by the local community for fund raising, picnics and days out. She has participated in these activities. A hiking group also uses the land. She has seen the following activities on the land: children

[18] A13
[19] A10
[20] A39

playing, informal football and cricket games, bird watching, picnicking, dog walking, kite flying, team games and people walking.

5.68. During the time she has used the land, the general pattern of use had increased: the land had become more popular.

5.69. She had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.70. In oral evidence Ms Bowen said that when she saw the orange tape around the square holes, she thought that the Council was planting more trees. The Council had protected new trees when they had planted trees before.

5.71. Ms Bowen's grandsons were 9 and 11 at the time of the inquiry, and live in Bedford. She looks after them sometimes in the school holidays, in the afternoons when she does not work, if her daughter is working, and also sometimes on the weekends. The application land provides a much larger area than her garden for kicking a ball.

5.72. In cross-examination on behalf of the First Objector Ms Bowen was asked about her statement that the land was used by a hiking group. She did not know the name of any hiking group, but said that she often sees hikers with big boots and backpacks walking along the footpath across the farm. The farm she is referring to is the farmland to the north of the application land. She had seen the hikers walking up and down the application land. They would have come across the farmland by the M1, and then come along the L-shape of the application land, and back down onto the farm that way, where there are public rights of way.

5.73. The reference to fundraising to is to activities in connection with Keech Cottage, a children's hospice, which is on the A6 towards Bedford, on the outskirts of Luton. The fundraisers come up at Christmas time and once in the summer with buckets and everyone goes over there. They come up with the singing Father Christmas train. People stand on the green to watch, as the train weaves in and out of the different roads of the Birds Estate. People have also built snowmen over there in snowy years.

5.74. Ms Bowen's own use is primarily dog walking. She said if you go to the land at dusk there are bats which fly right by your face if you stand there, and she enjoys that, particularly in autumn. They do not come out in the winter, but they come out a lot at this time of year. The bats come out of the trees on the application land itself, not out of the trees in the hedgerow.

5.75. Ms Bowen gets onto the land by using the footpath. She does not want her dogs to run across the road, so when she comes to the end of Bunting Road (she lives only two houses in), she turns right and up to the crossing on Kestrel Way. Sometimes she walks along the path. She goes out at 6 a.m. At this time of year walks along the lip built to stop the gypsies going onto the land, because that is the area which is in the light. There are no lights on the cycle path. She walks on the Kestrel Way side of the bump, and behind the bus stop. If she walked

along the path, she would be in pitch black. Ms Bowen said there was a problem with gypsies at one time, and the Council had built the bumps and put the bollards in, but she could not remember when. Ms Bowen was asked whether she was prevented from going onto the land when the gypsies were there. She said that she did go onto the land when the gypsies were there. They had put their caravans in a circle. She thought it was before the cycle path was built. She had been going to walk straight through the caravans, but the gypsies had said to her that they would not walk through if they were her, so she did not. There has been no trouble since the bump was built. Prior to that the gypsies would come, and were moved on. They would also park further down by the M1 bridge. It was not just one instance: before the bump was installed they were there a number of times, although she could not say how many.

5.76. Ms Bowen attended the Big Lunch. She was asked whether the reference to the local community picnic in her answer to question 17 was a reference to the Big Lunch. She said it was. She was asked about her answer to question 18 where she had said that the community activities took place every weekend. There was not a community picnic every weekend, but she has lived in the area a long time, and people will say to her do you want to go for a walk on the green. Her grandchildren and Colin Nye's grandchildren play together. Not every weekend, but sometimes, she might knock on a door and say are you going over. She does not want to walk miles. She sits on a blanket and lets the children play.

5.77. It was put to Ms Bowen that the picture which emerged from the monitoring carried out by the Objectors' witnesses was that the overwhelming majority of activity took place on the tarmac path. She agreed that there was a well-worn path there before the tarmac path was constructed. She was asked whether most people were on the path. She said that from the Objectors' witnesses' observations, they were obviously not there at the same time as her. She has lived in the area for 26 or 27 years, previously at 5 Skewer Close. Since the cycle path was put in, people use it for cycling: that is what it is. Her observation is of children playing, and of people walking and people sitting on the land, as well as the path being used. She said that it would be possible to go to Oxford Street on a Saturday and take a photograph which showed no-one there. She was on the land on Sunday, and met people she knows to say hello to there, and people were blackberry picking. The land is used. She agreed that bicycles use the path, and people walk up and down it, and they would rather use that than the road, but said that the land off the path is also used.

5.78. Ms Bowen currently works 8 a.m. – 2 p.m., for Whitbreads, training the call-centre staff for Premier Inns. She has always worked those hours, because those hours suit the dogs. She has worked for Whitbread for 10 years. Before that she was a rep on the road for S&G Components, and she worked 8-1.

5.79. In cross-examination on behalf of the Second Objector Ms Bowen said that she did not know when the bump to stop travellers getting onto the application land was built, although she thought it had probably been there 6 or 7 years.

5.80. Ms Bowen said that she had not read the Second Objector's witness statements. She was taken to Mr Burstow's statement[21]. She gets home from work at 2.15, and takes the dogs out, arriving home by 2.55 for Upstairs Downstairs on ITV3, so she would not have been on the application land either between 1 and 2 or between 3 and 4, as he was. Ms Bowen agreed that the area beside Pasture Way is the most pleasant place for children to play, but said that her grandchildren play opposite where she lives. The children usually play on the land after school or in the school holidays. She said that the picture painted by the photographs taken by Mr Burstow is not what she sees on the green. She did not accept that if one went on a random occasion that is what one would see, and returned to what she had seen on Sunday. People pick blackberries for quite a few weeks a year, maybe 8 or 9 weeks, she thought. There are also blackberry bushes along the former bus lane north of the application land. The blackberries are there for a long time.

5.81. Ms Bowen was asked to look at Mr Newberry's statement[22]. It was put to her that he had passed the site regularly over the last 10 years and had only seen people in transit. She said he saw something different to what she saw. He does not live there, she does. His 2009 visits, including the visit on 14th May 2009 at 2.30 p.m. when according to Ms Bowen's evidence she would have been dog walking on the land, were put to her. She pointed out that he mentioned that he had seen dog walkers on the site in the previous paragraph. In the afternoons she goes in different directions sometimes, but mainly tries to walk on the grass because that is what dogs like. Her present dog would be on a lead. She has owned dogs which she has not had on the lead. She does not throw a ball for her dog. She has a route at different times of the year. The morning one is up and down the embankment. The afternoon one is down the bank and up the side of the farm, not on the cycle path, until she crosses the road. It is a circular route. She has always had little dogs, and walks them a short way and often. The present dog is a Yorkshire Terrier. She does a different circuit depending on the time available and the time of year. As she has got older she has not gone on such long walks. She goes on smaller circuits.

5.82. Ms Bowen was asked about her statement that the general pattern of use of the land had increased. She said it had increased because of the bikes: people use the cycle path for bikes, and go 100mph up there, so if you do use the path, you risk your life. She agreed that the other dog walkers would be doing circuits, maybe not the same circuit as her, but circuits. A lot of her friends have grown old living in the area, and they used to do the farm walks, but cannot do them any more. The land is handy for short and often walks.

5.83. Ms Bowen was asked about Mr Salsbury's statement[23] and about his evidence that what he had seen was people walking along the designated footpath/cyclepath. She agreed that that was what he had said. Ms Bowen said that his visits were 10 minutes in duration. She had seen the photographs which Mr Bowen had taken. She agreed that there was no-one on the land in the photographs, but said that the position on Sunday would have been

[21] O2/6
[22] O2/31
[23] O2/43

completely different. It was put to her that what was in the photographs was typical of what you would see on the land. She said that she totally disagreed and returned to her evidence about the Sunday before the inquiry. She agreed that the Sunday before the inquiry was a lovely sunny afternoon. She agreed that some of the days in the photographs are nice days, and said that some are overcast, although she said that that was by-the-by: she had been over there in snow. She agreed that some of the days shown were sunny days. It was put to her that even on sunny days one could go to the application and all you would see was people going by on the cycle path walking or cycling. She said that was not what she sees. She does not walk down the path because of the speed that the cyclists go down the path. They do not slow down because they have right of way. Her circuits do not go along the cycle path. She walks along the embankment and in the foresty bit. She did ask someone to slow down once, when she was on the embankment further down, towards the M1 bridge, where you are right next to the cycle path, and got a tirade of abuse. She agreed that some people do walk along the cycle path. She said that she did not say that people do not use the cycle path, but rather that people also use the green for all sorts of reasons.

5.84. She was not saying that she used the application land because it was helpful to the application, but because she uses it, and she wants to carry on using it, because she is not getting any younger, and she does not want to walk half a mile to a park full of pit-bulls, because you are now on the Lewsey Estate. She has always enjoyed the green and the countryside the other side of it. The view is beautiful. She walked into the countryside the other side of it when she was younger, but does not do so any more.

5.85. In re-examination Ms Bowen was asked about the gypsies: she said that they did not stop her walking on all of the land, just on the area across the circle where they were camped. They were not all over the land. She could still use the land either from the top end or from the bottom end, and she did still use it. The gypsies had, over the years, been on the land adjacent to Pastures Way and they had also on the land adjacent to Kestrel Way. They did not cover the whole area: there were only maybe 6 or 7 caravans on each occasion.

Evaluation of Ms Bowen's evidence

5.86. I am satisfied that Ms Bowen was an honest witness. Although I was satisfied that Ms Bowen has, since the bund along the application land was built and the grass in that area re-grew, chosen to walk along the bund when dog walking in the early mornings, I am not satisfied that the nature of this use is such as to make it clear to a reasonable landowner that she is asserting a right to use the land as a whole.

5.87. I accept Ms Bowen's evidence that her grandchildren have played football on the application opposite the end of Bunting Road on occasion when she has been looking after them. Having regard to the ages of her grandchildren (9 and 11 at the time of the inquiry), it is likely that this activity would have taken place from 2002 or 2003 at the earliest. She stated that her grandchildren continued to use the application land for this purpose at the time of the inquiry.

(4) Mr Keith Smith
34 Buzzard Road, Luton

5.88. Mr Smith provided a written statement dated 23rd January 2010 which was sent to the Registration Authority with the application[24], a written statement dated 4th September 2010[25] and an evidence questionnaire dated 22nd August 2010.[26]

5.89. Mr Smith stated that he had known the application land since 1989, and had used it since that date every day for exercise and dog walking and to play with his godchildren and his family's children. He accesses the land from the public right of way which crosses the land. His immediate family use the land to walk his dogs. Mr Smith stated that he has seen the following activities taking place on the land: children playing, informal football games, dog walking, kite flying, people walking, blackberry picking and bicycle riding.

5.90. During the time Mr Smith had used the application land the general pattern of use has remained basically the same.

5.91. Mr Smith had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.92. In cross-examination on behalf of the First Objector Mr Smith was asked about his statement that he had made continuous use of the land. Mr Smith said that he has lived in the area for 21 years and has always had one or two dogs, which he, together with his wife, has walked on the land every day, two or three times a day. He walks straight across from Buzzard Road onto the land. He has used the land a lot more this last year, because he has been off work following a heart attack. Mr Smith used to work for Shanks waste, in Hitchen. His hours were 8.30-5, with an hour and a half for lunch, so he could get home and walk the dogs at lunchtime. Mr Smith said that the Council's and Aldwyck's evidence was just a snapshot. It was put to him that what those witnesses had seen was people walking or cycling up and down the tarmac path. He was asked whether it was fair to say that most activity takes place along that route. Mr Smith said that he generally walks along the top of the bank, although it depends on what the weather is: he uses the footpath if the weather is wet or snowing. One of his dogs he keeps on the lead, the other not. He refers to the path along the bank as the top footpath. He walks up to the roundabout and then back along Kestrel Road, crossing the footpath where it bends, and continuing along the path along the back of the hedgerow, to the east of the application land. He then turns round and comes back.

5.93. Mr Smith was asked about his use of the site for reasons other than dog walking. He does not have any children of his own, but when his god children, (who mostly live in Sheffield), children of the family, and the children of some friends who live in Dunstable come, they do not play in his garden, they go and play on the application land.

[24] A12
[25] A78
[26] A79

5.94. Mr Smith was asked whether the majority of the kick-about football which takes place on the land takes place on the Pastures Way part of the land. He said he would not walk all the way up there: he just walks across from the end of his road. His brothers and sisters come and see him with their children. He has played with his brothers and sisters' children over the years, an awful lot. He has two godchildren who now live in Australia, but who used to live two doors down from Mr Smith. They moved when they were 7 and 9, a couple of years ago. From when they were little until when they moved, he played on the green with them a lot. He and his wife do not have children, and these two godchildren almost became part of his family. They were always playing on the green. It was put to Mr Smith that the objectors' evidence suggested that the majority of use of the application land was on the cycle path. Mr Smith said that his wife will not walk on the cycle path. They walk on the embankment because it is safe: it is lit in the evening. He thought that if the people taking the snapshots had gone to the land in the evening at 6 or 7 o'clock they would have seen quite a few people doing that. Mr Smith agreed that use of the cycle path had increased since the tarmac was put in: that was the idea of the cycle path, to create a cycle route from Luton to Dunstable. He had also seen pedestrians on that route, but he said there were an awful lot of local people on the application land as well.

5.95. Mr Smith was asked about the gypsies, and about Mr/s Rodell's questionnaire evidence which was that use of the land had been prevented when gypsies put their caravans on it. Mr Smith thought that the bund had been erected in about 2003 or 2004. He agreed that prior to that, gypsies had been onto the land on several occasions. He still walked on the land when the gypsies were on the land. He said that it was not an issue for him. He thought they were only in the top left hand corner, in the northern end of the Pastures Way section of the land, and in the eastern area, before they did the waterworks. He had never seen them in the centre. The presence of the gypsies did not affect the area he walks. They would not have been in his way. When they were on the land to the east of the application land, he was able to do half of his walk: he could not do the bit which goes down towards the motorway bridge.

5.96. Mr Smith said before the cycle path was constructed on a rainy day one would not have walked by the edge of the field, where the cycle path currently is, because it would have been too boggy. Mr Smith was taken to the aerial photograph, and he agreed it showed a well-worn path in approximately the position that the cycle path now is. He pointed out that there is also a path on the route he describes as his top path route. He said that when it was wet one would not walk on the well-worn path. The routes were also affected by how the grass was cut during the year. In past years they only cut the grass every three or four months, so you would have to walk on the path by the hedge. That would have been the 1990s: 1992, 1993, 1994. They have cut it more frequently recently. He thought that how often it got cut depended how much money they had. He thought it had only been cut four times last year. The grass would grow, and therefore if you wanted to walk, the well-worn path visible in the aerial photograph was where you would go. The path along the top of the gypsy bund was also available. The path visible on the aerial photograph is the one that he would walk on 9 times out of 10.

5.97. In cross-examination on behalf of the Second Objection Mr Smith said that he thought the light green area was the bund, and said it took two or three years to condition itself after it was constructed. Mr Smith said that he did not dispute that the objectors' witnesses had seen what they said they saw, but said that he had lived near the land for 21 years, and what the objectors showed was a very small snapshot. He thought if he had taken pictures over the years his photographs would have shown people using the land every day. He said that he had no doubt the objectors' witnesses had seen what they saw: sometimes it is like that. On the Saturday before the inquiry, he had seen 12-16 people all doing different things.

5.98. Mr Smith said that the largest category of users was dog walkers. All the dog walkers did something very similar to what he does. Mr Smith had sometimes seen children accompanying adults on a walk. He was asked whether if one were looking for a destination to kick a football around, one would pick that area. He did not agree. He said that he had played rounders there with about 20 people 14 years ago on his 40th birthday. They played on the land opposite the end of Buzzard Road. That was a Saturday afternoon. It was his friends and family. It was a bit of fun, not serious. The ball did go onto the road a couple of times. Mr Smith said that he went to the land because it was the local place for him to go, and it was the same with youngsters playing with balls. The party itself was not spontaneous: it was planned. He was asked why he did not go to Lewsey Park. He said that he does not like Lewsey Park, and would not, if he had children, allow them to go there. It is not just around the corner.

Evaluation of Mr Keith Smith's evidence

5.99. I was satisfied that Mr Smith was an honest witness. I was not satisfied that the nature of Mr Smith's use of the application land for dog walking was such as to make it clear to a reasonable landowner that he was asserting a right to use the land as a whole for recreational purposes. Although he did not walk on the tarmac path, and did not, in wet weather, walk on the footpath in the position of the tarmac path before the tarmac was laid, but chose instead to walk along the top of the bund, nevertheless his dog walking on the application land was linear, as part of a circular route.

5.100. I accept Mr Smith's evidence that visiting godchildren and other children of his family members and friends have played on occasion on the application land opposite the end of Buzzard Road. I was also satisfied that he took his godchildren who used to be neighbours to the application land to play between perhaps 2003 and 2008, and that he organised a rounders game on the application land in about 1996 for his 40th birthday.

(5) Mr Nicholas Smith

28 Kestrel Way, Luton

5.101. Mr Smith provided a written statement dated 19th January 2010 which was sent to the Registration Authority with the application[27], a written statement dated 5th September 2010[28] and an evidence questionnaire dated 23rd August 2010[29].

[27] A32

5.102. Mr Smith has known the land since 2007, and has used the land from that time to date daily for walking and for playing ball games such as football and cricket once a week. He has also used the land for star gazing. His immediate family occasionally uses the land for dog walking. A community picnic took place on the land recently as part of the Big Lunch. Access to the land is not restricted and he can access it from all points.

5.103. Mr Smith has seen the following activities taking place on the land: children playing, informal football games, bird watching, picnicking, dog walking, team games, people walking, blackberry picking, community celebrations, bicycle riding and astronomy.

5.104. During the time Mr Smith had used the application land the general pattern of use has remained basically the same.

5.105. Mr Smith had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.106. In oral evidence Mr Smith said that he regularly sees people playing on the land. The houses in the area are very small and have small gardens. Although he understood that the Council's position is that the housing density is low, the gardens are not big enough for parents to play with their children, and the land is invaluable both for parents playing with their children, and for children playing by themselves. The only other place people can go is a mile away. People could walk there, but they would not go so often. The application land is used too regularly for it to be got rid of, in his opinion.

5.107. In cross-examination on behalf of the First Objector, Mr Smith said that before 2007 he lived on the other side of Luton. He only became familiar with the application land when he bought his present property. He works 9-5 and returns home from work at 5.30. He leaves home at 8.30 in the morning. He works Monday- Friday. His first hand knowledge of the land is mornings, evenings, weekends, occasional working from home days, and holiday weeks when he is usually at home.

5.108. Mr Smith walks on the land without a dog, for recreation and health. He walks all the way around the estate, on the road which goes right round the outside of the estate, and comes out near where the swimming pool is. He walks onto the land, and down the grass, not on the cycle path, but down the middle of the grass, to the end, south down Ravenhill Way, to where the allotments are, round through Lewsey Park, and back up Pastures Way, where the schools are. That is his daily walk when he gets home from work.

5.109. Mr Smith was asked about his evidence in relation to football and cricket. He was asked whether the cricket was infrequent. He said his friends get together

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[28] A86
[29] A87

at his house every Wednesday evening. His friends have children and they all go over to the land to play sports. They take a ball, or a cricket bat and ball, or a pair of binoculars. It is the same group each time: Mr Robert Edwards, who lives in Tottenhoe, Mr Daniel Bright from Dunstable, Mr Wesley Scott who lives in Putteridge in Luton, and Mr Oliver Carnell who also lives in Putteridge. They come with their families. When his friends started to have children they decided to set one night a week when they would get together. Three out of four times they come to Mr Smith's house, on the fourth time they go to one of the others' houses.

5.110. Mr Smith had not looked at either the Council's or Aldwyck's evidence. It was put to Mr Smith that the Council's and Aldwyck's employees and consultants had visited the land for varying lengths of time, and that the broad picture they had taken from the visits was that there was activity on the land, but that the activity was, for the vast majority of the time, on the tarmac path. Mr Smith was asked whether he was exaggerating what he had seen. He said he was not.

5.111. Mr Smith was asked how often he had seen picnics: he said occasionally, probably two or three families this year. He gave as an example one family who he had seen sitting opposite his house on a rug, eating from a picnic basket, when he was driving home from work. He did not know who they were and did not recognise them.

5.112. Mr Smith was asked whether it would be fair to say that most of the activity on the application land takes place on the tarmac route. He said no: the tarmac path is part of the national cycle route, and it is busy in the morning and evenings, with people cycling to and from work. The activities such as football and cricket are not played on the tarmac, but on the grass. The dog walking takes place mostly on the grass. Some people do use the tarmac because it is easier to walk on. He sees one woman with 3 Dulux dogs walking up the grass every day. One of his neighbours, Jean, who is in her sixties, crosses the land and uses the tarmac because it is easier.

5.113. In cross-examination on behalf of the Second Objector, Mr Smith was asked about his Wednesday evening activities. In the winter, his friends come to his house at about 7. Sometimes he cooks, and sometimes they get a take away. Dinner is usually ready for 7.30, finished by 8. It depends how flush he is feeling as to whether there is pudding. If they have coffee, if they are taking binoculars over to the application land, they would take the coffee with them. They would have finished dinner entirely by 8.30. Sometimes in the winter they would give going over to the application land a miss. The space station which they go to view comes over about once every 6 weeks. There is an online tracker, and if it is about, they go over and have a look at it. Mr Smith agreed that observing the space station is a sporadic and not all that frequent event, but said that that is not the only thing he and his friends look at. They are also interested in astronomy. They have for instance used the new Iphone app to look at the stars. Mr Smith agreed that he and his friends have other things to do and talk about other than going to the land and they do not always go to the land. In the winter it is dark and cold: they do go there to look at the stars but they cannot play sports on the land during winter.

