



Meeting: Regulatory Committee

Time: 10.00 am

Date: 13 July 2017

Venue: Committee Room 1 - County Hall, County Hall, Colliton Park, Dorchester, DT1 1XJ

Beryl Ezzard	David Jones (Chairman)	Byron Quayle (Vice-Chairman)
Shane Bartlett	Jon Andrews	Kevin Brookes
Margaret Phipps	Keith Day	Ray Bryan
Jean Dunseith	Katharine Garcia	Nick Ireland
Jon Orrell	Mary Penfold	David Shortell

Notes:

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- **Public Participation**
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Public Speaking

Members of the public can ask questions and make statements at the meeting. The closing date for us to receive questions is 10.00am on 10 July 2017, and statements by midday the day before the meeting.

Debbie Ward
Chief Executive

Contact: David Northover
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Date of Publication:
Wednesday, 28 June 2017

1. Apologies for Absence

To receive any apologies for absence.

2. Code of Conduct

Councillors are required to comply with the requirements of the Localism Act 2011 regarding disclosable pecuniary interests.

- Check if there is an item of business on this agenda in which the member or other relevant person has a disclosable pecuniary interest.
- Check that the interest has been notified to the Monitoring Officer (in writing) and entered in the Register (if not this must be done on the form available from the clerk within 28 days).
- Disclose the interest at the meeting (in accordance with the County Council's Code of Conduct) and in the absence of a dispensation to speak and/or vote, withdraw from any consideration of the item.

The Register of Interests is available on Dorsetforyou.com and the list of disclosable pecuniary interests is set out on the reverse of the form.

3. **Minutes**

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To confirm and sign the minutes of the meeting held on 22 June 2017.

4. **Public Participation**

To receive any public questions and or public statements in accordance with Standing Order 21 (2).

5. **Application for the registration of a town or village green at Herston Fields, Swanage**

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To consider a report by the Director for Environment and Economy.

6. **Questions from County Councillors**

To answer any questions received in writing by the Chief Executive by not later than 10.00am on Monday 10 July 2017.



Regulatory Committee

Minutes of the meeting held at County Hall, Colliton Park,
Dorchester, DT1 1XJ on Thursday, 22 June 2017

Present:

David Jones (Chairman)

Byron Quayle, Shane Bartlett, Kevin Brookes, Ray Bryan, Keith Day, Jean Dunseith,
Beryl Ezzard, Katharine Garcia, Nick Ireland, Jon Orrell, Mary Penfold, Margaret Phipps and
David Shortell.

Members Attending

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Officer Attending: Mike Garrity (County Planning, Minerals and Waste Team Leader), Vanessa Penny (Regulation Team Leader), David Northover (Senior Democratic Services Officer) and Phil Crowther (Solicitor).

For certain items, as appropriate

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(Notes: These minutes have been prepared by officers as a record of the meeting and of any decisions reached. They are to be considered and confirmed at the next meeting of the Cabinet to be held on **Thursday, 13 July 2017.**)

Chairman's Announcements

- 1 The Chairman took the opportunity to thank Councillor Margaret Phipps for chairing the meeting held on the 1 June in the absence of himself and the Vice-Chairman on that occasion.

Apologies for Absence

- 2 An apology was received from Councillor Jon Andrews.

Code of Conduct

- 3 There were no declarations by members of disclosable pecuniary interests under the Code of Conduct.

With reference to minute 6 and having sought and taken legal advice, Councillors Kevin Brookes and Jon Orrell confirmed that as they were both members of Weymouth and Portland Borough Council and the Borough Council had as landowner objected to the Town Green application site at the Nothe, they would withdraw from the meeting and would not take part in the debate.

Minutes

- 4 The minutes of the meeting held on 1 June 2017 were confirmed and signed.

Public Participation

5 Public Speaking

There were no public questions received at the meeting in accordance with Standing Order 21(1).

There were no public statements received at the meeting in accordance with Standing

Order 21(2).

Application for the registration of a town or village green at Nothe Gardens, Weymouth

6 The Committee considered a report by the Director for Environment and the Economy which considered an application to amend the Register of Town and Village Greens by the addition of an area of land at Nothe Gardens, Weymouth, as shown on Drawing 08/18 accompanying the report.