5.114. Mr Smith agreed that the bridge under the motorway is about 450-500 metres from his house (he described it as a long par 5). The Lewsey Park area is about 1 km, probably under a kilometre, from his house. He was asked why he had described the other available open space as being about a mile away. He said that it was because he had calculated his circuit as being about 1.6 miles, and the park was about half way round. He agreed that he and his friends could get into the car and go as far as they wanted, but said that, if he were a father, he would not let his children go to the other side of the estate unsupervised. He and his friends could go further, but they do not. Sometimes their meetings do not involve going outside at all, if it is raining. Occasionally, but rarely, they might go a bit further, for instance to Lewsey Park. The evenings end anywhere between 10:30 and midnight. He said that he was not saying that they use the application land for the full 2.5 hours. It was put to him that his use of the land was on the odd occasion: He said that if they meet three times a month at his house, they may use the land once or twice a month in the summer and occasionally in the winter.

5.115. Mr Smith was asked to look at Mr Burstow's statement[30]. Mr Smith agreed that he would not usually be on the land on a Friday afternoon between 3 and 4. Mr Smith was asked whether the photographs taken by Mr Burstow were representative of what he might see on the land on a Friday afternoon. Mr Smith did not agree that the photographs showed a typical scene on a Friday afternoon. He said that both people on the land and no people on the land were typical: there were never 100 people using the land. He said that one could turn up any day of the week, and take pictures of an empty bit of green.

5.116. Mr Smith was asked about his evidence of a family picnicking: he agreed that most of the site can be seen quite well from the road. Mr Newberry's evidence that he had only seen pedestrians, cyclists and dog walkers moving through the site using the cycle path on the occasions he drove past was put to Mr Smith. Mr Smith said that if he had been asked to keep a record over the last 6 months of the people he had seen on the land, it would be quite different to this.

5.117. Mr Smith agreed that the most common use of the land was dog walking, and that the dog walkers tended to walk their dogs in a circuit. He was asked to put that use to one side, and asked to assess whether the remaining use was sporadic and infrequent. He said it was more than that, and was quite frequent at the weekend. There is a group of 5-6 children who play regularly on the Pastures Way bit at weekends, sometimes with their fathers, who he thinks live 3-4 houses up from the end. They are aged 6-7. That is a normal occurrence, and he sees them regularly at the weekends. There is a group of children who play cricket on the patch opposite his house. He sees the cricket out of his window, but not as regularly as the football. Football is maybe 3 out of 4 weekends, and cricket one out of 4 or one out of 5 weekends.

[30] O2/6

5.118. Mr Smith was asked to look at Mr Salsbury's statement[31], and Mr Salsbury's evidence that he had visited the land on seven occasions, and only seen people walking or cycling on the path was put to him. Mr Smith said that he believes the use of the land is more than infrequent. He said that he can only comment on what other people say they have seen, on the basis of what he sees out of his kitchen or bedroom window.

5.119. Mr Smith was asked to look at Ms Kelly's statement[32]: Mr Smith agreed the facilities in Lewsey Park are extensively used, but said that Ms Kelly's evidence that she had never seen dog walkers or children playing on the application land was clearly incorrect. He said he did not know whether Ms Kelly's house overlooked the land, but said that he regularly sees people walking on the land, cycling on the land, playing on the land from his kitchen window while cooking. The main activity is dog walking, but the other activities do take place.

5.120. In re-examination Mr Smith was asked to identify the man in the photograph on A249: it is his cousin who was visiting from Australia. Mr Smith and his cousin went onto the land to play in the snow. There were also a couple of other people on the land who walked past and took some pictures.

Evaluation of Mr Nicholas Smith's evidence

5.121. In my judgment Mr Smith overstated his evidence as a result of his desire to see the application succeed. Although he stated in his written evidence that he and his friends used the land for ball games once a week since he moved to his present address in 2007, in cross-examination he accepted that this would in reality be once or twice a month in summer, and only occasionally in winter. Mr Smith's use of the application land for walking was a right of way type user, rather than the assertion of a general recreational right.

(6) Mrs Nicola Irons

36 Buzzard Road

5.122. Mrs Irons provided a written statement dated 4th September 2010[33] and an evidence questionnaire dated 23rd August 2010[34].

5.123. Mrs Irons stated that she had known the land since 2006, and had used it from that time to date, three times a day for dog walking. Her husband also uses the land for dog walking. She recently participated in an event for the Big Lunch which was held on the land. Access to the land is open.

5.124. Mrs Irons has seen the following activities taking place on the land: children playing, informal football games, bird watching, drawing and painting, dog walking and team games and people walking.

5.125. During the time Mrs Irons had used the application land the general pattern of use has remained basically the same.

[31] O2/43
[32] O2/77
[33] A54
[34] A55

5.126. Mrs Irons had used the land freely and openly, without permission, and had never been discouraged from using or accessing the land, either by notices or fencing.

5.127. In oral evidence Mrs Irons said that she knew the land before 2006 when she lived in Coltsfoot Green for a year in 2000. She did not live in the vicinity of the land between 2000 and 2006.

5.128. In cross-examination on behalf of the First Objector Mrs Irons confirmed that she had been involved with the application from the outset, and had witnessed the statements which were sent with the application.

5.129. Mrs Irons works at the airport as an accountant. She leaves home at about 7.30 and tries to get home by about 5, to miss the traffic.

5.130. Mrs Irons' own use of the land is for dog walking. She has one dog, a small dog, a cross Staffordshire-Bull Terrier. It needs walking every day. She does have a circuit for her dog, but in the winter tends to use the application land. In the summer she goes across the land and up the farmer's fields, and back from the motorway end along the green, but in the winter she does not feel it is safe to do the longer walk, as it is dark. She walks on the grass, because people cycling tend not to use their bells to tell you that they are coming. In winter she just walks from Pastures Way down to the bridge and back up, a straight line down, and a straight line back.

5.131. When she lived in Coltsfoot Green, she did not use the land, because she did not have a dog at that time. Her use of the land started in 2006, and was specifically in connection with her dog walking.

5.132. Mrs Irons was asked about the Big Lunch event: she was one of the people who attended the event. She was asked whether it was in part a village green meeting and in part a lunch. She said she just went to have her lunch.

5.133. Mrs Irons was asked about the activities she had seen on the land: she was asked whether the football generally takes place on the Pastures Way part of the land. She said it does: approximately opposite Gelding Close, but more towards the gates where the road starts.

5.134. Mrs Irons had not read any of the objectors' evidence. It was explained to her that various of the Council's officers had been asked to visit the land, and some of the visits had been 10 minutes, and some longer. Similarly Aldwyck and its consultants had visited the land. The broad picture from those visits was that the most common activities were cycling, dog walking and walking. She agreed that those were the most popular activities, with the addition of children playing, which she said she sees more than once a week. She sees them playing football, rounders or hide and seek.

5.135. It was put to Mrs Irons that a lot of the people the objectors' witnesses had seen were on the cycle track. She said that she saw people both on the track and off

it, and, of the dog walkers, more were on the green than on the cycle track. She did not accept that the majority of total use takes place on the cycle track: she said it was 50-50. She had seen cyclists, people with prams, and dog walkers on the path, but had also seen dog walkers on the green and children playing on the green. She had not seen more people on the cycle route than she had on the green.

5.136. In cross-examination on behalf of the Second Objector Mrs Irons said that had not owned a dog for the whole time she had been living at her present address. She acquired her dog in September 2008. She did not use the land before she got the dog. It was only when she got the dog she started using the land. She agreed that her statement that she had used the land continuously since 2006 was not correct and should be changed. Mrs Irons sets off for work at 7.15 and arrives at 7.30. Before she leaves she generally does a long circuit with the dog, going out between 5.30 and 5.45 with the dog. She tries to jog for exercise. She does the whole circuit including the farmer's field. She tries to do it at jogging pace. While she is at work the dog stays in, and she takes him out when she comes home. She does the short walk at that time, at around 5.15. Her garden is paved, so before bed they take the dog back over to the application land: that is a quick walk to toilet him. She goes over the road with the dog. She goes over the mound and stands on the grass. It is a very short affair, just to let the dog urinate.

5.137. Mrs Irons said that there were some dog walkers who are bad at clearing up, but there needs to be a dog bin: the only nearby dog bin is in the middle of the field with the mast, between Coltsfoot Green and the bridge. That area is currently overgrown.

5.138. Mrs Irons was asked to comment on the Second Objector's witnesses' evidence: it was put to her that in all of the visits made on behalf of the Second Objector no-one had seen anything other than people walking from A-B on the paths. It was put to her that the reality was that the lion's share of the time, if you go onto the site, there will not be anything other than people walking from A-B with or without a dog. She said that she has seen people on the land, when she has been out. She said that during the day, it is likely that people would be on the land less frequently, but because she works, she tends to see people on the land outside those hours.

5.139. Mrs Irons was asked whether the use of the land had increased since September 2008. She said she could not really say either way. When she is on the land she sees more than one other person on the land, generally. She sees the children more than once a week on the land. Last time she was out she saw a girl drawing or studying on the Pastures Way bit. That was the first time she had seen that. She said that it was quite rare to see someone drawing. She had not noticed a change in the pattern of use since she had been using the land.

5.140. Mrs Irons was asked whether the likelihood was that the one person she saw when she was out would be walking a dog. She said that she had also seen children playing, and both things were equal in her mind. She agreed that she sees dog walkers but not children out on her early morning walks. She was

asked whether that pattern was similar in the winter, on her afternoon walks, and she said that would be the same, except when there was snow. In the summertime she would definitely see more children than dog walkers, especially at that time in the evening. Those 5 or 6 children are out in the Pastures Way part nearly every night. Two of them live in the end house, and two in the second but end house, and there are another two children who come from another house in the area, she thinks on Geldings Close. She has not seen their parents out with them. She thinks they are between 7 and 8 years old. They are out when she goes out, and are still out when she goes home about half an hour later. They are out quite a lot during the evenings in the summer. That is the only place she has seen children playing, except in the snow, when they were more children playing along Kestrel Way.

5.141. Mrs Irons was aware of the planning application. She was an objector to the planning application, and started the petition against it. She was asked whether the village green application was related to the planning application. She said it was: her opinion is that the land is a green piece of land which is inherited for the community. Lewsey Park is too far and she would not feel safe there. She did not see that putting 51 units of housing on that land would be constructive. She was asked if that was her motive for giving evidence to the inquiry. She said she was telling the truth and there is a lot of use of the land. She did not agree that she had overstated her evidence deliberately to improve the evidence in support of the application, and said that having said she had used the land since 2006 was a mistake on her part: she had lived there since 2006, but only used the land since 2008.

5.142. There was no re-examination.

Evaluation of Mrs Irons' evidence

5.143. Mrs Irons, claimed to have been using the land since 2006 for dog walking, but when she came to consider the matter carefully in response to questions in cross-examination, realised that she had only had her dog since September 2008, and had only used the land since that date. I am satisfied that she did not deliberately mislead the inquiry in this regard, but her mistake does provide a clear example of the inherent unreliability of written evidence, untested by cross-examination. It must be the case that her husband Mr Irons' use did not commence until 2008 either.

Documentary evidence in support of the application

5.144. I have re-read the whole of the applicant's bundle in the course of preparing this report and here mention those parts which are most relevant only.

5.145. The applicant and his witnesses supplied a number of photographs, some of which have already been mentioned in the evidence of the witness who supplied them. Only a few of the photographs supplied were taken during the relevant period, although others which were taken after the end of the relevant period were said to show typical activities.

5.146. Photographs A246-247 were photographs provided by Mrs Paul of a VE Day celebration in May 1995. The activities visible in the photographs are all on the grass area to the east of Pastures Way, opposite the end of Gelding Close.

6. The First Objector's case

6.1. Six witnesses gave oral evidence at the inquiry on behalf of the First Objector. One further witness gave written evidence only. The evidence of those witnesses who gave oral evidence at the inquiry was tested by cross-examination and is therefore of substantially more weight than the evidence of those witnesses who provided written statements only. The evidence of those who provided written statements only must nevertheless be taken into account in evaluating the evidence as a whole.

(1) Mr Martin Samuels
Luton Borough Council

6.2. Mr Samuels provided a written statement dated 20th August 2010[35], in which he stated that he is employed by Luton Borough Council as a Development and Enabling Officer. He visited the application site on 20th August 2010 in connection with the application to register the land as a village green. He remained in the vicinity of the site for 35 minutes. He observed a mother and child picking berries from the hedgerow, two pedestrians using the footpath and three cyclists using the footpath. In addition two Community Police Officers walked along the footpath. The weather conditions were hot and sunny and the time of his visit.

6.3. In oral evidence Mr Samuels was taken to the table O1/17. He supplied the numbers to go into the table, having extracted them from his statement. He was asked about the 6 people given in the table as pedestrians using the path. He said that they were: a mother and child aged about 3 or 4 picking berries, the two community police officers who walked by on the path, and two walkers walking from the Houghton Regis end of the footpath towards the motorway. Mr Samuels was asked whether it was right that the mother and child were on the path as suggested by the table. He said that they came up the path, and stopped where the berry bushes were in the hedgerow opposite the end of Buzzard Road. They used the path to get there, but picked the berries from off the path: the path nearly adjoins where the blackberry bushes are, so they would have taken one step off the path and been there.

6.4. There was no cross-examination.

Evaluation of Mr Samuels' evidence

6.5. Mr Samuels' evidence was not challenged, and I accept it.

(2) Miss Grace Dawson
Luton Borough Council

[35] O1/10

6.6. Miss Dawson provided a written statement dated 8th September 2010[36]. Miss Dawson is employed by Luton Borough Council as a Housing Development Officer. She visited Kestrel Way on two occasions in connection with the application. On 24th June 2010 she visited Kestrel Way at 11:00 and remained in the vicinity of the site for 15 minutes. She observed no activity or use of the green areas along the extent of the site. The weather was sunny. On 29th June 2010 she visited Kestrel Way at 11:10 and remained in the vicinity of the site for 5 minutes. She observed no activity or use of the green areas along the extent of the site. The weather was sunny and warm.

6.7. Miss Dawson also provided two photographs of Lewsey Park, taken on 6th September 2010[37], and a photograph of Ravenhill Open Space taken on the same date[38].

6.8. In oral evidence Miss Dawson was taken to the table at O1/17. Miss Dawson provided the information which went into the table in relation to her visits. The table shows that there were three cyclists using the path on her first visit. She said that was an omission from her statement: on one visit she saw three cyclists and on the other she saw none. The table is accurate. There were three separate cyclists all travelling on the cycle path, from the Houghton Regis end towards the motorway.

6.9. In cross-examination Miss Dawson was asked what opinion she formed about the use of the site. She has been to the site on another couple of occasions earlier in the year, and had seen a couple of dog walkers and more cyclists, but could not say how many. Miss Dawson was asked about her photographs of the park: she said that there were quite a number of people using the playground which is visible on O1/22, but because she was on her own, she took the photograph from quite a long way away. The photograph on O1/21 she thought only showed a small slice of the park. She took 15-20 pictures in the park, but she did not make a record of how many people there were there. The play park on O1/22 was well-used. She would not expect the area in the foreground to be being used in the middle of the day, because the age group for whom it is designed should be at school. She agreed that the photograph on O1/23 does not show anyone using Ravenhill Way open space, but said that it was just a snapshot of that one second in time.

6.10. In re-examination Miss Dawson said that the cyclists she saw were using cycle path, and the dog walkers were also on the cycle path.

6.11. In response to my question Miss Dawson said that it was Mark Davie who had asked Miss Dawson for the information to go into the table on O1/17. She and other officers had been asked to visit on specific days, and populate the table on their return. The table is a shared document. She inserted the information into the table when she came back into the office. The statement was prepared later. The statement was prepared from the table and the notes which she had put in her outlook calendar as a record of what she had seen.

[36] O1/2
[37] O1/21-22
[38] O1/23

Evaluation of Miss Dawson's evidence

6.12. I was satisfied that Miss Dawson was an honest witness, and I accept her evidence.

(3) Mr Mark Davie

Luton Borough Council

6.13. Mr Davie provided a written statement dated 5th September 2010[39]. Mr Davie is employed by Luton Borough Council as a Research Officer. He made three visits to Kestrel Way in connection with the application. On 7th July 2010 he visited Kestrel Way at 18:30 and remained in the vicinity of the site for 10 minutes. He observed one mounted cyclist riding on the cycle path, and one dog walker using the cycle path. The weather was sunny and warm. On 31st July 2010 he visited Kestrel Way at 13:00 and remained in the vicinity of the site for 5 minutes. He observed 3 mounted cyclists riding on the cycle path, 2 dog walkers using the grassed area and a number of children (between 4 and 5) playing football on the grassed area. The weather was sunny and warm. On 22nd August 2010 he visited Kestrel Way at 10:00 and remained in the vicinity of the site for 10 minutes. He observed one person cycling on the cycle path area, and one dog walker on the cycle path area. The weather was sunny and warm.

6.14. In oral evidence Mr Davie was asked about the table at O1/17. Mr Samuels, Miss Dawson, Mr Pinder and Mr Davie were told by their manager, Mr Thompson, that they were to carry out a number of visits to the site. He could not remember whether Mr Thompson had produced the categories, or whether they were the subject of discussion. He created the table in a shared document, and put in both their outlook diaries and his outlook diary the dates of the visit, and followed up with them on the date of the visit to complete the table, by a variety of methods, including telephone calls, putting the data in together, or them using the shared document, depending on their level of I.T. capability.

6.15. Mr Davie was asked about the activity he had seen off the path on his second visit. The number of children playing football he saw was between 4 and 5. They were playing as one group. They were towards the roundabout, more or less opposite the entrance to Peregrine Road. The children were in their early teens, he thought. The dog walkers were a couple and a dog. They were also in the Peregrine Road area when he saw them, and were walking towards the motorway. He was not sure whether they were walking in one direction or around in circles.

6.16. In cross-examination Mr Davie was asked where he was standing when he was monitoring the site. He said that when he monitored the site he tried to park in Peregrine or Buzzard Road, then he would walk along Kestrel Way towards the motorway, and come back through the site. He could not see the whole of the land at any one time.

6.17. Mr Davie said he could not say whether, had he stayed for longer, more dog walkers would have arrived. The dog walker on the first visit was on the path

[39] O1/1C

all the time he observed him. On the first occasion he remembered the dog being on the lead. He did not remember whether the dog was on the lead on the third occasion, but the dog walker and the dog were both on the cycle path.

Evaluation of Mr Davie's evidence

6.18. I was satisfied that Mr Davie was an honest witness, and I accept his evidence.

(4) Mr Ken Pinder
Luton Borough Council

6.19. Mr Pinder provided a written witness statement dated 26th August 2010[40] in which he stated that he is employed by the Council as a Development and Enabling Officer. He visited Kestrel Way on one occasion in connection with the application. On 20th July 2010 he visited Kestrel Way at 13:30 and remained in the vicinity of the site for 20 minutes. He observed two mounted cyclists riding on the cycle path, one dog walker using the path and the grassed area, and three pedestrians, one alone and two together, using the path. The weather was sunny and hot.

6.20. In oral evidence Mr Pinder was asked to give further details in relation to the dog walker. As he was walking along the path, a man with a dog on a lead approached from the top of the path. He went onto the path, walked along the path for a way, then onto the grassed area and around the grassed area, with his dog on the lead.

6.21. In cross-examination Mr Pinder was asked to confirm where he was in the vicinity of the land. He said that he walked along the full length of the path. He came onto the path at the eastern end, and walked along the full length of the path, around the corner, and back down the full length of the path, and walked back to where his car was parked, on Ravenhill Way near the community garden. He was in the area for a number of purposes, one of which was to look at the community garden. He walked over the grassed amenity area coloured pink on the plan at O1/18, up Kestrel Way, and along the path, right to the bottom of Kestrel Way. He was asked whether of the 20 minutes, most of the time was spent on the pink area. He said that he looked at the fence which surrounds the community garden, then across the pink land, to the path in Kestrel Way, and along the full length of the path, to the roundabout, to the end of the land edged red, and retracing his steps. The 20 minutes does not relate to his whole visit. He thought he would have spent about 15 minutes on the application land, and about 20-25 minutes in the vicinity, including the time walking along the remainder of the Kestrel Way path.

Evaluation of Mr Pinder's evidence

6.22. I was satisfied that Mr Pinder was an honest witness, and I accept his evidence.

(5) Miss Sarah Markham
Luton Borough Council

[40] O1/9

6.23. Miss Markham provided a written witness statement dated 8th September 2010[41], in which she stated that she has worked primarily in Housing-related roles since 1985. She had been employed by the Council on a permanent contract as Estate Services Manager for 10 months at the time she wrote her statement. In the 22 months prior to that, she worked for the Council as a Senior Housing Officer under a fixed term contract, working for a services agency called Badenock and Clarke, in which role she was responsible for managing the Council owned properties on the estate known as Lewsey Farm.

6.24. Miss Markham stated that she was familiar with the application land from the time when she was Senior Housing Officer with responsibility for managing the Lewsey Farm housing estate, including the roads directly adjacent to the application land. During that period she had a range of responsibilities which meant that she was on Lewsey Farm estate for an average of at least 2 hours per day Monday-Friday, at varying times, between 08:00-17:00. She had to drive past the land on most days each week, as Kestrel Way forms a main route between key areas of housing which she managed.

6.25. Miss Markham stated that during her time managing the Lewsey Farm area, her observation was that the land was used very infrequently by people in the area. She only saw pedestrians or occasionally dog walkers, mainly on the cycle path, with only very occasional use of the land itself for the same activities. She observed those activities on average less than once a week. She never saw anyone using the land for any ball games or for similar recreational activity.

6.26. In oral evidence Miss Markham was asked why, when driving past, she took notice of what was happening on the application land. Part of her role is estate management, which is to look at what happens around the estate, and pick up environmental issues, such as fly-tipping and anti-social behaviour. Additionally she formerly worked as an estate agent and therefore notices land, and in particular noticed the application area and wondered why it had not been developed at the same time as the rest of the estate.

6.27. In cross-examination Miss Markham was asked how long it took her to pass the land. She said it was not just driving past: she managed properties along the road, in particular Gelding Close, where she had had a number of management issues, and in addition she had properties in Peregrine and Bunting, some of which are still council-owned, quite a few in Peregrine, and some in Finch Close and Swallow Close. She can see the land if she parks at the top of these roads. If she was carrying out observations on a particular property, she would not park right outside that property, but would park around the corner. Miss Markham said she was not able to speculate as to what she would have seen if she had driven past on the weekend. She said that she had driven past the land the previous Sunday at 3.30 in the afternoon, up and back, to check her recollection of the land, and had seen just two people walking along the footpath.

[41] O1/6

6.28. In re-examination Miss Markham was asked what her view of the land was when she was driving: she said she could see quite a bit of it. When driving down Kestrel Way she was able to see the whole of the footpath. She thought that if someone was close to hedge, the chances were that they were on the footpath, because the footpath follows the line of the hedge. She accepted that she cannot see their feet, but she said that she assumed from the fact that they were close to the hedge that they were on the path. On Sunday she could see the people and their feet: they were walking towards the bottom of the hill, and she thought they were approximately opposite Bunting Road, as she was driving down the hill. Miss Markham was asked by Mr Mason to clarify where the people were when she saw them, by reference to the wiggle in the path. She said that the people she saw were slightly after the wiggle in the path, on the motorway bridge side of the wiggle. She did not see anyone else on the land.

6.29. In response to my questions Miss Markham said that she approached the application land from the south along Pastures Way, turned right at the roundabout, down Kestrel Way, turned in Swanmead, off Ravenshill Way. On the way back she went straight on at the roundabout. She did not see the two people on the way back. She did not turn into the dead end part of Pastures Way, where Gelding Close is.

Evaluation of Miss Markham's evidence

6.30. Miss Markham provided her honest recollection to the inquiry. I am satisfied that her recollection was good, and that she had a good opportunity to observe the application land reasonably frequently during the working day during the period from 2008 to the end of the relevant period when she was in the vicinity in connection with her work on the estate. I accept her evidence that she does not remember seeing the application land used for ball games by children during that time. I also accept her evidence that her recollection is that the land was only in infrequent use by local inhabitants, most of whom used the cycle path, but some of whom used the remainder of the application land to walk or dog walk.

(6) Mr Alan Thompson

Luton Borough Council

6.31. Mr Thompson provided two written statements, both dated 8th September 2010[42]. Mr Thompson has been employed by the Council for 36 years, and was, at the time of the inquiry, employed by the Council as a Strategy and Development Manager, in which role he has responsibility for developing housing strategy and facilitating the production of new affordable homes through partnerships with housing associations and other agencies.

6.32. In his first statement Mr Thompson set out details of three visits he made to the application land in connection with the application. The first visit was at 11:30 on 19th May 2010. He remained in the vicinity of the site for 10 minutes. He saw one mounted cyclist riding on the cycle path. The weather was warm and dry. The second visit was at 15:00 on 10th June 2010. He remained in the

[42] O1/11 and O1/12

vicinity of the site for 15 minutes. He saw 3 mounted cyclists riding on the cycle path and 3 pedestrians using the path (one single person and one couple with a buggy). The weather was overcast and dry. The third visit was at 14:40 on 18th August 2010. He remained in the vicinity of the site for 10 minutes. He saw one mounted cyclist riding on the cycle path, 2 dog walkers using the path and one dog walker on the grassed area. The weather was sunny and warm.

6.33. In oral evidence Mr Thompson was asked to give further details about the dog walker he saw on the third visit. It was a woman with a dog, and he thought the dog was on a lead, walking diagonally from the most northerly part of the site, approximately opposite Bunting Road, across the grassed area towards Kestrel Way and its junction with Buzzard Road.

6.34. In his second statement Mr Thompson set out the history of the application land.

6.35. The application land, together with other land at Kestrel Way, was purchased by the Council in 1935 for open space. In 1976 the Council's Recreation Services Committee resolved that part of that area, including the application land, be made available for housing purposes. A large part of the area was sold for development, and now forms part of the Lewsey Estate.

6.36. In oral evidence Mr Thompson said that he did not know precisely when the bund was installed. He knew that there had been traveller incursions onto the site up until about 2002 from the council's records, and the records show that there were no incursions after 2002, so he thought that the bund had probably been erected immediately after the last incursion.

6.37. Mr Thompson did not have any first hand knowledge of where the travellers parked, although he does have access to the Council's records for the years 1999-2002, from which he could see that there had been a number of incursions, 9 or 10 in that period, ranging from 2 caravans to, on one occasion, 16 caravans. The times from report to removal were from 1-2 days to 19 days. Mr Thompson could not be sure that all the encampments referred to in the Council's records were on the application land itself: the records recorded encampments on "land adjacent to Kestrel Way". There are no separate records relating to "land adjacent to Pastures Way" and he thought that the whole strip of land was probably referred to under the heading "land adjacent to Kestrel Way".

6.38. Mr Thompson stated that the Lewsey Farm estate was constructed largely by the Council in the 1960s and early 1970s and provided nearly 2000 new Council houses. Many of the original tenants have exercised the right to buy, and Lewsey Farm is now held under a mixture of tenures, including a number of housing association properties. Kestrel Way and the roads to the south of Kestrel Way were developed later in the 1970s, to provide a mixture of privately owned and council homes. The site is overlooked both by properties which were developed as part of the original estate, and by properties which are part of the newer Kestrel Way area.

6.39. In oral evidence Mr Thompson said that the housing bordered by Leagrave High Street, Pastures Way, Wheatfield Road and Poynters Road is the initial part of the Lewsey Farm estate, built in the 1960s and early 1970s, the majority in the 1960s. The area to the south of Leagrave High Street is predominantly private housing, and is pre- and immediately post-war. The segment running along Pastures Way and Dunstable Road is the older part, built in the 1930s. The "poets" area is predominantly private housing. The Council owns only two or three houses in that area. The initial part of the Lewsey Farm Estate included the properties in Gelding, Paddock, Thresher and the top of Pastures Way, opposite the site. Mr Thompson thought Gelding Close and Pastures Way had been built in the latter stages of the development. The area to the east of Pastures Way was built later.

6.40. The houses on Bunting Road were not built at the same time as Gelding Close. The first part of the "birds" part of the estate was built in 1977, Peregrine Road and the first few houses in Kestrel. Most of Bunting, Buzzard and Skewer were built as private development in the 1980s. The council sold three packets of land to private developers. Coltsfoot and Field Fare, Swan Mead and Goldcrest were the last parts to be developed, in the late 1980s. Swallow and Finch were developed later than Peregrine and Kestrel, and were developed by the Council over a period of about 8 years. The council retained an L-shaped packet of land including those roads and Linnet.

6.41. Mr Thompson stated that the Council currently has responsibility for over 500 families who are homeless and accommodated in emergency housing. The Council also has a significant housing waiting list. The Council identified the application land as an area which could be developed for new affordable homes, to provide much-needed housing in the Borough. The local planning authority has granted planning permission to Aldwyck for the development of 51 properties on the application land, including six supported housing flats for clients with specific housing needs. The Council has been in negotiation with Aldwyck, and it has been agreed that the Council will obtain nomination rights to the properties to be built on the application land, which will help to reduce the housing waiting list and the number of families in emergency housing.

6.42. Mr Thompson stated that Mr John Fisher of the Council's highways department had told him that the track across the land is adopted public highway and was constructed in 2004, along the route of a footpath which had been in existed for many years. The footpath is shown on the 1970 Ordnance Survey map.

6.43. The application land is maintained by the Council's Parks Department, which cuts the grass 17 times a year from the end of March to October. The cycle path is swept weekly.

6.44. Mr Thompson stated that he had been familiar with the land for several years, and had had cause to visit it on a number of occasions both prior to and after submission of the application. He had not been aware of the land being used in the manner of a town or village green when he had visited, and had rarely seen people using the land at all. With one exception, the few people he had

seen using the land had been walking or cycling along the cycle path, or the footpath which pre-dated the cycle path.

6.45. After the application was made, the Council determined that it would monitor the extent to which the land was in fact being used for sports and pastimes. To this end Mr Thompson arranged for officers to visit the land regularly, with a view to gaining a true picture of activity. Council officers had visited the land on 10 occasions in the 13 weeks before the inquiry.

6.46. Mr Thompson exhibited a plan showing the other open spaces near to the application land owned by the Council[43]. Various activities are held on these spaces which are open to the public. Lewsey Park is an area of public space measuring over 26 Ha. It is located 600 metres from the application land. Lewsey Park is recognised as the central open area for Lewsey Estate. It hosts annual events such as the Lewsey Community Festival, car boot sales, funfair visits, and other social and community events. As well as the free access open space, it also contains sports pitches, tennis courts, an indoor swimming pool and a children's play area. Mr Thompson appended a list of organised activities which had taken place on Lewsey Park in 2010[44]. In addition, within 400 metres of the application land there is another area of well-maintained open space of approximately 1.8 Ha, used for leisure activities including dog walking and children's play. Mr Thompson appended an aerial photograph showing this area and Lewsey Park. Mr Thompson stated that, to the extent that village green type activities take place in the vicinity of the application land, it was his understanding that such activities were carried out on one or other of these locations.

6.47. In cross-examination Mr Thompson was asked to explain where his observations on his visits were from. On his first visit he parked on Pastures Way, roughly in front of 271, and sat there and observed that part of the land, and then he moved his car up towards the edge of the roundabout so he could see down the footpath. On his second visit, he parked in the same spot, and went onto the footpath across the grass, and walked the length of the path to Coltsfoot Green and back. On his third visit he drove past the site three times, turning at Ravenhill Way, and at the roundabout.

6.48. Mr Thompson said that his discussion with Mr Fisher related to the footpath, rather than to the use of the land.

6.49. The First Objector re-called Mr Thompson to give further evidence in relation to the neighbourhood identified. Mr Thompson said that he is familiar with the Office for National Statistics "neighbourhoods". His understanding is that the neighbourhoods identified by the ONS are a statistical grouping of about 1500 individuals. There are over 100 lower level super output areas in Luton itself, and their purpose is to enable comparison between the areas. The neighbourhoods are identified by reference to approximately 1500 population, so that comparative statistics can be drawn up and used for each area.

[43] O1/18
[44] O1/19

Evaluation of Mr Thompson's evidence

6.50. Mr Thompson was an honest witness. I accept his evidence.

Witnesses on behalf of the First Objector who gave written evidence only

6.51. The following witnesses provided written statements on behalf of the First Objector, but did not attend the inquiry to give oral evidence.

Mr John Fisher
Luton Borough Council

6.52. Mr Fisher is employed by the Council as Highways Database Engineer and is responsible for the Council's highways records database. He appended a plan to his statement showing the cycle path, and stated that the path is publicly maintained highway and was constructed by the Council as highway authority in about 2004 and designated as a cycle path, and signed as such. The route of the cycle path followed a well-worn route which had become established following the construction of the M1 in the late 1950s: a nearby motorway underbridge provided the means for a route to become established for journeys which crossed the motorway. The route has been in existence for many years and was shown on the 1970s Ordnance Survey maps. The route was converted to cycle track pursuant to section 3 of the Cycle Tracks Act 1984 and is part of National Route 6 of the National Cycle Network.

Evaluation of Mr Fisher's evidence

6.53. Mr Fisher's evidence was uncontroversial, and provides useful information. I accept it.

7. The Second Objector's case

7.1. Four witnesses gave oral evidence on behalf of the Second Objector. Two further witnesses provided written statements but did not attend the inquiry to give oral evidence. The evidence of those witnesses who gave oral evidence at the inquiry was tested by cross-examination and is therefore of substantially more weight than the evidence of those witnesses who provided written statements only. The evidence of those who provided written statements only must nevertheless be taken into account in evaluating the evidence as a whole.

(1) Mr Jonathan Burstow
Vincent & Gorbing

7.2. Mr Burstow provided a written statement dated 8th September 2010[45]. Mr Burstow is director for Housing and Community projects at Vincent & Gorbing, Architects and Town Planners. He has been the director in charge of the Kestrel Way project since March 2009. Prior to that date his colleague, Geoff Yates, who is now a consultant to the firm, held that position.

7.3. Mr Burstow stated that the firm made two visits to the site prior to the commencement of design work, and took reference photographs on both occasions. Mr Yeates made the first visit on 19th November 2008, between

[45] O2/6

13:00 and 14:00. He took 9 photographs on that occasion, which Mr Burstow appended to his statement. The photographs show that there were no activities or pursuits taking place on the site at that time.

7.4. In oral evidence Mr Burstow said that he knew the time of Mr Yeates' visit: he had shown the statement to Mr Yeates and Mr Yeates had confirmed that the date and time of his visit were stated correctly. Also the digital photographs on the firm's system have a date and time when they were taken. The observations as to what was going on on the site when Mr Yeates visited were Mr Burstow's observations from the photographs, but Mr Yeates had also told Mr Burstow that there were no activities or pursuits taking place on the site at the time.

7.5. Mr Burstow made the second visit on 13th March 2009 between 15:00 and 16:00. He took 9 photographs, which he appended to his statement. Mr Burstow said that his recollection was that the site was deserted, and this was confirmed by the photographs. There were no activities or pursuits taking place on the site, apart from the occasional pedestrian using the cycle path across the site. The only other pedestrians Mr Burstow saw were the two waiting at the bus stop, who are visible on photograph JB7[46].

7.6. In oral evidence Mr Burstow said that he knew the time of his visit because the digital photographs on the office server have the time and dates on, and he had confirmed by looking at his diary that that was indeed the date he had visited the site. He visited the site on his way back from a seminar in Milton Keynes. He took 17 photographs on that occasion, and he selected 9 from them to append to his statement. He had selected all the photographs he took which show the application land. The others did not show the site: the purpose of the visit was to appraise the locality and determine the architectural character of the surrounding buildings.

7.7. Mr Burstow stated that in his opinion the application land is severely limited in its use, due to its narrow proportions and irregular contours resulting from mounding, and significant slopes, and the national cycle route crossing it. He thought that these reasons, together with the presence of better public recreational spaces in the neighbourhood, explained why he and Mr Yeates had not seen any activities taking place on it.

7.8. In cross-examination Mr Burstow said that the photographs were time stamped between 15:00 and 16:00. He said he probably was there for at least an hour. He moved the car at least once and got out and moved around the area. It was put to him, by reference to O2/19, that if this photograph was taken between 15:15 and 15:40 it would show a lot of traffic around the school at pick up time. Mr Burstow said that when he arrived he parked in Pastures Way, and he thought he would have taken this photograph at the beginning of the hour period: it was possible it was taken before 15:15. He then drove down to the far end of the site, down Kestrel Way, near Coltsfoot.

[46] O2/23

7.9. Mr Burstow confirmed that photographs 1, 2, 3, 4, 7, 8 and 9 were all taken from the first car position. He thought he would have turned around after photograph 7 and walked back towards his car to take 8 and 9. After taking these photographs he moved to the other end in the site. Photographs 5 and 6 he thought were the sign at the bottom end of the site. He said that he was more interested in the houses which face onto the site, and the photographs are showing the houses which face onto the site. It was put to him that at the other end of the site his attention would have been on the housing. He said that he did not remember seeing lots of children all the time he was there. There may have been maybe two children, but he did not remember crowds of children.

Evaluation of Mr Burstow's evidence

7.10. I am satisfied that Mr Burstow sought to provide his honest recollection as to whether or not there was anyone on the application land during his site visit on 13th March 2009, but I am not satisfied that he had a clear recollection, independent of what was shown in his photographs, of the activity on the site on that day. I was not convinced that his recollection as to where the sign shown in photographs 5 and 6 was (at the end of the site) was accurate: in my judgment the Applicant's suggestion that the sign shown is the one where the cycle path turns between Pastures Way and Kestrel Way is more likely to be correct. Mr Burstow conceded in response to questions in cross-examination, when faced with the fact that his visit would have coincided with the end of the school day, that there may have been maybe two children on the site while he was there, (contrary to his written evidence, which he had confirmed without amendment in examination in chief). I was not satisfied that he had any clear recollection of how many children or other users of the site passed him on that day. Neither Mr Burstow's photographs nor Mr Yeates' photographs showed anyone on the site.

(2) Mr Mark Newberry

Robinson Low Francis

7.11. Mr Newberry provided a written statement dated 6th September 2010[47] in which he stated that he is a partner in the Stevenage office of Robinson Low Francis, a professional construction consultancy practice. He has worked as a Surveying and Project Management Consultant for the Kestrel Way project since early 2009.

7.12. Mr Newberry stated that he had passed the application site on a regular basis over the last 10 years en route to local clients and meetings. The frequency occasions on which he had passed the site had been at a minimum monthly, and at times as much as weekly. He had never witnessed anyone using the application land for recreational purposes. The only activities he had noted had been pedestrians, cyclists and dog walkers in transit moving through the site using the cycle path.

7.13. In oral evidence Mr Newberry explained that his route would take him up to the Pastures Way/Kestrel Way/ Wheatfield Road roundabout, where he would turn left onto Wheatfield Road. The local clients' visits and meetings he referred to

[47] O2/31

had taken place to the north of the junction between Wheatfield Road and Poynter Road, where there is a significant office estate development. He was project manager of the office estate development for two years. After that he had two clients who were based on that estate who he used to visit for meetings regularly. He used the Pastures Way route as a cut-through to avoid the traffic on the main roads.

7.14. On his usual route, turning left at the roundabout into Wheatfield Road, he can see quite a way down Kestrel Road: he would be looking that way to see whether there was oncoming traffic. On the return journey he sometimes went straight over the roundabout, along Kestrel Way and along Ravenhill Way. He is interested in areas available for development, and the firm had project managed a development in the southern part of Ravenhill Way. Usually he would go back along Pastures Way. He paid attention to the application land because it was a development opportunity, as was the agricultural land to the north of it, to which there is an access off the end of Pastures Way.

7.15. He was asked why, if there had been a lot of people playing on the application land, he would have remembered it. He said he would have viewed it as exceptional, because it was a narrow site, next to a busy road, and it would have struck him as out of the ordinary to see children playing that close to the road. It is not an area which is obvious for recreation.

7.16. Mr Newberry stated that he had visited the application land in his capacity as project manager of the Kestrel Way redevelopment project on the following dates and at the following times:

Date	**Time**
14.05.2009	14:30
10.07.2009	09:30
14.07.2009	10:30
11.08.2009	09:30
03.09.2009	09:30
17.09.2009	13:30
05.10.2009	13:30
16.10.2009	09:30
23.10.2009	10:30
07.12.2009	13:30

7.17. On each occasion he spent 10-15 minutes walking the site. He did not witness any activities on the site other than people who were in transit and who were using the cycle path solely to access areas beyond the site boundaries.

7.18. In oral evidence Mr Newberry said that he knew he had visited the site on the occasions stated, because his time recording system shows how he has spent each half hour in the day. On each of those occasions half an hour is allocated to a visit to the application site, and on each of those occasions he has time allocated to meetings on the adjacent business park estate on one or other side of that site visit. He met occasional people who were walking their dogs on the site, but tended to try and keep a low profile when visiting sites. He thought

that on one occasion he had been accompanied by Geoff Yeates, and on one occasion by someone from Aldwyck, but most of the time the visits were to suit his personal timetable.

7.19. In cross-examination Mr Newberry was to explain his oral statement that he had met dog walkers on site, by reference to his written statement. He said he did not remember anyone being beyond the cycle path, although a couple of the dog walkers had extendable dog leads. Mr Newberry was asked whether he would have avoided going onto the land to avoid being approached. He said that he parked in Pastures Way or one of the adjacent roads, and walked along the land. He was not trying to be clandestine: he would say good morning or afternoon to people on the site, and would not avoid going onto the site because there was someone there. Mr Newberry was asked whether he had seen dog walkers on the land on the corner of Tomlinson Avenue and Wheatfield Road. He said that he did not remember seeing any dog walkers there either, but that area is not a potential development site that they were watching. His attention is generally drawn to sites with development potential. He has almost a watching brief and keeps an eye on such sites. The specific times he went onto the site were after he was appointed as Project Manager. He had not been involved in the site to the north of the end of Pastures Way.

7.20. One of the two clients Mr Newberry goes to see on the business estate is Aldwyck.

7.21. In answer to my questions, Mr Newberry said that the project management job on the office estate began in 1998. 1999 was when the main construction work was carried out, and the work was completed just into 2000. Prior to that they carried out an office refurbishment in 1995-1996. In 1999 at the peak of the development he was on site every week for a period of about 5-6 months.

Evaluation of Mr Newberry's evidence

7.22. I am satisfied that Mr Newberry was an honest witness who had a good opportunity to observe the application land on 10 occasions between May 2009 and December 2009, after he was appointed as Project Manager of the Kestrel Way redevelopment project, as he walked the site on each of those occasions. I accept his evidence that he does not remember seeing any local people on the land who were not on the cycle path.

7.23. I am also satisfied that in the 10 years prior to 2009 when Mr Newberry drove past the application site he did not observe any large scale activity on the application land, and I accept his evidence that he would have viewed a large number of people playing on the application land as exceptional, because of the narrowness of the site and its proximity to the road.

(3) Mr Patrick Anthony O'Sullivan
Aldwyck Housing Association

7.24. Mr O'Sullivan provided a written statement dated 8th September 2010[48]. Mr O'Sullivan stated that he had worked for Aldwyck Housing Association for 16

[48] O2/33

years in various development management roles and was, at the time of writing his statement, employed as Regional Development Manager, with responsibility for all development activities within the eastern operational region of Aldwyck Housing Group. He has been the lead manager of the project delivery team working on the Kestrel Way development.

7.25. Mr O'Sullivan stated that he had visited the site four times since August 2010 in connection with the application. His first visit was on 2nd August 2010 at around 14:00. He walked the length of the cycle path from the roundabout at Pastures Way to the end of the cycle path and returned back to Pastures Way. He spent approximately 15 minutes on site. He witnessed no other pedestrian or cycle user on the cycle path, or on the remainder of the site. His second visit was on 10th August 2010 at 11:40. He monitored the site from his car over a 15 minute period from two locations: the first at Pastures Way, and the second at the junction of Kestrel Way and Coltsfoot Green. He witnessed no pedestrian or cycle user on the cycle path, or on the remainder of the site. He took four photographs on this occasion, which he appended to his statement.

7.26. Mr O'Sullivan's third visit was on 12th August 2010 at 14:50. He monitored the site from his car over a 15 minute period from two locations: the first at Pastures Way, and the second at the junction of Kestrel Way and Coltsfoot Green. He witnessed no pedestrian or cycle user on the cycle path, or on the remainder of the site. He took four further photographs on this occasion, which he appended to his statement. His fourth visit was on 17th August 2010 at 17:25. He walked the length of the cycle path from the roundabout at Pastures Way and returned back to Pastures Way. He spent approximately 15 minutes on site. He witnessed no other pedestrian or cycle user on the cycle path, or on the remainder of the site.

7.27. In oral evidence Mr O'Sullivan said that he had visited the site before 2nd August 2010, when Aldwyck had been asked by the local authority to look into the site, in about October 2008. He was unable to confirm the exact date of his visit, which was why he had not mentioned it in his statement. He visited a second time after that and before August 2010 to see if he could identify any statutory services across the site (looking for manholes and other signs), but he had not mentioned that either, because he could not confirm the date.

7.28. Mr O'Sullivan said that he was able to specify the times of his visits during August 2010 because the photographs are timed, and he had set aside blocks of time in his diary to do things out of the office, including making the visits to this site.

7.29. Mr O'Sullivan said that the development site to the north of the end of Pastures Way is to the east of Sandringham Drive, and to the north of the line of pylons. The northern part of that development would back onto the rear of the houses on the southern side of Kingsland Close. You would not be able to see that site from Wheatfield Road.

7.30. In cross-examination Mr O'Sullivan was asked what the weather was like when he visited the site on visits 2 and 3. On visit 2 the weather was overcast,

with intermittent showers. It was similar on visit 3. It was overcast and there could have been some rain, he could not remember. He agreed that there is rain on the windscreen in photograph 1[49]. He said that he walks his dog in all weathers, so there could have been people on the application land. He was asked whether it was possible there were people on the site: he said that he could see that there was no-one on the site, along the footpath or using the green. He could not see around the corner onto the Pastures Way part of the site, and that was why he had moved and monitored the site from the second location. Mr O'Sullivan agreed that when photograph 3 was taken it was still raining. He said he could not speculate on what people might have done had it not been raining throughout his visit. It was raining for periods and dry for periods when he was there, and there was no-one on the site when it was dry.

7.31. Mr O'Sullivan agreed that photograph POS5[50] shows the end of the application site. He was asked whether he could see through the trees. He said that the trees do not form a solid barrier, and he would have been able to see people walking along through them. He saw no-one passing through the trees when he was there. On photograph POS6[51], you can see through the trees to the hedge behind. He agreed that he could not see round to the end of Pastures Way from there, and said that was why he had moved to the second location, from where he could see both parts of the site. He spent about 10 minutes at the base of Kestrel Way and about 5-7 minutes parked at the end of Pastures Way on both visits 2 and 3.

Evaluation of Mr O'Sullivan's evidence

7.32. I am satisfied that Mr O'Sullivan was an honest witness and I accept his evidence.

(4) Mr Peter James Salsbury
Aldwyck Housing Group

7.33. Mr Salsbury provided a written statement dated 7th September 2010[52]. Mr Salsbury is a Project Manager in the Development Department of Aldwyck Housing Group, a post he has held for 3 years. He has been the project manager for the Kestrel Way project since its inception in 2008. His role includes commissioning and co-ordinating the work of professional consultants who have advised Aldwyck on the development of affordable homes on the site.

7.34. Mr Salsbury stated that he had monitored the use of the application land since June 2010. He had made 7 visits to the site in connection with the application. In oral evidence Mr Salsbury was asked how he knew the dates and times of his visits. He said that his office is only 5 minutes from the site. On returning from a site visit he would record the time, what he saw and download the photographs.

7.35. Mr Salsbury's first visit was on 29th June 2010 at 15:10. He observed the site for 10 minutes. He saw one cyclist using the site, on the cycle path. He took 7

[49] O2/35
[50] O2/39
[51] O2/40
[52] O2/43

photographs on this occasion which he appended to his statement. Mr Salsbury's second visit was on 6th July 2010 at 15:45. He observed the site for 10 minutes. He saw one cyclist using the site, on the cycle path. He took 5 photographs on this occasion which he appended to his statement. Mr Salsbury's third visit was on 7th July 2010 at 11:30. He observed the site for 10 minutes. He saw two cyclists using the site, on the cycle path. He took 4 photographs on this occasion which he appended to his statement.

7.36. Mr Salsbury's fourth visit was on 23rd July 2010 at 10:45. He observed the site for 10 minutes. He saw one cyclist using the site, on the cycle path. He took 4 photographs on this occasion which he appended to his statement. Mr Salsbury's fifth visit was on 27th July 2010 at 20:00. He observed the site for 10 minutes. He saw one cyclist using the site, on the cycle path. He also saw a group of youngsters playing football on Pastures Way, next to the grassed area, but using the street instead. He took 3 photographs on this occasion which he appended to his statement. Mr Salsbury's sixth visit was on 28th July 2010 at 08:00. He observed the site for 10 minutes. He saw two members of the public walking along the cycle path. He took 3 photographs on this occasion which he appended to his statement. Mr Salsbury's seventh visit was on 2nd September 2010 at 16:00. He observed the site for 10 minutes. He saw three dog walkers, one lady walking, two cyclists and three people on motorbikes using the site, all of whom on the cycle path. He took 5 photographs on this occasion which he appended to his statement.

7.37. Mr Salsbury had visited the site prior to the submission of the planning application on numerous occasions with consultants, contractors and Council representatives. He never witnessed anyone using the site other than the cycle path.

7.38. In October 2009 Mr Salsbury commissioned site investigations to be carried out on site by BRD Environmental. BRD Environmental excavated a number of trial pits, approximately 40-50 metres apart. The trial pits were back-filled, and surrounded with orange plastic fencing to prevent people walking over the damaged ground. Some of the areas remained fenced for over 6 months. Aldwyck did not receive any complaint or comment from the public about his disturbance to the application land.

7.39. In oral evidence Mr Salsbury said that the areas fenced were approximately 1.5 metres square. The fencing stayed up for about 6 months, from about October 2009 to the start of March 2010. The company did not remove it and he said that it may have been removed by members of the public.

7.40. In cross-examination Mr Salsbury was asked why it was necessary to fence the trial pits if no-one was using the land. He said because the ground needed to repair itself. The company who carried out the survey would have been liable if anyone had damaged themselves walking over the sites of the pits and would have fenced them to protect themselves. Mr Salsbury was asked whether he was sure that the work had been done in October 2009, rather than September 2009 and he said that he had commissioned the work in October 2009.

7.41. Mr Salsbury was asked whether he had taken a photograph of the group of youngsters he had seen playing football on 27th July 2010. Mr Salsbury said that he did not think it was wise to take photographs of children and that was why he had not included a photograph of the children playing football on the road. Mr Salsbury confirmed that he had walked the entire site when taking his photographs.

Evaluation of Mr Salsbury's evidence

7.42. I am satisfied that Mr Salsbury was an honest witness and I accept his evidence. I prefer his evidence as to when the trial pits were dug to that of Mr Mason: Mr Salsbury had commissioned the work and had access to the commissioning documents, and on that basis I consider that his evidence was more likely to be accurate on this point.

Witnesses on behalf of the Second Objector who gave written evidence only

7.43. The following witnesses provided written statements on behalf of the Second Objector, but did not attend the inquiry to give oral evidence.

Mr Peter Challoner
P & C Property Services

7.44. Mr Challoner provided a written statement dated 6th September 2010[53] in which he stated that he has been a general practice chartered surveyor since 1982. In early September 2009 he was instructed by Aldwyck Housing Group to provide valuation advice in relation to the capital values of potential dwellings on the Kestrel Way site, along with a land market value for the scheme. Mr Challoner visited the site at about 16:00 on 4th September 2009 to obtain background information prior to drafting his report. He was there for about 15 mintues. He took 14 photographs on that occasion, showing various views of the site from varying directions, which he appended to his statement. No other pedestrians or cyclists are visible in the photographs. He stated that he did not remember seeing any public use of the site during his visit.

Evaluation of Mr Challoner's evidence

7.45. I do not accept Mr Mason's submission that Mr Challoner in describing his photographs as showing various views of the site from varying directions overstated his evidence. It is correct to say that the labels "showing the site (deserted) from several angles" was not an appropriate label to attach to the photographs on O2/30, as the photographs on that page show the field to the north of the application land, and do not show the application land at all.

Ms Rita Kelly
91 Pastures Way

7.46. Ms Kelly provided a written statement dated 7th September 2010[54]. Ms Kelly has since 2006 been employed by Aldwyck as a Personal Assistant to the Director of Development and New Business. She is 43 years of age. Her

[53] O2/26
[54] O2/77

family home for the last 42 years has been 91 Pastures Way. She purchased 91 Pastures Way from her mother in 2004, when her mother moved elsewhere, and has lived at the property since that date. From when she left home until 2004 she lived elsewhere, including 5 years abroad. Whilst living in the UK she visited weekly, and she visited 6-monthly when living abroad.

7.47. Ms Kelly stated that she was very familiar with the application land. She was very surprised to learn of the application, because, had she been asked whether she considered the application land to be an area for recreation, she would have said no, because the application land is relatively small and adjoins a busy road and because there are ample and more suitable facilities for recreation elsewhere. There is a cycleway across the land which Ms Kelly has used herself and has seen being used, but she has never seen children playing on the application land, or dogs being walked there, or known of any fetes or community events being held on the land. Ms Kelly stated that all events of that type are held on Lewsey Park. Lewsey Park has ample facilities such as a park, 5 football pitches, tennis and basketball courts, a swimming pool and squash courts. There are large green open spaces in Lewsey Park for dog walking. Moreover Ravenhill Way is at the end of Kestrel Way, and there is an open green space there with a pathway which runs alongside the motorway all the way to Leagrave High Street, and which also links to Lewsey Park and much larger green open areas.

7.48. Ms Kelly said that she would not allow her own daughter (who was born the previous year) to play on the application land because it is near to a busy road, and because the tunnel at one end of the strip of land is notorious locally for anti-social behaviour. She would not therefore feel safe leaving her child to play on the application land.

Evaluation of Ms Kelly's evidence

7.49. Ms Kelly's house is some distance from the application land. It is not clear from her statement what opportunity she would have had to observe the application land, and as she did not attend the inquiry to give oral evidence, it was not possible to ask her about this. I do not place much weight on her evidence.

8. Submissions on behalf of the First Objector

8.1. Mr Booth provided written opening submissions in accordance with my directions, and provided helpful written closing submissions, which he amplified orally.

8.2. Mr Booth stated that the inquiry was concerned with the application dated 25th January 2010 of Mr Mason to register land at Kestrel Way as a town or village green. The application was made pursuant to section 15(2) of the Commons Act 2006. The relevant twenty year period during which the Applicant must demonstrate use of the Land for lawful sports or pastimes is therefore the period 25th January 1990 – 25th January 2010.

8.3. In proceedings of this nature, the burden of proof is on the applicant who wishes to see the land registered as a town or village green, to demonstrate that the requirements of the statutory definition are satisfied. Insofar as is relevant, section 15 of the 2006 Act provides:

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
(2) This subsection applies where-
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
(b) they continue to do so at the time of the application.

8.4. Mr Booth submitted on behalf of the Council that the Applicant had failed to demonstrate:

(i) that the Land has been used for lawful sports and pastimes by a significant number of people; and
(ii) that use of the Land has been carried on by the inhabitants of a locality or neighbourhood within a locality for the purposes of the 2006 Act.

Sports and Pastimes - Evidence of Use

8.5. Mr Booth said that the Applicant had adduced a significant amount of documentary evidence in support of the Application. However, at the Inquiry, the oral evidence presented was extremely limited. Of the six witnesses whom the Applicant called,

- One (Mrs Irons) could speak to the period 2006-2010, and had only used the Land herself in the period 2008-2010;
- One (the Applicant himself) could only speak to the use of the Land during the period 2006-2010
- Two (Mr Nicholas Smith and Mrs Sarah Cox) could only speak to use of the Land during the Period 2007-2010.

8.6. There were only two witnesses who could speak to use of the Land during the entirety of the Relevant Period as opposed to the last 3 or 4 years, namely Mr Keith Smith and Ms Sue Bowen.

8.7. Mr Booth said that the Council acknowledged that a number of the statements/questionnaires prepared by persons who did not appear also spoke to use of the Land over a greater part (if not all) of the Relevant Period, but submitted that, given that neither the Council nor Aldwyck were able to test their evidence in cross examination, in all fairness that evidence could attract only very limited weight. Mr Booth submitted that the importance of evidence being scrutinized in cross-examination was self evident, but said that it was particularly highlighted in the course of this Inquiry having regard to the answers given by those of the Applicant's witnesses who did attend the Inquiry

to questions put by counsel or the Inspector. Mrs Irons initially (albeit inadvertently) claimed to have used the Land since 2006. Cross-examination revealed that her use in fact began in 2008. Mr Nicholas Smith initially claimed to have spent "every" Wednesday evening on the Land with a group of friends who met at his home. It later transpired that in fact, one meeting in four took place at one of his friend's homes elsewhere, and that visits to the Land took place "once or twice a month in summer and occasionally in winter".

8.8. Mr Booth said that he did not propose to address the evidence of Aldwyck's witnesses but the Council placed reliance on that evidence, which he submitted was entirely consistent with its own.

8.9. Mr Booth said that the evidence of the six (or more accurately two) witnesses on behalf of the applicant who claimed to have seen the Land used for lawful sports and pastimes for the duration of the Relevant Period must be set against the extensive evidence presented by the Council and Aldwyck. Mr Booth submitted that when considered collectively, the statements of the Objectors' witnesses presented a picture that was compelling, and which was clearly at odds with that which the Applicant wishes to paint.

8.10. Mr Booth submitted that the Council's evidence was wholly credible. He submitted that all the Council's witnesses were transparently honest in giving their accounts, providing detail both in respect of the matters which assisted the Council's case, and those which did not. The Council's witnesses had visited the Land during 2010 at all times of day both on weekdays and at weekends[55]; and while the visits had not been particularly long in duration, they had been significant in number. In only a single instance[56] did the council officer witness activity that would suggest to a reasonable landowner that use of the Land exceeded that which one would expect to see given the existence of an adopted public highway running across it ('the Cycle Route')[57].

8.11. Insofar as there has been any fluctuation in the level of user over the Relevant Period, the position appears to be that the intensity of use has increased in recent years[58]. Further, the Council has monitored use of the Land during the Summer school holidays – so that children could be expected to be making use of the Land during the 'working' week as well as at weekends. As such, looked

[55] Ms Markham's recent visit was on a Sunday afternoon at 3.30pm, Mr Davie visited on a Saturday (31 July 2010) and Sunday (22 August 2010).

[56] This is the visit of Mr Mark Davie on 31 July 2010 when he witnessed a couple walking their dog and a group of 4-5 children playing football on the grassed part of the Land. It is right to note that Mr Martin Samuels witnessed a mother and daughter blackberrying on 20 August 2010, however the evidence (unchallenged by Mr Mason in XX) was that in order to pick the fruit it was only necessary to take a single step off the Cycle Route. Such very limited diversion from the pathway cannot reasonably be said to amount to lawful sports and pastimes – see the report of Vivian Chapman QC as regards an application to register land at Thrupp and Bullfield Lakes as a town or village green, to which reference is made later in these submissions.

[57] The Cycle Route was laid to tarmac in 2005 and follows the route of a long-standing footpath, which has been in use for decades. It is noted that the Applicant expressly excluded the Cycle Route from the Application. However, for ease of reference in these submissions the terms Land is used to describe both the grassed area and also the tarmaced Cycle Route.

[58] See for example the questionnaire of Ms Bowen, at page 40 of the Applicant's bundle.

at in the round, as regards the period when monitoring was taking place the position could not have been more favourable to the Applicant. It gave him the best possible chance of council officers witnessing the Land being used for sports and pastimes.

8.12. In that sense, and as a consequence, the Council's survey of activity – particularly when supplemented by the evidence of Ms Markham, (which addresses a much longer period: 2007-2009) and by that of Aldwyck's witnesses – could not realistically be much more robust.

8.13. Given the very limited nature of the oral evidence presented to the Inquiry by the Applicant, and given the robust evidence presented by the Council (and Aldwyck) in rebuttal, it is submitted that the Applicant has simply not done enough to demonstrate that the Land has been used for sports and pastimes by significant numbers of people.

Character of Use

8.14. As regards the character of the use to which the Land has been put, Mr Booth contended on behalf of the Council that during the Relevant Period the use had overwhelmingly:

- comprised of walking, dog walking or cycling;
- focused on the Cycle Route; or
- been otherwise linear in nature.

8.15. Mr Booth pointed out that the Applicant conceded in cross-examination that walking (with or without dogs) and cycling were the 'primary' activities which took place on the Land. This was born out by the witnesses who appeared at the Inquiry in support of the Application, all of whom walked or ran – with or without dogs – on the Land (for example, the Applicant used it "mainly for dog-walking", Mrs Irons only began using it at all when she bought her dog in 2008 and Mrs Cox walked her pram and previously jogged on it).

8.16. The Applicant and his witnesses accepted that some of this activity – both their own and other peoples – took place on the Cycle Route (eg Mrs Cox). Having regard to the results of the Council's 'monitoring' exercises, it is submitted on behalf of the Council that this accounts for the vast majority of these activities.

8.17. Mr Booth submitted that such 'use' of the Land cannot count towards registration of the Land as a town or village green. He relied in support of this submission on the observations of Lightman J in *Oxfordshire County Council v Oxfordshire City Council & Robinson*[59]:

> "...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

[59] [2004] Ch 25, at paras 102-104.

> potential Green will ordinarily be referable only to exercise of a public right of way to the Green. But walking a dog, 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)**.
>
> Three different scenarios require separate consideration...
>
> Th**e second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a Green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a Green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way".** (emphasis added)

8.18. Mr Booth submitted that in light of Lightman J's comments, it must be right that use of the Cycle Route falls to be disregarded, even where the dogs of those walking on the Cycle Route range far and wide. In support of this latter submission he relied on the remarks of Sullivan J in *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council*[60]:

> "it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs, around the perimeter of his fields and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.
>
> Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?
>
> The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand

[60] [2004] 1 P&CR 36, at paras 102-104.

> upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.358E of Sunningwell. **I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation**". (emphasis added).

8.19. Mr Booth said that these remarked were approved by Lord Hoffman in *Oxfordshire*, and submitted that these remarks clearly applied to use of the cycle path to get from A to B, but also where the evidence was of use of the cycle route for recreational walking, such as walking and gossiping, or dog walking, with no other purpose than that it was a nice day, this activity should be regarded as falling within the right of way type user. Mr Booth said that it was contended by the Applicant's witnesses that *some* of this activity – namely walking (with or without dogs) – took place on the grassed area. In this context both Mr Keith Smith, Mrs Irons and Ms Bowen all claimed that when they walked on the Land they did so on the grass rather than on the Cycle Route.

8.20. However, all accepted that when they went walking in this way, their use of the Land generally formed part of a longer circuit or else a linear walk that headed down the Land towards the motorway, and returned on much the same line. For example, Mr Kevin Smith described a circuit which took in both Ravenhill Way and Lewsey Park, and also related how when on the Land he would walk towards the motorway "along the top of the mound". Indeed, a worn path running along pretty much the route he identified is visible in the aerial photograph[61]. Furthermore, Mr Kevin Smith confirmed that in his view other dog walkers on the Land used it in a "similar way" to himself; Mr Nicholas Smith too agreed that the most common use of the Land was by dog walkers who "walk in a circuit".

8.21. Once again, having regard to relevant case law it is submitted that such 'linear' activity cannot, in the circumstances of this case, justify registration[62]. Linear activity – such as that engaged in by Mr Kevin Smith when walking on the mound – insofar as it suggests anything to a landowner, is generally suggestive that the persons engaging in it may be seeking to assert the existence of a right of way.

8.22. Even taken at its highest, the Applicant's position could only be that the position is "*ambiguous*". In such circumstances, having regard to the comments of Lightman J above, the assumption should be made that the rights engaged are "less onerous" rights of way, rather than "more onerous" village green rights.

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[61] See Applicant's bundle at p.245A.

[62] There was only very limited evidence of 'general' dog walking on the Land, in the sense of wandering around on the Land, throwing a ball for a dog to retrieve, although Mr Mason claimed to engage in this activity on occasion.

8.23. The last thing to say in this context of 'linear activity' is that it is easy to forget that the current appearance of the Land does not appear to be consistent with its appearance in years past. Only two of the Applicant's witnesses were able to speak to how the land looked and was used prior to 2006, and one of these – Mr Kevin Smith – stated that during the 1990s, the grass on the Land was cut infrequently and in such a way that the Council effectively "*forced*" people who wished to walk along the Land to walk along the track which has since been laid to tarmac as the Cycle Route. Although now there is linear walking along the top of the bund, and previously (when the aerial photograph was taken) there was linear walking further into the land, the evidence suggested that this was not the position in the early 1990s: then the grass was too long to walk across and people had to walk on the path next to the hedgerow.

8.24. Mr Smith's evidence is strongly suggestive that, at least in the 1990s, the Land was generally used in such a way as would have suggested to the landowner that local people who ventured onto the Land, did so for the purpose of using certain defined routes in the manner of rights of way, rather than for the purposes of using it as a town or village green.

8.25. Turning aside from this linear activity to consider what might be described as more 'sporting' sports and pastimes, the evidence of use is very scant indeed.

- There is the single 'Big Lunch' community event. Points to note in this context are firstly that this event (for which there was "*not a large turnout*" - Applicant XX) did not take place during the Relevant Period; and secondly, try as the Applicant might to claim otherwise, it clearly was organised with an eye to the Application. Indeed, Mrs Cox even described it as a "*meeting for local residents in support of the land being classed as a village green*"[63].
- The only other picnic of which any of the witnesses gave first hand evidence, was the packed lunch that Mrs Cox ate on the Land when she was viewing her current home, at a time when she was not a 'local inhabitant' but was resident in South Wales.
- Then there were the Wednesday evening 'boys' nights' spent by Mr Nicholas Smith and his friends on the Land. As it transpired, these did not take place nearly as frequently as Mr Smith first sought to represent, and of course none of his friends inhabit either the claimed locality or neighbourhood. Further, the credibility of Mr Smith's evidence must be somewhat in question, given that he claims to have been playing/seeing regular games of cricket on the Land outside his house in circumstances where even the Applicant himself only purported to have seen cricket played once or twice. The only reasonable conclusion to draw here is that, inadvertently, Mr Smith was exaggerating the extent of his use
- The Applicant made much of blackberrying. However, to the extent that this goes on the evidence of Mr Samuels (unchallenged) was that one need only take a single step off the Cycle Route to engage in it. In some places it is a bit further: maybe 3-4 steps for a child, but this use

[63] Applicant's bundle page 49.

is nevertheless ancillary to the use of the footpath. Given the status of the Cycle Route as adopted public highway, such activity cannot be regarded as lawful sport or pastime - see paragraph 306 of the Thrupp and Bullfield Lakes report.

- A number of witnesses spoke of having seen children playing football on the Land. To the extent that this takes place, the general consensus was that games were played on the 'Pastures Way' limb of the Land[64]. However, although the Applicant might wish it were otherwise, the reality appears to be that football took place only on rare occasions[65]. Mrs Cox said that she "*couldn't remember being on the Land when there was football*", and on all the many occasions when council officers (or Aldwyck personnel) visited during the Summer Holidays, there was a single instance when football was being played on the Land. Again, this is highly suggestive of the evidence in respect of this issue being exaggerated.
- Recollections were not clear: people will tend to remember occasions when incidents took place, rather than occasions when nothing took place. This will colour people's evidence.
- Lastly, there is the assertion of general 'children's play' having taken place on the Land. The short point to make here, is that no such activity was *ever* witnessed by *any* of the many persons called by the Council and Aldwyck, who had visited the Land. This is so, notwithstanding that a very large number of the visits took place during the school Summer Holidays, a time when one could reasonably expect children to be out and about playing on the Land, if they are accustomed to do so. The fact that no one witnessed such activity is strongly suggestive that – to the extent which it is carried on at all – it is carried on sporadically at best. According to Mr Smith's evidence the grass was long in the early 1990s. Mr Booth submitted that I could not conclude that the land was being used at that time for lsp to any significant degree.

8.26. There were doubtless other instances of 'one off' pastimes being engaged in on the Land[66]. For example, there was the VE Day party, the rounders match played on the occasion of Mr Kevin Smith's 40th birthday, and the single occasion when Mrs Irons witnessed someone sketching on the Land.

8.27. However, the fact of the matter is that the sum total of all the evidence of user does not amount to much, and when one looks at the testimony of the Applicant and that of both the Objectors' witnesses it is not possible reasonably to conclude that activities are carried on in such a way as to suggest the Land is in use as a town or village green. Crucially, given the existence of the Cycle Route and the extent to which use of such a highway should be regarded as ancillary to that route (Thrupp and Bullfield), the evidence before the inquiry is

[64] See for example the evidence of Mrs Irons on this point.
[65] All the photographs of football being played in the Applicant's Bundle related to the same game of football – Applicant XX.
[66] After much careful thought, it is submitted that 'harvesting' grass to feed to chickens – as Mrs Cox appears to have done from time to time over the last year or so – cannot amount to a lawful sport and pastime. Strictly speaking, it might be said to be more akin to taking a hay crop.....

not sufficient to demonstrate to a reasonably attentive landowner that his/her land is being used for lawful sports and pastimes so as would justify its registration pursuant to the 2006 Act.

Neighbourhood/Locality

8.28. The Application was made initially having regard to the locality of Lewsey Electoral Ward ('the Ward'). The Council does not dispute that the Ward is capable of comprising a locality for the purposes of the 2006 Act, insofar as it is a unit recognisable at law (see Harman J in Ministry of Defence v Wiltshire County Council [1995] 4 All ER 931). However in its objection the Council contended that such use as has taken place did not signify user by the inhabitants of that locality, owing to the fact that the claimed users of the Land were not spread throughout the Ward, but rather inhabited the few streets in the immediate vicinity of the Land.

8.29. As a result, the Applicant amended his case so as to rely on the use by the inhabitants of the neighbourhood identified on page 37B of the Applicant's bundle ('the Claimed Neighbourhood').

8.30. As regards reliance on the Ward as a locality the Council maintains the stance previously adopted, namely that the evidence does not signify that the Land has been used by the inhabitants of the Ward. In pursuing this contention, the Council emphasises the following points:

- there is no evidence that anyone living anywhere in the Ward other than in the Claimed Neighbourhood has ever used the Land for any purpose whatsoever; and
- the Claimed Neighbourhood comprises only a very small proportion of the Ward – approximately 1/8th, if that.

8.31. In order for registration of land to be justified, an applicant must provide evidence of user of the land sufficient to signify its use by the inhabitants of the neighbourhood or locality relied upon. Where the evidence is to the effect that the use of the land is carried on by the inhabitants of only one corner of the claimed 'area' (whether that area be a neighbourhood or a locality), that evidence will not be sufficient to signify that the land has been used by the inhabitants of the claimed area, but will instead only signify use by the inhabitants of that 'corner' of the wider area.

8.32. The requirement that use be carried on – in broad terms at least – by persons living throughout the claimed neighbourhood or locality, is sometimes referred to as a 'spread and fit'. In the present case, there is quite clearly insufficient 'spread' of users throughout the Ward for the Applicant to contend that the Land has been used by the inhabitants of the Ward as a whole, as opposed to a neighbourhood within it. Mr Booth said that whereas there will inevitably be more intensity of use for those who live nearest, in order sensibly to say that users come from the whole area, there must be users spread across the whole area.

8.33. It is in that context that the Applicant determined to rely instead on the use of the Land by the inhabitants of the Claimed Neighbourhood. However, unfortunately for the Applicant, in the course of the evidence it became readily apparent that the Claimed Neighbourhood is not a 'genuine' neighbourhood, in the sense envisaged by Sullivan J in R (on the application of Cheltenham Builders Ltd) v South Gloucestershire County Council (2003) 4 PLR 95. It was selected by the Applicant solely on the basis that he *"[thought] that would be the area that people who use the land come from"*. In that sense, it is precisely what Sullivan J disapproved of when he observed in Cheltenham that:

> "*I do not accept the defendants' submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate on a plan*"[67].

8.34. The Claimed Neighbourhood does not in any sense possess the "*degree of cohesiveness*" which Sullivan J found that a neighbourhood must have. Indeed, when the Applicant was asked (by the Inspector) whether there was any characteristic which 'identified' the 'Claimed Neighbourhood' aside from the fact that people living within it made some use of the Land, he frankly replied "*no, not that I could say*".

8.35. If it were acceptable to identify a 'neighbourhood' by adopting the approach of the Applicant, that term would be shorn of all meaning. In all cases it would be a wholly straightforward matter to identify a 'neighbourhood' simply by pointing to the addresses of those who claimed to have used land as a town or village green. Such approach is clearly not what Parliament can have intended.

8.36. As regards the Claimed Neighbourhood, it is readily apparent that the Applicant was right to accept there is nothing which 'binds' it together in any meaningful sense.

8.37. Looking first at the Birds Estate, that comprises a mix of council and private housing, built at separate stages during the 1970s & 1980s. Mr Thompson explained that during the 1970s the Council itself built Peregrine Way, part of Kestrel Way and also Swallow, Linnet, Sparrow and Finch Closes. The remainder of the land in that estate was sold off to private developers in three separate lots and the resultant dwellings constructed later during the 1980s.

8.38. Further, this development was wholly separate to Pastures Way and Gelding Close, which streets were constructed during the 1960s, and also other development elsewhere in the Ward. Indeed, Mr Thompson explained that 'Poets Corner' – at the southern end of the Ward – had been constructed in the 1930s and 1940s.

8.39. As such, notwithstanding Gelding Close has been identified by the Applicant as falling within the Claimed Neighbourhood, in no way does it share an identity or sense of community with streets such as Bunting Road.

[67] At para 85.

8.40. In one sense it is understandable that the Applicant should seek to 'manufacture' a neighbourhood in this way, since some of the user he relied upon was apparently carried on by the inhabitants of Gelding Close and the northern end of Pastures Way[68].

8.41. However, the fact remains that the 'Claimed Neighbourhood' is a wholly artificial construct, dreamed up solely for the purposes of the Application. As such it is wholly incapable of forming the basis for registration of the Land.

8.42. In relation to the alternative claimed neighbourhood, Mr Booth drew my attention to Mr Thompson's evidence that the neighbourhood used by the ONS was not a neighbourhood as required by the 2006 Act. The ONS "neighbourhood" was a purely administrative term, and a label given to units of approximately 1500 individuals, for purposes of comparative statistical analysis. The shop, schools and half of the doctors' surgery are outside this alternative claimed neighbourhood, and are not in any sense the preserve of either of the claimed neighbourhoods.

Summary

8.43. The words of Lord Bingham in R (on the application of Beresford) v Sunderland City Council [2004] 1 AC 889 are often quoted by Objectors at village green inquiries. However, they are none the less forceful and significant for that.

> "*As Pill LJ rightly pointed out in R v Suffolk County Council, ex parte Steed ... "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green...". It is accordingly necessary that all ingredients of [the] definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a [neighbourhood or] locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence is met*"[69].

8.44. Having regard to this observation, it is submitted on behalf of the Council that the Applicant has failed to demonstrate "all the ingredients" necessary to justify registration. Accordingly, the Council respectfully submits that the Inspector should recommend that the Application be refused.

9. Submissions on behalf of the Second Objector

9.1. Mr Ground provided written opening submissions in accordance with my directions, and provided helpful written closing submissions, which he amplified orally.

Introduction

[68] In this context one notes that the VE Day celebration was a 'Gelding Close affair' organised by a resident of that street, Mrs Paul (Applicant XX), and also that the football on the Pastures Way limb of the Land is played by children living in houses on Pastures Way (Mr Nicholas Smith XX).
[69] At para 2

9.2. Mr Ground said that this is a case where the applicant and a small group have sought to block affordable housing being built close to their houses and have used the Village Green regime as a tool for that opposition. The site has a footpath/cycleway across it and it is clear that people have used this to go across the site, it has been used at most sporadically and infrequently for any other use. It has not been used by people from any neighbourhood with any level of cohesiveness. The applicant has withdrawn their pure locality case, correctly, because there is no shadow of a case that users have come from all over that ward, it would also exacerbate the weakness of their significant number case.

9.3. Mr Ground said that his submissions would deal with the following points:

(1) burden of proof and legal test on quality of user required;
(2) whether lawful sports and pastimes have been shown;
(3) whether there are a significant number engaging in those lsp;
(4) whether there has been shown to be 20 years;
(5) periods of interruptions; and
(6) no neighbourhood with sufficient cohesiveness.

Burden of proof

9.4. Lord Bingham made it clear in ***R (Beresford) v Sunderland City Council HL*** [2004] 1 AC 889 that all ingredients of the definition should be met before land is registered. He agreed with Pill LJ that it is no trivial matter for a landowner to have land registered as a village green. The burden is clearly on the applicant to prove all elements of the definition. See paragraph 2 of R (Beresford) v Sunderland City Council HL [2004] 1 AC 889.

9.5. The test for the quality of the user has been set out recently by the Supreme Court in ***R (on the application of Lewis) v Redcar and Cleveland Borough Council*** [2010] 2 WLR 653 as whether:

> *"the user was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6 and 77), the owner will be taken to have acquiesced in it –."*[70]

9.6. If a use has been trivial or sporadic it will not carry with it the outward appearance of user as of right.[71]

9.7. The applicant must show that the user was of such an amount and in such a manner as should be regarded as the assertion of a public right. The correct way to look at that is from the point of view of the reasonable landowner[72]. In particular the applicant has to show that the user was for lsp and not footpath/cycle path use and that there were no gaps in the use. They have failed to show user of such an amount and such a manner as should be regarded as an assertion of a public right. The user that remains after the footpath/cycle path

[70] see Redcar per Lord Hope at paragraph 67
[71] See if necessary Sunningwell 357D at O2 221
[72] See if necessary Sunningwell 352H

use is stripped out as will be shown in later sections is trivial and sporadic and not done by a significant number. The burden is of course also on the applicant to show whether there are a significant number engaging in those lsp and for the whole 20 year period. This they have failed to do. In addition the burden is on the applicant to show that the users have come from a neighbourhood with sufficient cohesiveness. They have failed to do this.

9.8. The applicant has not discharged burden to show user for lsp.

Legal distinction with footpath/Cycle path

9.9. Mr Ground submitted that a footpath/cycle path use is clearly not one which is for a lawful sport or pastime[73]. In fact in ***R (on the application of Laing Homes Ltd) v Buckinghamshire*** [2004] 1 P&CR 36 one of the reasons why the decision was quashed was because it was necessary to strip out all of the footpath use before coming to a decision as to the quality of user and Sullivan J found that the Inspector had not done that task. See paragraph 105- 110 of ***Laing***[74]

9.10. In addition in ***Laing*** Sullivan J set out some guidance about dog walking and footpaths. Essentially what he said was that dogs that wandered off the paths and owners attempts to retrieve an errant dog would not suggest to the reasonable landowner that the users were exercising more than a footpath use. See paragraphs 103-104 on pages 598-9[75]

9.11. This is coupled with the guidance given at first instance by Lightman J in ***Oxfordshire CC v Oxford City*** Council [2004] Ch (the Trap Grounds case). He said where there was a track which is already a highway:

> *".. the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way and only as referable as of right of the rights incident to a green if clearly referable to such a claim and not reasonably explicable to the existence of the public rights of way"*[76]

9.12. In addition Lightman J said that it is only when the track or tracks are of such a character that the user of it or them cannot give rise to a presumption of dedication at common law as a public highway that recreational user may readily be lsp for the purposes of a village green and went on to say:

> *".. 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)"*[77]

9.13. Lord Hoffmann in Traps Grounds expressly commented favourably on Lightman's suggestions and Sullivan J's observations. He regarded them as

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[73] ***R (on the application of Laing Homes Ltd) v Buckinghamshire*** [2004] 1 P&CR 36
[74] O2 page 108
[75] O2 p107
[76] See para 104 Oxfordshire CC v Oxford City Council [2004] Ch page 154 O1
[77] See paragraph 102 page 154 O1

"sensible suggestions" and *"common sense observations"* respectively. See paragraph 68 of Trap Grounds in HoL [O1 pg191]

The evidence

Evidence of Second Objector.

9.14. Mr Ground submitted that the evidence of the second objector was compelling that the only use that has been made which is not trivial or sporadic is a footpath/cyclepath use. The number of snapshot visits, timed randomly, coinciding with what one would expect to be a busy period the summer holiday, was deeply revealing and shows that really the site is used only for footpath cyclepath.

9.15. **Jonathan Burstow** is a professional Architect and gave evidence of two visits made by his firm. The first was made in the claimed period on 19 November 2008 between 1pm and 2 pm by his colleague Mr Yeates and on that occasion there were no activities or pursuits taking place on the site. Mr Yeates had been shown the statement and confirmed that was the case. It was supported by extensive photographs that confirm it to the case which were date stamped on the server so the time and date could be confidently stated.[78] Mr Burstow himself visited on Friday 13 March 2009. He was confident as to the date and time because the photos were date stamped and it tallied with his diary.[79] In addition his recollection was supported by the photographs taken. In fact he took 17 photograph but has selected the 9 which show the site which now appear on pages 17-25. They show no activity apart from a walker striding purposefully along the footpath.[80] His evidence was that:

> *"There were no activities or pursuits taking place on the site, apart from an occasional pedestrian using the cycle route across the site."*[81]

9.16. **Peter Challoner** is a fellow of the RICS. His evidence is well supported by 14 photographs, unlike all of the applicant's witnesses. As a result it was thought unnecessary to call him. It is quite apparent that on a fine day of Friday 4 September at around 4pm there were:

> *"no other pedestrians or cyclists were seen at the site"*

9.17. **Mark Newberry** is a partner in the construction consultancy practice of RLF. He gave evidence of many observations of the site in two categories. The first was observing the site en route to other places when he had a good view of the site and took an interest because he was watching it as a development site. These were regular observations which had a minimum frequency of monthly and at times as much as weekly. He explained the various office developments and refurbishments and the reason why he would pass this site as a cut through. He was able to see into the site from the Kestrel Way/ Pastures Way roundabout. In addition he sometimes drove the length of Kestrel Way. He had an interest in the site because he was watching it for development. The fact

[78] see examination-in-chief of JB
[79] ibid
[80] see page 25
[81] see page 6 O2 §4

that he was not aware of a site that could not be seen from the road close to Kingsland Close is irrelevant and does not cast any doubt on his observations of this site which can clearly be seen from the road. The second category of observations was those specific visits to the site in his capacity as project manager of the planned redevelopment. He was able to be precise as to times and dates from his internal timesheets. On each of these ten occasions all done before the application he gave evidence that:

> *"at no time did I witness any activities other than people who were in transit and were using the cycle path solely to access areas beyond the site boundaries."*[82]

9.18. It is of course noticeable that many of those visits were done in the summer holiday of 2009, when if this land were really used it would be about the most likely period.

9.19. **Patrick O'Sullivan.** He made two earlier visits before his monitoring for this application: one in October 2008 and one later to identify services. He did not notice any lsp on these occasions. He made four visits in August 2010 to monitor the site. Whilst this is outside the application period there is a clear inference that the same would be true of earlier periods. In fact the applicant's witnesses all said that use had either increased or stayed the same. It is a particularly robust period to monitor because August 2010, in the heart of the summer holiday would be a period of maximum potential for use. On those 4 visits Mr O'Sullivan did not observe any use of the site. His recollections are comprehensively corroborated by numerous photographs. Mr Ground submitted that the conclusion I should draw from this is that in the summer holiday the land was not really being used, which he suggested was unsurprising when one considers the close park and its superior facilities.

9.20. **Peter Salsbury** made 7 visits nearly all of them in the summer holidays. Again they were backed up by photographs taken on each occasion. The result is that even in the summer holidays the only use that was made of the land was transit cycle and footpath use. He was able to be accurate as to dates and times because he downloaded the photos and made notes directly he got back to the office after each visit. His office is only 5 minutes away from the site.[83] In addition he gave evidence that for a period of up to 6 months 6 squares were fenced off. Each was about 1.5m by 1.5 m. [2.25m²]

9.21. **Rita Kelly's** evidence was accepted so far as all the facilities are concerned at the nearby Lewsey Park. Her own observations from living and visiting the area for all her life and in particular living close to the site since 2004 and having used the cycleway is that she has "never myself seen any children playing there". This is from a close witness, albeit one who is not directly overlooking the development site and was not an objector to the planning application.

[82] see page 32 O2
[83] see examination-in-chief of PS

THE COUNCIL'S EVIDENCE

9.22. The Council's evidence similarly is that the site was only really used for transit footpath purposes. They visited on 10 occasions including weekends two Saturdays and a Sunday, many of the visits were in the summer holiday. The vast majority of users and uses being made were footpath/cycle path use. There was only one exception which supports the conclusion that this use was trivial and sporadic. Mr Ground submitted that the monitoring evidence should be regarded as completely reliable, as the employees carrying out the monitoring exercise were expressly noting their observations. The weight to be given to visits for other purposes depended on the circumstances of the visit and who went. Mr Ground suggested that it was likely that Mr Newberry, being interested in the site from a development point of view, and as a project manager, would have remembered activity on the site, although his recollection of the earlier visits were not of the same quality as the monitoring visits. Where a substantial number of photographs were taken for other purposes, I should infer that those photographs would have captured any use which was taking place.

THE APPLICANT'S EVIDENCE

9.23. It is quite clear that the applicant and at least some, if not all of his witnesses, are using this application as a way to resist a development which the planning system has approved. Their evidence with this obvious motivation has to be treated with a degree of caution. In addition, there is a temptation to remember the land when something happened as opposed to when it was empty and nothing was going on.

9.24. The weakness of the evidence is really apparent from the lack of photographs. This is stark. In recent time it has become commonplace to carry a camera around and with the advent of digital photography the cost of taking a photo is very limited. This lack of photos is even more powerful evidence of lack of activity bearing in mind the considerable effort of the applicant circulating many people close by with a form which specifically asked for photos at box 33.[84] The photographs do not point to anything like a sufficient use to pass the test to become a village green. They amount to various pictures of the "big lunch" which was an event that Mrs Cox described as: "a meeting for local residents in support of the land being classed as a village green"[85] It was of course after the application and to put it mildly in these circumstances staged with one eye on this application. There are a couple of photographs of a gentleman from Australia playing with snow, a rare and unusual event of course and of a VE celebration, which falls into a similar category. That leaves a single football game also outside the period. As a photographic record it is entirely consistent with the Council and Aldwyck's evidence of virtually no use of the land and only footpath/cycle path use. It is entirely consistent with the evidence of the nature of the area as being uninviting for recreation and there being much better places close by.

The Applicant's live witnesses.

[84] see page 43 AB for example
[85] page 49 AB

9.25. **Mr Mason** in examination-in-chief said that "most are going a to b". He seemed then in cross-examination to give different figures for the working week in which he said 25% were passing through in the working week. Bearing in mind the nature of this land, and what the council witnesses and Aldwyck witnesses have seen it is just not credible that it is such an attraction in its own right. In addition it turned out that this percentage was based on very limited observation. All the time he has been there he has leaving home at 7.45 am and getting back at 6.15 apart from one year when he had some Tuesdays when he would have a short period in the afternoon at home. He accepted all the evidence of the second objector in cross-examination. That is entirely consistent with him knowing that the vast bulk of the time the site is only being used by people walking across it even in the summer holidays.

9.26. **Sarah Cox's** use to walk her child to sleep and her jogging before were a classic footpath use taking place on the footpath. She has only known the land since 2007. She went on to the land for the "big lunch" which on her form she understood to be a meeting about the village green application. On only one occasion within the period has she actually sat down on the land and that was when she was viewing her house and she was not a local resident. So far as children playing she confirmed in cross-examination that "she might see a few occasionally". She said she "cannot remember a game when I was there" referring to a ball game.

9.27. **Sue Bowen** has known the land for a longer period. She has been using it for dog walking. She used to do a longer circuit and now does a shorter circuits.[86] She has effectively been walking from a to b on the site. There used to be a well worn path before tarmac.[87]

9.28. **Keith Smith**. He generally did circuits with his dog. He confirmed there were gypsies on land before the bund came in Pastures Way and close to Kestrel Way. He also confirmed that in many years the grass was mown in such a way as to force you on to the path. This he confirmed was in 1990s when it was cut every 3-4 months. He did not dispute the evidence of Aldwyck's witnesses. The only occasion he went on to the land when he remembered a specific occasion was on his 40th birthday when he "had had a good celebration" and they played some game of rounders. This is probably a unique occasion certainly sporadic and occasional.

9.29. **Mr Nicholas Smith** could only speak about the site since 2007. His evidence was completely unspecific and not supported by any photographs. It became steadily less credible when probed. His weekly visits to the site on Wednesdays, which is how he started in his evidence, turned out not to happen in the winter when the timing made that really out of the question. They were accepted as being sporadic after a little questioning. His friends from Dunstable and Luton came to have dinner and the attraction of the land in question for 30-year-old men is such that it is only really consistent with sporadic visits. He had curiously exaggerated how far "the only other area" for recreation was when he

[86] see cross-examination by RG
[87] cross-examination AB

said it was over a mile in examination-in-chief and yet knew that there was green space near the motorway that was a long par 5 [ie a little over 450 yards]. In fact Lewsey Park itself is less than one km away. This was evidence that was clearly exaggerated for effect. He confirmed that the main use was dog walking which was in circuits.

9.30. **Nicola Irons** has only used the land since September 2008. That is despite her witness statement claiming she had made continuous use of the land since 2006. Mr Ground submitted that this shows that we must be cautious of written statements in this case. This was not corrected until the second cross-examination. Rather than 3 years of use before the application she only had 1, and even then it was around a full time job. Her use was for walking her dog in circuits. She confirmed that the only place she had seen children play was up Pastures Way except in the snow. She had started the petition against the planning application and explained in cross-examination that she was giving evidence because it was imperative to the community to have this piece of land.

The written evidence in support of the application

9.31. Mr Ground submitted that the written evidence should have less weight bearing in mind it was not subject to cross-examination and said that this was particularly so in this case where:

(1) There is little photographic evidence.
(2) The evidence of many of those who did give evidence changed when probed.
(3) The statements were all typed for the witnesses.
(4) Many of the witnesses who came were motivated by resisting development.

Whether lawful sports and pastimes have been shown and whether there are a significant number engaging in those lsp

9.32. Mr Ground submitted that the result of his trip through the evidence was that if one does the exercise of stripping out the footpath use and the use incidental to that there is effectively only a sporadic, trivial and occasional use, if any left. All the evidence was that the dog walking was the most common use and all the dog walkers did circuits which following ***Laing*** and ***Trap Grounds*** per Lightman J is a footpath use. The inquiry did not hear from any witness who gave details of them regularly using the land for lsp or receive any photo showing regular use in the relevant period. It was all unspecific accounts of at most occasional sitings of others which was uncorroborated and unreliable.

9.33. Similarly, the numbers doing anything other than footpath use is so small as not to pass the ***McAlpine*** test. It is not in Sullivan J's words:

> *"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"*[88]

[88] see AB pg 281

9.34. Mr Ground said that it was possible to test this against the high water mark of the Applicant's case: the occasional siting of football on the Pastures Way part of the land. There was no live evidence from any participant or any participant's parents. There are no names of the any of the participant. There is one occasion photographed after the application went in. Keith Smith thought the mowing was such as to force people onto the path in the 1990s. All the monitoring of Aldwyck and visits before and all the Council monitoring many of which cumulatively were in the summer holidays only saw one kick about going on with 5 kids. Some of the applicant's witnesses never saw children playing. If this use ever did start it is likely that it was interrupted by the travellers (Mr Smith and Alan Thompson). In addition the proximity of 5 football pitches at Lewsey Park and informal kick about areas there is consistent with at most occasional and sporadic use.

9.35. Mr Ground submitted that the numbers of users were insufficient footpath/cycle path was stripped out. This is so if one looks at the smaller neighbourhood advanced and even more so with the locality originally advanced.

Whether there has been shown to be 20 years use

9.36. Mr Ground submitted that even recently when the use was greater, there was insufficient evidence of use for lsp which was not trivial or sporadic by a significant number. Before there was even less, according to the witnesses that go back that far (e.g. Sue Bowen). The aerial photo shows well worn paths. The other witness who gave evidence about that period Keith Smith spoke of the mowing regime forcing the footpaths to be used.

Interruptions.

9.37. Mr Ground submitted that, should I find that the claim was otherwise made out, the 6 squares used to dig pits and the land used by the gypsies (certainly the Pastures Way land) should be extracted from the area recommended for registration as a village green, because there were interruptions in the use of this land.

Neighbourhood within locality

9.38. Mr Ground said that the case was put at the Inquiry on the basis of a neighbourhood within a locality. The effect of the answers of Mr Mason was that the neighbourhood shown at 37B was selected just on the basis of where users came from. He said he marked where people he met who used the land came from in orange. He confirmed to the Inspector that the orange area is where people who used the land came from and "there is not anything else that distinguishes this area". This is absolutely the type of area that lacks the cohesiveness required. It fails the test set out by Sullivan J in R (On the application of Cheltenham Builders) v South Gloucestershire [2003] EWHC 2803 (Admin) at paragraph 85.[89] In the ***Mental Health Trust*** case HHJ Waksman spoke of the need for cohesiveness being emphasised by the requirements under the Regulations to specify the neighbourhood in the Register. It is not more than a line on a plan. It is the sort of argument that HHJ

[89] see O1 at page 172

Behrens described as trying to pull itself up by its own bootstraps. He said such an argument would "denude the word neighbourhood of any real meaning.[90]

9.39. In relation to the alternative claimed neighbourhood, Mr Ground adopted Mr Booth's submissions: the ONS was not trying to pick a cohesive neighbourhood. Insofar as Mr Mason had identified facilities which could potentially tie the area together, the schools, the doctors' surgery and the shop in this case all served a wider area, and did not as a matter of fact tie the area together.

Conclusions

9.40. Mr Ground said that the village green application has no merit. The use that has been made of this land is for footpath/ cycle path use and those incidental to that. Other use is trivial or sporadic, not by a significant number, not for the required period. The users, if there are any regular users for anything other than rights of way use, do not come from a neighbourhood with any level. The second objector requested that I should recommend refusal of registration and asked the Registration authority to refuse the application for all of the above reasons. The Second Objector wishes to be able to provide the affordable housing so that people can climb onto the property ladder which the planning system has decided is in the public interest in this case.

10. The Applicant's submissions

10.1. Mr Mason provided helpful written opening submissions in accordance with my directions and made oral closing submissions. Mr Mason said that a member of the public had said in response to the advertisement of the proposed disposal of the land that the land was used for informal recreation. The planning notice was erected on the site in November 2009, and objections were made, again relying on the use of the land. Mr Mason said that at that point he became aware of the threat to the open space, and started to prepare the application in the hope of protecting the open space. He did not accept that the purpose of the application is to frustrate the development of the land. Mr Nicholas Smith obtained the OSS booklets on village greens. Mr Mason is an associate of ILEX, and because of his knowledge of land law he took over responsibility for making the application. When the planning application was made it was noted that the TVG application would be determined separately.

10.2. Mr Mason said that he could not improve on his case on neighbourhood and locality, although he noted that Mr Thompson had referred to the OSS neighbourhoods being used as "a way to compare neighbourhoods".

10.3. The houses which make up the Bird Estate are largely seen as starter homes, and it was difficult to obtain evidence of 20 years use: that was why the evidence of that length came from Pastures Way and Gelding Close. He said that those people who lived on the Bird Estate previously would have used the land in the same way as those who live there now, so there would be 20 years use from that property.

[90] see *Leeds* case, [2010] EWHC 530 at paragraph 79.

10.4. He reminded me that on the first day of the inquiry the inquiry heard evidence from two witnesses who had lived on the Birds Estate for over 20 years. Furthermore Mr Aitken gave evidence of having used the land from 1972-1984, and his children continue to use the land. Mr Mason said that the Aitkens children are part of the group seen in the photographs of the football. Also, attached to the original application was a statement from Mr Dimmock, who used the land from 1965, until he moved from the area in 2010.

10.5. Mr Mason accepted that it was difficult to show that the land had been used by a large number of people who had continued to use the land for 20 years, and continue to use it to date, but said that he thought that the evidence showed that the land had been used by local inhabitants for a period of 20 years and continued to be used. The question is not whether the individual users who gave evidence had used the land for 20 years, but whether the land had been used for 20 years. Mr Mason said that the written evidence supports the use of the two oral witnesses who had used the land for 20 years. He accepted that no previous resident of the houses had come forward to give evidence that they had used the land in the same way as the people who now live in the houses do.

10.6. Turning to the witness evidence, Mr Mason said that Mr Burstow's evidence relied on photographs of Mr Yeates. This was simply a snapshot of the second on which the photograph was taken. He said that he used memory of the visit (he did not mention notes) together with his photographs, which appeared to have been taken over a short period over time. The sign in his photographs is the one on the corner of Kestrel Way and Pastures Way. All of his photographs were taken while his car was parked in the first of the two positions.

10.7. Mr Challoner: the purpose of his visit was not to look for use of the land, and three of the photographs attached to his statement show land which is not the application land, but is the farmer's field to the north of the application land. They do not show the application land, other than the hedgerow, but are labelled "showing the site (deserted) from several angles". In that respect his evidence is overstated.

10.8. Mr Newberry: confirmed he viewed the site from the roundabout, and confirmed what he saw from the car, but was not able to give similar evidence of another potential development site on Wheatfield, or of the Sandringham Drive development, which another witness had said was not visible from the road, but which Mr Mason invited me to observe is in fact visible from Wheatfield in 3 or 4 places.

10.9. Mr O'Sullivan: accepted that his visits were during showers, which diminished the chances of him seeing anyone on the land.

10.10. Most of the witness evidence provided is of short periods of time during the day, and only shows a snapshot of that moment in time as Miss Dawson said.

Use of the land

10.11. Mr Mason said that the fact that the land is used for lawful sports and pastimes has been confirmed by the evidence of Mr Davie. Lord Hoffman said that the right must have been enjoyed openly and in the manner in which a person rightfully entitled would have used it[91], and in *Redcar* Lord Walker said that the question was how the matter would have appeared to the owner, or if an absentee owner, to a reasonable owner. Had the landowner here been viewing the application land here, he would have seen these activities and would have appreciated that the right was being asserted.

10.12. *Sunningwell* recognised that dog walking and playing with children are in modern life the sort of recreation which may be the main function of a TVG. The use has been for 20 years, and of such amount and in such a manner as would be reasonably regarded as the assertion of a public right. The landowner sending his employee to inspect the land for 5 minutes on a Saturday afternoon is now met with the fact that the land is being used by local inhabitants: the landowner should have taken appropriate preventative steps to avoid an application being made. As was said in *Redcar*, if the landowner fails to take such steps, he is treated as having acquiesced in the use of the land by local inhabitants for LSP as of right.

10.13. In relation to the question of whether use had been by a significant number of inhabitants, Mr Mason said that the evidence showed that the land was used by a significant number of inhabitants. The First Objector's witnesses confirmed seeing people using the land, and the Second Objector's witnesses found lack of evidence of use in the rain, and in photographs taken over a short period of time.

10.14. Mr Mason said he would not add to the neighbourhood and locality point. The claimed locality was Lewsey Electoral Ward, and the claimed neighbourhood was the neighbourhood known by the ONS as Luton 009A, within Lewsey Electoral Ward.

10.15. Mr Masons said that there had been no dispute that the lawful sports and pastimes had been enjoyed without force, secrecy or licence.

10.16. So far as the lawful sports and pastimes themselves were concerned, Mr Mason said that the three parties' evidence differed on this point. The applicant's witnesses spoke of many activities. The First Objector confirmed some of this evidence. The Second Objector's witnesses had not seen any of this, apart from the dog walking mentioned in cross-examination. All of the Applicant's witnesses and some of the First Objector's witnesses confirmed blackberry picking, dog walking and informal football. Mrs Bowen and Mr Smith provided evidence of use for 20 years, and 13 other witnesses who provided written evidence also spoke to 20 years' use. Use of the land continues to this day.

10.17. The activities had taken place on the application land.

[91] Sunningwell

10.18. Mr Mason submitted that Ms Bowen and Mr Keith Smith's evidence confirmed use of the land for a period of 20 years, and said that written evidence of 20 years' use was also provided by 13 other witnesses. Use of the land continued as at the date of the inquiry.

11. The Law

11.1. The application was made under section 15(2) of the Commons Act 2006. The Commons Act 2006 received Royal Assent on 19th July 2006. Section 15 of the Act was brought into force on 6th April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007[92]. Section 15 provides (as relevant):

> "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where—
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
> (b) they continue to do so at the time of the application."

11.2. The Commons Registration Act 1965 provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31st July 1970 for the registration of greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be…a town or village green unless it is so registered".

11.3. The concept that land could be registered as a new town or village green if it had been used as of right by the inhabitants of any locality for lawful sports and pastimes for more than 20 years was introduced by sections 13 and 22 of the Commons Registration Act 1965. These sections provided for the amendment of the register where any land could be shown to have become a town or village green after the end of the original registration period. The courts placed a narrow construction on the words "inhabitants of the locality". By section 98 of the Countryside and Rights of Way Act 2000, this part of the test for registration was widened, so that it was sufficient if user was by "a significant number of the inhabitants of any locality or of any neighbourhood within a locality".

11.4. The amended provisions were repealed and replaced by section 15 of the Commons Act 2006. Section 15 was brought into force on 6th April 2007 by the Commons Act (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007[93].

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[92] SI 456/2007
[93] SI 456/2007

11.5. Many of the words and phrases used in section 15 of the Commons Act 2006 are identical to the words and phrases used in section 22 of the Commons Registration Act 1965. The decided cases on what those words meant in the 1965 Act remain authoritative when considering the meaning of the same words in the 2006 Act.

a significant number…

11.6. "Significant" does not mean considerable or substantial. 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[94]. It is not necessary that the users come predominantly from the claimed locality or neighbourhood: provided a significant number of the inhabitants of the claimed locality or neighbourhood are among the users, it matters not that many or even most come from elsewhere[95]. The requirement is that the users include a significant number of inhabitants of the claimed locality or neighbourhood, so as to establish a clear link between the locality or neighbourhood and the proposed town or village green, even if such people do not comprise most of the users.[96]

…of the inhabitants of any locality…

11.7. A "locality" cannot be created by drawing a line on a map[97]. A "locality" must be some division of the county known to the law, such as a borough, parish or manor[98]. An ecclesiastical parish can be a "locality"[99] but it is doubtful whether an electoral ward can be a "locality"[100].

…or of any neighbourhood within a locality…

11.8. The clear intention of Parliament in introducing these words was to relax the requirements necessary and to weaken links with the old rules relating to common law village greens. In a neighbourhood case, the technical difficulties in the word "locality" that have arisen in relation to common law greens should not be imported. As a result, where the locality relied upon is, for instance, a town, it can be a relevant locality even if it is not (or is no longer) a recognisable local government unit.[101] A "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood[102]. A neighbourhood need not lie wholly within a single locality[103]: the claimed

[94] R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77
[95] Oxfordshire and Buckinghamshire Mental Health Trust v. Oxford City Council [2010] EWCH 2010, paragraph 71.
[96] Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 69.
[97] R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48
[98] Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] 3 EGLR 69 at para. 133
[99] R (Laing Homes) Ltd v Buckinghamshire CC
[100] R (Laing Homes) Ltd v Buckinghamshire CC
[101] Leeds Group PLC v. Leeds City Council [2010] EWHC 810, paragraph 89.
[102] R (McAlpine) v Staffordshire CC
[103] Oxfordshire County Council v. Oxford City Council ("the Trap Grounds case") [2006] UKHL 25, para. 27 disapproving R (Cheltenham Builders Ltd) v South Glos. CC at para. 88

neighbourhood can fall within two or more localities. Further an Applicant may rely on two or more qualifying neighbourhoods within a locality or localities[104].

11.9. It was said in *R (Cheltenham Builders Ltd) v South Gloucestershire County Council*[105] that a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness[106]:

> "a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a locality… I do not accept the Defendant's submission that a neighbourhood is any area of land that an Applicant for registration chooses to delineate upon a plan. The registration authority have to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise, the word "neighbourhood" would be stripped of any real meaning. If parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

11.10. However, these words have to be read in the light of the fact that "neighbourhood" is an ordinary English word, defined in the dictionary as "a district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity" and of Lord Hoffman's comment in *Oxfordshire* that the word "neighbourhood" was deliberately imprecise[107]. There are various factors to be taken into account in determining whether there is a neighbourhood, including whether the area has community facilities and shops, whether estate agents sell properties by reference to the area, the names of the street, whether the area contains connecting streets, the style and date of the housing within the area[108]. The boundaries of a neighbourhood are often not logical, and it is not necessary to look too hard for reasons for the boundaries.[109]

11.11. In my judgment there must be a reasonable spread of users throughout the claimed locality (in a locality case) or neighbourhood (in a neighbourhood case), and the users of the application land, so that it can sensibly be said that the users come from the claimed locality or neighbourhood as a whole. In a neighbourhood case, it is not necessary for the locality within which the claimed neighbourhood falls itself to be small enough to accommodate a proper spread of qualifying users: it is sufficient if the neighbourhood is small enough to accommodate such a spread.[110]

…have indulged as of right…

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[104] Leeds Group PLC, paragraph 96.
[105] [2004] 1 EGLR 85
[106] at para 85
[107] Leeds Group PLC, paragraph 103
[108] Leeds Group PLC, paragraph 104
[109] Leeds Group PLC, paragraph 105
[110] Leeds Group PLC, paragraph 90

11.12. Use of land "as of right" means use that is not by force, nor stealth nor with the licence of the owner ("*nec vi, nec clam, nec precario*")[111]. Whether use is of right does not turn on the subjective beliefs of users[112]. User "as of right" must be use as a trespasser and not use pursuant to a legal right[113]. The requirement that use should not be by force includes a requirement that use is not contentious, that is that the use is not one which continues despite the land owner's protests and attempts during the relevant period to interrupt it[114].

11.13. Where the owner has erected notices on the land, the fundamental question is what the notice conveyed to the user: if the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render the use contentious. The notice should be read in context, and in a common sense, rather than a legalistic way[115]. If it is suggested that a landowner should have done something more than erect a notice, the decision maker should consider whether anything more would have been proportionate to the use in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user[116].

11.14. In *Sunningwell*[117] the importance of acquiescence on the part of the landowner in considering whether use was as of right was emphasised in Lord Hoffman's speech at 351H:

> "It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v Colchester Corporation (1867) LR 2 CP 476, 486). The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v Angus (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:
>
> > "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me

[111] R (on the application of Lewis) v. Redcar and Cleveland BC [2010] UKSC 11, para 20.
[112] R v Oxfordshire CC ex p Sunningwell PC
[113] R (Beresford) v Sunderland CC paras 3, 9 & 30
[114] Lewis, para 89-91
[115] Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.
[116] Oxfordshire and Buckinghamshire Mental Health Trust, paragraph 22.
[117] [2000] 1 AC 335.

> that acquiescence and nothing else is the principle upon which these expedients rest.""

11.15. In *R (on the application of Lewis) v Redcar & Cleveland Borough Council*[118] the Supreme Court once again looked at the issue of as of right. The Supreme Court allowed the appeal and disapproved the judge-made law that had grown up to the effect that, in addition to the question whether the use was nec vi, nec clam, nec precario, there was an additional question to be answered, viz, whether it would have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging, the effect of which had been that, so long as the local inhabitants' recreational activities did not interfere with the way in which the owner had chosen to use his land, there would be no suggestion to him that they were exercising or asserting a public right to use it for lawful sports and pastimes. The Supreme Court held that, where the land had been used concurrently by both the landowner and by local people during the qualifying period, the apparent deference of the recreational users to the landowner's own use of the land did not preclude their use being use as of right. However where there have been successive periods in the qualifying period during which recreational users are first excluded and then tolerated as the owner decides, for instance a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals are indoors for the worst of the winter, the use over the qualifying period as a whole is not use as of right[119].

…in lawful sports and pastimes…

11.16. The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play[120].

11.17. Of particular relevance in this case is the question of whether and to what extent walking across land falls to be regarded as lawful sports and pastimes. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way[121].

11.18. In *Laing Homes*[122] Sullivan J considered the relevance of the presence of footpaths and bridleways over land the subject of a village green application and gave guidance about dog walking and footpaths:

> "102. … For obvious reasons, the presence of footpaths or bridleways is often highly relevant in applications under section 22(1) of the Act: land is more likely to be used for recreational purposes by local inhabitants if there is easy access to it. But it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields

[118] [2010] UKSC 11 delivered on 3rd March 2010
[119] Per Lord Walker at paragraph 27
[120] R v Oxfordshire CC ex p. Sunningwell PC [2000] 1 AC 335 at pp 356F-357E
[121] Oxfordshire CC v Oxford CC [2004] Ch 253 at paras 96-105
[122] [2004] 1 P&CR 36

– and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.

103. Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly found on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?

104. The landowner is faced with the same dilemma if the dog runs away from the footpath and refuses to return, so that the owner has to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants from obtaining a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields: see per Lord Hoffmann at p.358E of Sunningwell[123]. I do not consider that the dog's wanderings or the owner's attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.

105. While the Inspector was not obliged to carry out a field-by-field analysis, he was obliged to grapple with the principal point made in the Claimant's analysis: that looking at the 20-year period, walking, including dog walking, was the principal activity, and that it was largely confined to the footpaths around the perimeter of the fields. If that use was discounted, the other activities over the remainder of the fields were not of such a character and frequency as to indicate an assertion of a right over the entirety of the 38 acres for 20 years, not least because the other paths (across the fields) only began to evolve after 1993 and so were not claimed as footpaths …

108. …[T]he two rights are not necessarily mutually exclusive. A right of way along a defined path around a field may be exercised in order to gain access to a suitable location for informal recreation within the field. But from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.

109. I do not suggest that it will be necessary in every case where a footpath crosses or skirts an application site under the Act to distinguish between the exercise of a right of way and the use of a site for informal recreation. The footpath may be lightly used as such and

[123] "I should say that I do not think that the reference to people "straying" from the footpath was intended to mean that recreational user was confined to people who set out to use the footpath but casually or accidentally strayed elsewhere. That would be quite inconsistent with the findings of user which must have involved a deliberate intention to go upon other parts of the land."

> the evidence of non-footpath use may be substantial. But the present case is most unusual in that there were recently confirmed footpaths around the perimeters of all three Fields. These footpaths were not lightly used. The Footpath Inspector had concluded that there was "unchallenged evidence of considerable weight that their routes have been in such use as would satisfy section 31 of the [Highways Act] 1980". The Claimants drew the Inspector's attention to evidence from one of GAG's witnesses "that the majority of people in the fields stuck to the boundary footpaths" (10.16).
>
> 110. It is no accident that the Inspector's list of activities in paragraph 14.25 commenced with dog walking and general walking (i.e. without dogs). On any view of GAG's evidence set out by the Inspector in Chapter 7 of his Report these were the principal activities throughout the 20-year period. A number of the other activities were very occasional, such as kite flying, or of limited duration, e.g. use by the Cub Scouts appears to have ceased in 1987 (7.67). I do not underestimate the difficulties confronting the Inspector but he does appear to have relied upon the extensive use of the perimeter footpaths as such, for general and dog walking, in reaching his conclusion that there was abundant evidence of the use of the whole of the fields for lawful sports and pastimes for the 20-year period (14.25). To Laings, as a reasonably vigilant, and not an absentee, landowner those walkers would have appeared to be exercising public rights of way, not indulging in lawful sports and pastimes as of right."

11.19. Sullivan J held that the claim succeeded on the ground that on the evidence as recorded by the Inspector, once the use of the footpaths around the edges of the fields was discounted, there was insufficient evidence of use of the entirety of the three fields for lawful sport and pastimes over the relevant 20-year period from which the landowner could reasonably have deduced that those using the fields were asserting a right to use them as a village green. The Inspector had failed to analyse the recreational use of the fields excluding the use of the footpaths as such by walkers with or without dogs.

11.20. Lightman J considered Sullivan J's comments in *Laing* in his judgment at first instance in *Oxfordshire* and gave some further guidance about how use of tracks across the application land should be regarded:

> "[102] The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a Green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must

depend how the matter would have appeared to the owner of the land: see Lord Hoffmann in *Sunningwell* at pp 352H-353A and 354F-G, cited by Sullivan J in *Laing* at paras 78-81. 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 exercise of a public right of way to the Green. But walking a dog, 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).

[103] Three different scenarios require separate consideration. The first scenario is where the user may be a qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a Green or for both. The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to (e.g.) an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track e.g. fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a Green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.

[104] The second scenario is where the track is already a public highway and the question arises whether the user of the track counts towards acquisition of a Green. In this situation, the starting point must be to view the user as referable to the exercise (and occasional excessive exercise) of the established right of way, and only as referable to exercise as of right of the rights incident to a Green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way.

[105] The third scenario is where there has been a longer period of user of tracks referable to the existence of a public right of way and a

> shorter period of user referable to the existence of a Green. The question which arises is the effect of the expiration of the 20-year period required to trigger the presumption of dedication of a public highway on the potential existence after the full 20 years qualifying user of a Green. During the balance of the latter 20-year period the user of the path will prima facie be regarded as referable to the exercise of the public right of way (cf. para 104 above). The question raised is whether the user during the previous period should likewise be so regarded because the presumed dedication as a public highway dates back to the commencement of the 20 year period of user of the way. In a word, does the retrospective operation of the dedication as a public highway require that the user of the path throughout the 20 year period giving rise to the dedication should be viewed retrospectively as taking place against the background of the existence throughout that period of a public footpath? In my judgment the answer is in the negative. Over the period in question the user of the path was in fact "as of right" and not "of right". It is totally unreal to view user as taking place against the background of the existence of a public right of way at a time before that right of way came into existence. Where a public right of way comes into existence during the period of potentially qualifying user for the existence of a Green, in determining whether the qualifying user is established it is necessary to have in mind that at least some of the user must have been referable to the potential (and later actual) public right of way. But that does not mean that acts of user may not also or exclusively be referable to qualifying user as a Green. I do not think that anything said by, let alone the decision of, Sullivan J in *Laing* should be read as to the contrary effect. The question must in all cases be how a reasonable landowner would have interpreted the user made of his land."

11.21. In giving judgment in the *Oxfordshire* case in the House of Lords Lord Hoffman commented favourably on the guidance given by both Lightman J and Sullivan J, describing Lightman J's guidance as "sensible suggestions about how such evidence might be evaluated" and Sullivan J's judgment in *Laing* as containing "useful common sense observations; for example, on the significance of the activities of walkers and their dogs".

11.22. In my judgment the correct approach for the Registration Authority to adopt in the light of these decisions is as follows. Where there are tracks across the application which either are public highways or where the use of the track may give rise to a claim to dedication as a public highway, in applying the question posed in *Redcar* "would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging", the decision-maker must distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields. In doing so he must look at the user as a whole and decide adopting a common-sense approach to what claim the use is referable. Recreational walking upon a defined track may

be referable to either right depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Each case must to this extent turn on its own facts, but the following general guidance applies.

11.23. Use of a track as a means of access to the application site will ordinarily be referable only to the exercise of a public right of way to the site. Walking a dog, jogging or pushing a pram on a defined track across the application site may be recreational use and may be part of the recreational use as a whole, 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 village green right).

11.24. Where a track across the land is already public highway, the starting point is to view any use of that track as referable to the exercise and occasional excessive exercise of the established right of way and only as referable to exercise as of right of the rights incident to a green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way. Where use of a track may be qualifying user either as a claim to dedication as a public highway or for a prescriptive claim to a green or both, use of the track to get from A to B, or to get to, for example, an attractive view point, may be readily regarded as referable to public right of way-type use. A reasonable landowner would not regard walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields as exercising a right to indulge in lawful sports and pastimes. However if the users of the track fly kites, for instance, or veer off the track and play, or meander leisurely over the land and enjoy the land on either side of the track, the use is more likely to be regarded as exercise of a right to indulge in lawful sports and pastimes.

11.25. Where a dog strays off the footpath, and where a dog-owner's attempts to retrieve his errant dog result in him straying off the footpath, a reasonable landowner would not object, because such behaviour would not suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.

11.26. If the decision-maker comes to the view that the use of a track would have appeared to a reasonable landowner to be referable to the exercise of a public right of way rather than referable a right to enjoy a lawful sport or pastime, that use must be discounted when weighing the evidence of use of the application land as a whole for lawful sports and pastimes.

…on the land…

11.27. "Land" is defined as including land covered by water[124]. In *Oxfordshire County Council v Oxford City Council*[125] it was held that land, substantial parts of

[124] Commons Act 2006, section 61.
[125] [2006] UKHL 25, [2006] 2 AC 674, at para 44.

which were overgrown and inaccessible for recreation, could be registered as a new green, provided that the land could be regarded as having been used as a whole for recreation.

…for a period of at least 20 years and they continue to do so at the time of the application.

11.28. The House of Lords held in *Oxfordshire* that the relevant 20 year period under section 22(1)(a) of the Commons Registration Act 1965 was the 20 years immediately before the date of the application (rather than the date of registration, as the Court of Appeal had held). The 2006 Act sets out this aspect of the test clearly in the statute: in order to satisfy the criteria contained in section 15(2), the qualifying use must continue at the date of the application.

Procedure

11.29. The procedure on applications to register new greens is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

Who can apply?

11.30. Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application

11.31. An application made under the 2007 regulations is required to be made in prescribed form 44, signed by or on behalf of the Applicant and must be supported by a statutory declaration in the prescribed form[126].

Accompanying documents

11.32. The application is required to be accompanied by every document relating to the matter which the Applicant had in his possession or under his control or to which he had a right to production, or a copy of every such document[127]. In most cases, there are few documents other than user questionnaires or statements as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Preliminary consideration

11.33. Where an application appears on preliminary consideration by the authority not to be duly made, the authority may reject it without publicising it, but must give the Applicant an opportunity to put the application in order, if it appears that he might be able to do so[128].

Publicity and inspection

11.34. The registration authority must publicise any application which it does not reject on preliminary consideration[129]:

[126] 2007 Regulations, regulation 3.
[127] 2007 Regulations, regulation 3.
[128] 2007 Regulations, regulation 5(4)
[129] 2007 Regulations, regulation 5

- By sending by post a notice in form 45 to every person whom the authority has reason to believe to be an owner, lessee, tenant or occupier of any part of the land affected by the application, or to be likely to wish to object to the application
- Publish and display a copy of the notice in the concerned area
- Serve a copy of the notice on every concerned authority
- By fixing the notice to some conspicuous object on any part of the land which is open, unenclosed and unoccupied, unless it appears to the registration authority that such a course would not be reasonably practicable.

11.35. The date to be inserted in the notice as the date by which statements in objection to an application must be submitted to the registration authority must be such as to allow an interval of not less than 6 weeks from the latest of the receipt in the ordinary course of post or publication and display of the notice[130].

Objections

11.36. Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land. The authority must consider any written statement that it receives before the date on which it proceeds to further consideration of the application and may consider any objection received after that date, but before the authority finally disposes of the application.[131]

Determination of application

11.37. The Regulations make no specific provision as to how a Registration Authority ought to determine a contested application. A practice grew up under the predecessor regulations to the 2007 Regulations, the Commons Registration (New Land) Regulations 1969, which was repeatedly approved by the Courts, whereby the Registration Authority appointed an independent legally qualified inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. This is the procedure which has been adopted in this case.

Procedural issues

11.38. A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the Applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[132]. However, in my view, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in application form.** The House of Lords held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4 of

[130] 2007 Regulations, regulation 5(2)
[131] 2007 Regulations, regulation 6
[132] R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in R (Beresford) v Sunderland at para. 2

Form 30, provided that there is no procedural unfairness to the Objectors. The issue for the registration authority is whether or not the application land has become a new green

- **Part registration.** The House of Lords held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** The Court of Appeal held in the *Oxfordshire* case that the Applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the Applicant's wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view.
- There is no power to award costs.

12. The Application Land

12.1. I carried out an unaccompanied visit to the application site and the locality before the commencement of the inquiry. Although my directions made provision for an accompanied site visit, should any party wish me to carry out an accompanied site visit, no party requested that there should be an accompanied site visit and so I did not carry out an accompanied site visit.

12.2. During the course of the inquiry Mr Mason indicated that he wished to amend his application by including the cycle path crossing the application land, which had previously been excluded from the application land, within the application land. Mr Mason said that he had excluded the area comprising the cycle path because he wanted to exclude the users who were using the path as a right of way, but he would now like to include the cycle path. Neither objector objected to the amendment of the application to include the cycle path, and I acceded to the application.

12.3. The application land is on the northern edge of an area of housing known as Lewsey Farm, to the west of the M1 motorway and to the north of the A505 Luton Road. The application land is an L-shaped piece of land lying to the east of the northernmost section of Pastures Way, and to the north of the western half of Kestrel Way. There is housing along the western side of Pastures Way opposite the application land, and along the southern side of Kestrel Way opposite the application land. There is a field in agricultural use to the north and east of the application land, to the north of Kestrel Way and the east of Pastures Way. The application land is effectively a wide grass verge, of approximately 25-35 metres in width, between the road and the hedges of the field. There is a raised bund along the roadside edge of the land, of the type which is frequently constructed to prevent traveller incursions.

12.4. The application land is crossed by a tarmac path which was at the time of my site visit signed as a cycle track. The tarmac path was created in 2005. The tarmac path is adopted highway, but is not shown on the Definitive Map of public rights of way. The extent of the adopted highway is shown on a map provided by the Registration Authority pursuant to my directions.

12.5. That part of the application land which adjoins Pastures Way is a flat area of grass of approximately 25 metres in depth, with an embankment along its western edge. The hedge to the east is a thick mixed hedge including sloe, hawthorn, bramble and rose. The cycle path comes onto the land at its northern end and then runs parallel to the hedge. The area between the hedge and the cycle path had not been mown at the time of my site visit, but appeared to be maintained by rough strimming. The grass to the west of the cycle path was mown. There is no pavement along the road side of the application land.

12.6. Where the application land turns the corner between Pastures Way and Kestrel Way a spur off the tarmac path gives access to the road on the corner of Pastures Way and the roundabout. There are three bollards here, preventing vehicular access to the application land.

12.7. That part of the application land which adjoins Kestrel Way is a raised area of grass of approximately 35 metres in depth with some trees, bushes and saplings on it. There is an embankment along its southern edge. There are 5 poplar trees at the corner of the application land near the roundabout. There are some saplings and bushes opposite the end of Buzzard Road and a group of about 9 conifers opposite the end of Bunting Road. Further along the application land, approximately opposite the end of Osprey Walk, there was a group of about a dozen larger trees which were quite closely planted. There is no pavement along the road side of the application land. There is a bus stop opposite (approximately) 32 and 34 Kestrel Way which sits on the edge of the application land, as do the lampposts lighting the street. The grass to the south of the tarmac path was closely mown at the time of my site visit, and the strip between the tarmac path and the hedge had been mown on this part of the application site.

12.8. On both the part of the application site fronting Kestrel Way and the part of the application site fronting Pastures Way there were a couple of areas which had been left unmown, of about a metre square in each instance, which were marked by bricks on the ground. I am satisfied that it is likely that these areas were the areas disturbed by the digging of trial pits referred to in evidence.

12.9. Other than the tarmac path, there were no obvious paths across the application land at the time of my site visit, or other visible signs of regular use.

History and past use of the application land

12.10. The historic Ordnance Survey map provided by the First Objector, dating from the 1970s, shows the application site before the housing along Kestrel Way and most of the housing to the south of Kestrel Way was constructed, but after construction of the northern part of Pastures Way and Gelding Close and of the housing to the west of Peregrine Road. An unmade path is shown running from what is now the roundabout between Pastures Way and Kestrel Way, along the northern edge of that part of the application land which now adjoins Kestrel Way and towards the motorway underpass.

12.11. The applicant produced an undated aerial photograph which showed the land before the construction of the tarmac surfaced cycle path. The photograph shows a well-worn path in approximately the same position as the present tarmac path. There is also a fainter path running approximately parallel to Kestrel Way and between the heavily worn path and the road. The road side edge of the land appears to be a much lighter colour than the rest of the land, and I accept that it is likely that the variation in colour resulted from the then reasonably recent erection of the bund to prevent traveller incursion. There is another discoloured area of grass approximately opposite 1 and 15 Gelding Close, which the applicant suggested must have resulted from heavy use of the land in that area. In my experience, and as is shown by the discolouration of the grass along the edge of the application land, apparent discolouration of grass visible in an aerial photograph can result from factors other than use, such as interference with the ground beneath grass, or a difference in the composition of the soil. I note that there are other patches of discolouration in the grass along Kestrel Way, albeit smaller than the area on the Pastures Way section. The more recent photographs (2010) of children playing football on that part of the application land which is opposite Gelding Close show them playing much further north, opposite 273 and 275 Pastures Way, rather than on the area which is discoloured on the aerial photograph. There was no witness evidence which supported the suggestion that the discoloured area was where children played football. In the absence of other evidence to support this conclusion I am not persuaded that it is more likely than not that the discolouration results from heavy use.

12.12. I accept the Council's evidence that the land was, until about 2002, subject to occasional traveller incursions and that in about 2002 a bund was erected along the roadside edge of the application land, since which time there have been no further incursions. This evidence was consistent with the evidence on behalf of the applicant, and with the aerial photograph.

12.13. I accept the Council's evidence that the footpath across the application land was, by order under section 3 of the Cycle Tracks Act 1984 made in about 2004, designated as a cycle track, with the effect that it became a highway maintainable at the public expense for the purposes of the Highways Act 1980, over which the public have a right of way on pedal cycles and a right of way on foot. This evidence was consistent with the evidence on behalf of the applicant, and with the aerial photograph.

13. Findings of fact

Evaluation of the Applicant's witnesses' evidence

13.1. In my judgment it is clear that Mr Mason and of Mr Nicholas Smith's purpose in making this application was to seek to prevent the development of the application land. This application was made in response to Aldwyck's application for planning permission to develop the application land for housing. I have not seen a copy of the planning application, but I gather that the land the subject of the application for registration matched the land the subject of the planning application, although the deep verge area in fact continues towards the motorway bridge, in an easterly direction from the eastern boundary of the

application land, along the whole of the northern side of Kestrel Way, and, had the application been made in isolation, the whole of that area might have been included in the application land. The fact that the application was made for this purpose does not necessarily mean that the application lacks merit: it is often said by applicants, in my view with justification, that it is only the threat of potential development which prompts communities to apply to register land, in circumstances where an application could have been made previously. However, in my judgment it is important to bear in mind the motivation for making the applicant when considering the evidence in this case, and in particular to consider the possibility that the applicant's witnesses' desire to prevent the proposed development of the application land may have led them to overstate their evidence.

13.2. The six witnesses who gave oral evidence on behalf of the applicant gave evidence of the use that they had made of the application land and of the activities they had seen taking place on the application land. However, of those six witnesses, four had only known the land for the last 3 years of the relevant period, or for a shorter time. The remaining two, Mr Keith Smith and Ms Bowen, had known the land for the whole of the relevant period.

13.3. Thirty-four witnesses provided written evidence only on behalf of the Applicant. Nineteen witnesses who provided written evidence only claimed to have used the land for the whole of the relevant 20-year period. A further 4 witnesses claimed to have used the application land since 2000 or earlier. I accept Mr Booth's submission that evidence given in writing by witnesses who did not attend the inquiry to give oral evidence, and whose evidence was not therefore tested by cross-examination can in any case only be afforded limited weight, and I also accept his submission that the importance of scrutiny by cross-examination was highlighted in this case by reason of the fact that both Mrs Irons and Mr Nicholas Smith accepted in cross-examination that they had over-stated their written evidence.

13.4. The evidence of those who provided written evidence only came in three forms: (1) a short standard form statement, (2) an evidence questionnaire based on the Open Spaces Society questionnaire, and (3) statements drawn up by the Applicant from the witness's answer to that questionnaire, amended as necessary by the witness and signed. Twelve witnesses completed a short standard form statement only. A further seven completed an evidence questionnaire only (two jointly). Seven completed an evidence questionnaire and a statement, one an evidence questionnaire and a short standard form statement, and the remaining seven completed a short standard form statement, an evidence questionnaire and a statement. The short standard form statement read as follows:

> "I …….. of ……. hereby confirm in support of the application for registration by Mr Keith Mason of the Land Adjacent to Kestrel Way and Pastures Way as a village green that I have used the said land for the purpose of pastimes namely …… for a period of ……. years."

13.5. The evidence questionnaires suffered from the deficiencies commonly seen in such questionnaires: the questions are in many instances leading, and the form assumes that the witness has used the land. If the use made by a witness of the land has changed over the period, the form is unlikely to elicit that information: there is no space for specifying different periods of use of different types, and the questions are posed in the present tense. The information which the form is most likely to elicit is information concerning use over the most recent period before completion of the form, whereas the application requires evidence concerning use over the 20 years prior to the application being made. A particular shortcoming in the form in the instant case was the fact that, although the form asked whether there were any public paths crossing the land, it did not ask witnesses to separate out their use of the land into use of the public path and use of the remainder of the land.

Evaluation of the Objectors' evidence

13.6. I found the evidence of the Council's and Aldwyck's employees who had carried out monitoring visits in 2010, after the application was submitted, valuable in assisting me to assess the evidence of use. I accept Mr Ground's submission that the monitoring evidence should be regarded as completely reliable, as the employees carrying out the monitoring exercise were expressly noting their observations. The evidence of the Applicant's witnesses was that use had remained the same, or, if anything, had increased in recent times. There was no suggestion that use had ceased or diminished since the application was submitted. Therefore, although the monitoring visits of the Council and Aldwyck's employees took place after the end of the relevant period, I accept the Objectors' submission that it is likely that the level and types of use of the land indicated by those visits is the same as the level and types of use that would have been found on similar visits during the relevant period.

13.7. I also accept Mr Ground's submission that the weight to be given to visits by the Objectors' witnesses for other purposes depended on the circumstances of the visit and who went. I accept his submission that it was likely that Mr Newberry would have remembered activity on the site. Where witnesses took photographs, however, I hesitate to conclude that those photographs would have captured any use which was taking place: I note Mr Salsbury's reluctance to photograph the group of children playing football on 27th July 2010. I infer that those taking photographs for purposes other than monitoring use would have tried to avoid including people in those photographs if possible.

Evidence of use

13.8. Four of the witnesses who gave oral evidence and 15 individuals who provided written evidence only, (from 13 households in total) claimed to be using the application land at the time of their statements for dog walking. Not all dog walking falls into the category of lawful sports and pastimes. Dog walking along a linear route, particularly if that route is a public right of way, should be regarded as use of that right of way, rather than as the assertion of a more general right over the whole of an area of land, even if the use of the path is on occasion excessive.

13.9. On three of the 21 monitoring visits by the Objectors' employees a total of 4 dog walkers were seen off the path. Dog walkers (a total of 7) were seen on the path on 4 of the visits.

13.10. I was satisfied that Mr Mason had used the application land for dog walking since 2006, and that his dog walking included use which a reasonable landowner would recognise as village green type use.

13.11. I was satisfied that Ms Bowen and Mr Keith Smith had used the application land primarily for dog walking throughout the relevant period. Their dog walking was linear in nature. In my judgment dog walkers such as Ms Bowen and Mr Smith who chose not to walk along the tarmac path because they want to be on that part of the land which is lit by the street lights or because they do not want to be troubled by the cyclists using the tarmac path, and instead walk in a linear fashion along the grass would be regarded by a reasonable landowner as asserting an alternative right of way on foot, rather than a general right to use the application land as a whole for recreation.

13.12. The written evidence insofar as it consisted of evidence of having used the land for walking, exercise, jogging or running, cycling or dog walking was equivocal: walking, exercise, jogging or running and cycling are all activities which may well have been activities which took place on the cycle path across the application land and in a manner which would have been referable to the exercise of that right of way. Where witnesses who gave written evidence only stated "dog walking" as an activity that they carried out on the application land, therefore, it is impossible to tell without having had the opportunity to ask the witness questions in oral evidence whether that use was a right of way type use or a village green type use. There was no suggestion that cycling took place anywhere other than on the cycle path. The statements of the witnesses who gave written evidence only did not provide any detail which might have served to show that the use in each instance of the land for walking, exercise, jogging or running was not reasonably explicable throughout the relevant period as referable to the existence of the public right of way across the land. Even if these activities did not take place on the cycle path itself, but along the grass, the nature of the use may well have been such as would have been regarded by a reasonable landowner as right of way type use, rather than village green type use.

13.13. In my judgment the large majority of local inhabitants who were using the application land for activities other than children's play during the months before the inquiry were using the tarmac path across the land. This use would have been regarded by a reasonable landowner as attributable to use of the right of way across the land, rather than as village green type use. However there were others who did not stick to the path, but wandered across the application land. Their use would have been regarded by a reasonable landowner as use of the application land as a whole for recreation. In my judgment it is likely that this pattern of use has been consistent at least since the tarmac cycle path was constructed in about 2004.

Evidence of use for children's play

13.14. Three of the witnesses who gave oral evidence on behalf of the Applicant claimed to have used the application land with children to play (Bowen, K Smith, N Smith). Ms Bowen claimed that her grandsons had used the land occasionally when she is looking after them to play football (since about 2002 or 2003). They use the land opposite the end of Bunting Road. Mr Keith Smith claimed that he had used the application land with his brothers and sisters' children when they visited during an unspecified period "over the years", and more regularly with his godchildren who lived on Buzzard Road between about 2003 and 2008. Mr Nicholas Smith claimed that he had used the application land to play games with his friends and their children once or twice a month during the summer since 2007.

13.15. Of those who provided written evidence only, 17 witnesses claimed either that children within their family used the land to play or that they themselves used the land to play with children. Every witness who completed an evidence questionnaire ticked to indicate that they had seen children playing on the application land.

13.16. The three witnesses who gave oral evidence on behalf of the applicant who did not claim to have used the land for children's play (Mason, Cox, Irons) all stated that they had seen children playing on the application land. Mr Mason's evidence was that there is a group of children who play football opposite the end of Gelding Close on a Saturday. This evidence was supported by the written evidence of Mr and Mrs Charbonne of 273 Pastures Way and by the oral evidence of Mr Nicholas Smith. Mr and Mrs Charbonne provided photographs of a group of approximately 9 children playing football taken in September 2010. No information was given as to who the children in the photographs were, or as where they lived, although I infer that some of the children must be from the Charbonne family. In addition to the Charbonnes, two other families living on Pastures Way claimed that their children used the land for football (Aikens, Scowen), but there was no evidence as to the ages of their children or as to the period when they might have played football on the land. There was no evidence to link those children to the children in the photographs. Although Mr Mason's evidence was that he believed the Saturday footballers were from Gelding Close, there was no evidence to support this belief: none of the residents of Gelding Close who provided written evidence (Dudley, Paul, Rodell) claimed to have used the land for football. There was no evidence as to for how long this activity had been going on: Mr Mason could only have witnessed it after 2006, as he did not know the land before that date. I note that the Charbonne family claimed to have used the land only from 2003.

13.17. The level of frequency of use suggested by the Objectors' monitoring evidence does not support the applicant's case that the application land was in regular use for children's play throughout the relevant period. Further, none of the Objectors' witnesses who were familiar with the application land during the relevant period (Markham (2008-2010 no ball games), Thompson (with one exception no-one doing anything other than walking or cycling along the path), Newberry) remembered seeing children playing on the application land. I must

consider carefully whether the two pictures can be reconciled, or whether I must conclude that either that the evidence on behalf of the Applicant is overstated, or that the Objectors' evidence underplays the frequency with which such activities were observed.

13.18. The likely pattern of children's play is that it will take place in the evenings and at weekends during school term-times, rather than during working hours, and also at any time during school holidays. More than half of the 21 monitoring visits carried out by the Council and Aldwyck's employees, taken cumulatively, were carried out during the school summer holidays, when, if the land was extensively used by local children for informal play, one would have expected those children to be there. Of the remaining 10 visits, a further three were after school (15:45, 20:00 and 16:00). In addition Miss Markham had having driven past the application land on the Sunday before the inquiry at 15:30 and had not seen any children playing on the land. On only one visit, a Saturday lunchtime visit (also during the school holidays), the employee monitoring the land (Mr Davie) reported having seen a group of 4-5 children playing football on the application land, opposite the end of Peregrine Road.

13.19. Having regard to all the evidence I am not satisfied that the application land was extensively used by local children during the Objectors' monitoring period, but I am satisfied that it was used sufficiently frequently to alert a reasonable landowner to the fact that it was in general use by local children for recreation.

Other activities on the application land

13.20. Where witnesses who gave written evidence only referred to having used the land for bird watching, listening to birds and nature watching, such activities must in my judgment in the absence of any further evidence be regarded as likely to be ancillary to and therefore attributable to use of the right of way. Similarly, a statement in written evidence that the witness had used the land for socialising is equivocal, and I do not accept such evidence as proving, on the balance of probabilities, use of the land for lawful sports and pastimes.

13.21. There was some evidence of blackberry picking taking place on the application land. I am satisfied that the blackberry bushes on the application land can be reached by taking a couple of steps from the cycle path. In my judgment blackberry picking by people who walk along the cycle path to reach the blackberries should be assumed to be an excessive user of the right of way, rather than an assertion of a more general recreational right over the whole of the application land.

13.22. I am satisfied that a party was held on that part of the application land which adjoins Pastures Way in 1995 to celebrate the anniversary of VE Day: although none of the people who attended that party gave oral evidence, photographs of the event were provided by Mrs Paul, and Mrs Scowen mentioned the event in her evidence questionnaire and statement. Mrs Scowen also stated that bonfires were held on the land until 2004, but this evidence was not corroborated by any other witness.

13.23. I accept Mr Keith Smith's evidence that he had organised a rounders match on the application land opposite the end of Buzzard Road in 1996, on the occasion of his 40th birthday.

13.24. Ms Bowen stated that people stand on the land to watch the Keech Cottage fundraisers' Father Christmas train weaving in and out of the roads on the Birds Estate. No other witness mentioned this activity. It was not clear for what period this activity has taken place, or whether it takes place every year.

13.25. I accept Mr Nicholas Smith's evidence that he and his cousin played on the application land in the snow in February 2009. His photographs do not show anyone else on the application land.

13.26. Several of the applicant's witnesses had attended the Big Lunch event held on the application land (Cox, Nye, Bowen, N Smith). This event took place after the end of the relevant period. Where witnesses referred in their written evidence to using the land for picnics, attending functions and community picnic, but have not elaborated further, I cannot be satisfied, on the balance of probabilities, that this is a reference to an event other than the Big Lunch.

Has the applicant shown that the land used for lawful sports and pastimes throughout the relevant period?

13.27. The burden of proof is on the applicant to show that the application land was used for lawful sports and pastimes throughout the relevant period. Of those witnesses who gave oral evidence, four only had knowledge of the land which dated from 2006 or later and therefore could only give evidence relevant to the later years. In the light of Ms Bowen and Mr Smith's evidence I cannot assume that the use which has taken place in the last few years is representative of the use over the whole of the period.

13.28. Mr Keith Smith was not specific as to the dates on which he played on the application land with his nephews and nieces. His play with his godchildren was post-2003. Mr Smith did not suggest that he used the remainder of the land, apart from the path, for any purpose at all during the period when the grass was not cut regularly (1992-1994): the essence of his complaint was that the maintenance routine followed by the Council at this time made it impossible to use the remainder of the land. Indeed, from Mr Smith's evidence it seems unlikely that the land other than the path would have been used for recreational activities regularly during the early 1990s. The land would not have been suitable for use for football or informal cricket at this time.

13.29. Ms Bowen's main use of the land was for dog walking, and in recent times her routes had been linear, but short, whereas in earlier times her evidence was that her route was a much longer circuit including the application land. I am satisfied that that type of use would be a right of way type use rather than a village green use. She made no claim specifically to have used the whole of the application land for any other recreational purposes in the early 1990s: Ms Bowen's evidence of children's play related to her own grandchildren, the elder of whom was born in 1998 or 1999.

13.30. The written evidence is insufficiently specific to enable me to conclude that those who provided written evidence only used the whole of the application land for recreational activities during the early 1990s. The weaknesses in the written evidence identified above are such that it is equivocal on this point. Those who gave written evidence only might reasonably have regarded their use of the land as continuing throughout the relevant period, despite the fact that, for part of the 20-year period, they were unable to use any part of the land other than the path itself. For the purposes of establishing village green use, use of the path only would be insufficient. The witnesses could have answered the questions asked by the form positively and honestly stated that they used the land for the whole of the relevant period, without understanding what use was relevant and what was not.

13.31. In the face of Mr Smith's evidence as to the condition and usability of the land other than the path during the early 1990s and in light of the equivocal nature of the written evidence it is not open to me to find that the witnesses who provided written evidence only continued to use the whole of the application land during that period. The written evidence will not bear the weight required to make up the evidential gap in the Applicant's case in relation to use in the early 1990s. There is simply insufficient evidence to support a finding, on the balance of probabilities, that the land as a whole was used for recreation throughout the whole of the required 20-year period.

13.32. I am therefore not satisfied that there was significant use of the application land for walking, dog walking, jogging, running or cycling which went beyond use which was reasonably explicable as referable to use of the right of way throughout the whole of the relevant period. Similarly I am not satisfied that the Applicant has discharged the burden of proof of showing that the application land was in general use by local children for recreation throughout the relevant period.

Occupation of parts of the application land by travellers

13.33. I am satisfied that parts of the application land were from time to time occupied for short periods by travellers' camps until about 2002 or 2003. I am not satisfied that these incidents interrupted such use as there was of the application land for lawful sports and pastimes.

14. The claimed locality or neighbourhood within a locality

14.1. The locality or neighbourhood within a locality in respect of which the application was stated to have been made in the application form was Lewsey Electoral Ward. By paragraph 7.4 of my directions I required the applicant to provide one or (as appropriate) two large scale OS maps (at a scale of not less than 1:10,000), in the case of the first map marked to show the boundaries of the "locality" relied upon and, in the case of the second map, any "neighbourhood" relied upon.

14.2. Mr Mason provided two maps, the first[133] marked to show the boundaries of Lewsey Electoral Ward, and the second[134] marked to show a number of streets within Lewsey Electoral Ward which Mr Mason said was the neighbourhood upon which he relied ("Claimed Neighbourhood 1"). The streets included within the claimed neighbourhood were: Gelding Close, Buzzard Road, Peregrine Road, Lapwing Road, Swallow Close, Eagle Close, Goshawk Close, Bunting Road, Skua Close, Osprey Walk, Coltsfoot Green, part of Pastures Way (the section to the north of the roundabout between Pastures Way, Wheatfield Road and Kestrel Way) and part of Kestrel Way (the section to the east of the roundabout between Pastures Way, Wheatfield Road and Kestrel Way and up to the junction with Coltsfoot Green). In oral evidence Mr Mason said that Linnet Close, Sparrow Close and Finch Close should also have been coloured, and had been omitted in error from the claimed neighbourhood.

14.3. On the final day of the inquiry Mr Mason said that he wished to put forward the neighbourhood known by the Office for National Statistics website as Luton 009A as an alternative neighbourhood ("Claimed Neighbourhood 2"). Mr Mason sought permission, which I granted, to give further evidence in relation to the issue of neighbourhood. The Objectors did not object to Mr Mason putting forward this area as an alternative neighbourhood, but the First Objector sought permission to recall Mr Thompson to give further evidence in relation to this alternative neighbourhood, which I granted.

Conclusions on locality and neighbourhood

14.4. I was not satisfied that the application land was used by the inhabitants of Lewsey Electoral Ward as a whole. There was no evidence of use from people living anywhere other than in the immediate vicinity of the land.

14.5. I am not satisfied that Claimed Neighbourhood 1 is a neighbourhood within the meaning of the statute: there is no evidence that this area has any cohesiveness or any separate identity. I accept Mr Booth's submissions in this regard. Mr Mason, when asked to explain how Claimed Neighbourhood 1 had been defined, said that it was the area from which he thought the people who use the application land came. He very fairly said that there was not anything else which he could think of which distinguished Claimed Neighbourhood 1. Mr Mason identified three potentially unifying features for Claimed Neighbourhood 1 on the final day of the inquiry: a doctor's surgery, two schools and a local shop. All of these facilities lay outside the claimed neighbourhood, and served a much larger area than Claimed Neighbourhood 1.

14.6. Although Claimed Neighbourhood 2 was a "neighbourhood" identified by the Office for National Statistics as Luton 009A, it seemed to be an area identified for statistical convenience, rather than on the basis of any shared identity. I was not satisfied that Claimed Neighbourhood 2 is a neighbourhood within the meaning of the statute. Further, I was not satisfied that the application land was used by the inhabitants of Claimed Neighbourhood 2 as a whole: there was no

[133] A/37A
[134] A/37B

evidence of use by individuals living in the western part of Claimed Neighbourhood 2, other than in Gelding Close and Pastures Way.

15. Applying the law to the facts

a significant number…

15.1. In my judgment during the parts of the relevant period when the application land was proved to have been used for lawful sports and pastimes, it was used by a sufficient number of people to signify to a reasonable landowner that it was in general use.

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

15.2. Lewsey Electoral Ward was accepted by the Objectors to be a potentially relevant locality within the meaning of the statute, and I am satisfied that it is a locality within the meaning of the statute. The Applicant did not pursue the claim made in his application form that the inhabitants of Lewsey Electoral Ward as a whole made use of the application land for recreation at the inquiry, and, had he done so, he would not have succeeded on the basis of the evidence before the inquiry.

15.3. I was not satisfied that either of the claimed neighbourhoods put forward in the alternative by the Applicant was a neighbourhood within the meaning of the statute for the reasons set out above. In addition I was not satisfied that the users of the application land could sensibly be said to come from Claimed Neighbourhood 2 as a whole. The Applicant has not satisfied this part of the test for registration.

…have indulged as of right…

15.4. There was no evidence to suggest that such use of the application land as there had been during the relevant period was forceful, permissive or secretive. The Applicant has satisfied this part of the test for registration.

…in lawful sports and pastimes…

15.5. Much of the use of the application land was referable to use of the right of way which crosses the land. However, when this use was stripped out, there remained some evidence that there had been, during the more recent part of the relevant period, recreational use of the application land which was more than trivial or sporadic, and which was not referable to use of the public right of way which crosses the land. The application land was used for recreational dog walking and for children's play, principally football and bat and ball.

15.6. However, the Applicant did not discharge the burden of proving that these activities had been carried out throughout the relevant period, and in particular there was no specifically dated evidence of use of the application land for recreational purposes before 2000 which was more than sporadic.

15.7. There was evidence of a single use of part of the land for a VE Day anniversary celebration in 1995 and some suggestion that there might have been bonfires on

the land until 2004, but in my judgment these activities were sporadic only and are not sufficient by themselves without more to justify registration.

…on the land…

15.8. The application land is land within the definition provided by the statute and has been sufficiently clearly defined to constitute "land" within the meaning of the statute. This part of the test for registration is satisfied.

…for a period of at least 20 years and they continue to do so at the time of the application.

15.9. The relevant period in relation to this application is 26th January 1990-26th January 2010. The use of the application land continued down to the date of the application, but, for the reasons set out above, the Applicant failed to discharge the burden of proving that the application land had been used for lawful sports and pastimes throughout the earlier part of the relevant period. In my judgment the application ought to be refused on this ground.

16. **Conclusion and Recommendation**

16.1. I conclude that the application to register the application land fails because the Applicant has failed to show on the balance of probabilities that the land has been used throughout the relevant period for lawful sports and pastimes. I recommend that the application should be refused for this reason.

16.2. In addition, the applicant has failed to demonstrate that either of the claimed neighbourhoods on which he relied was a neighbourhood within the meaning of the statute. I recommend that the Registration Authority should refuse the application on this ground also.

16.3. The Registration Authority is required to give written notice of its determination and of the reasons for its decision to the Applicant and to every person who made representations concerning the application. I recommend that the reasons are stated to be "the reasons set out in the Inspector's Report dated 22nd November 2010".

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22nd November 2010