With the aid of a visual presentation, and having regard to the Update Sheet appended to these minutes, the basis for the application was explained and what it entailed. Photographs and plans were shown to the Committee by way of illustration. This showed the claimed application area, its characteristics and setting within the townscape and its relationship with development in that part of Weymouth, including the local road network. Officers confirmed that evidence had established that the land of the application was in the ownership of Weymouth and Portland Borough Council and that the Borough Council had objected to the application. Photographs showed the site from various directions within, depicting features such as entrance signage, interpretation boards, benches, toilets blocks and pathways all of which had been maintained primarily by the Borough Council, in association with Natural England.

The background to the application was explained by officers. This had been made in 2008 by Roger Genge on behalf of 'Friends of Nothe Gardens' with the claim that the site had been used, as of right, throughout a period of 20 consecutive years. In 2012 the applicant asked to amend the application by reducing the area of the claimed green. The Committee's attention was drawn to the user evidence of the claimed green in support of the application which was summarised in the report, together with a matrix showing the activities in which people participated and charts showing periods and level of use. Issues to be considered were set out in Paragraph 9 of the report, with the statutory tests for determining a town or village green being set out specifically in paragraph 9.2.

The Committee's attention was also drawn to a statement of common ground agreed between the applicant and the objector – the Borough Council. This statement set out the matters on which the applicant and the objector agreed and the issues where they disagreed. This narrowed the issues that the Committee needed to determine.

With regard to the Update Sheet, the Solicitor drew the Committee's attention to the withdrawal of the application – on the day preceding the meeting - by the applicant following the applicant's reconsideration of the terms of the Memorandum of Understanding between the Borough Council and the Friends of Nothe Gardens. Essentially this gave assurances that the application land would not be used for development purposes, which was the primary reason for the application being lodged. However the Solicitor confirmed that in its capacity as Registration Authority, the County Council was required to adjudicate on the application and to register the application land if there were sound reasons for doing so or, if not, to reject the application.

Officers summarised the Borough Council's position - in that the land was in public ownership by them and has been used, with permission and by right, for public recreation since the late 19th century - with numerous organised events being held there which had restricted and limited public access. Moreover there were a series of byelaws enacted by the Borough Council which covered Nothe Gardens and served to restrict use. Similarly, evidence had been submitted to support this case, in opposition to the application. This too was outlined in the Director's report.

In response, as officers explained, the applicant stated that his understanding was that Nothe Gardens had been used for recreation by the public - as of right –

preceding their purchase by the Borough Council, with access never having been prevented or restricted even during organised events and that the byelaws had only been effectual since 2005.

Officers clarified that the substantive issue for the Committee to determine was whether use of the application site was 'as of right'. Officers considered that the evidence submitted by the Borough Council, in particular the Byelaws and ownership documents, together with its management and maintenance of Nothe Gardens clearly showed that use was 'by right'.

The attention of the Committee was drawn to the receipt of the view of the County Councillor for Rodwell, Clare Sutton, who considered that the Committee should draw its own conclusions based on the evidence presented and their expertise and experience and, on that basis, she would accept whatever decision was made. However she did feel that the applicant should have been given more opportunity to prepare his case and that description might be afforded him to have this opportunity when he spoke at Committee.

On that basis, the opportunity was provided for Roger Genge to address the Committee. He confirmed that whilst he had formally withdrawn his application, he explained the reasoning for why this had been lodged and the circumstances for this. However, upon reconsideration, he was now satisfied that the Memorandum of Understanding with the Borough Council was sufficient to alleviate his primary concerns for the use of this site.

The opportunity was then provided for members to ask questions of the officers presentation and on what they had heard and took this opportunity to have their understanding of what the application entailed clarified.

Officers drew the Committee's attention to the critical issues under consideration - in terms of the application site, the evidence submitted by both sides and whether use was 'as of right' or 'by right'. The Committee concluded that, in the circumstances, the recommendation contained in the Director's report was wholly appropriate given the evidence that had been asked to consider, with the evidence submitted by the Borough Council - in particular the Byelaws and ownership documents - together with its management and maintenance of Nothe Gardens clearly showed that use was 'by right' and this was conclusive in their view.

Resolved

That the application to register Nothe Gardens, Weymouth as a town or village green be refused.

Reason for Decision

The application site is owned by Weymouth and Portland Borough Council as a public park and gardens. As such the use of the application site is 'by right'. Further, the actions of the Borough Council in maintaining the application site and providing facilities for the public constitute implied permission, supporting the conclusion that use is as of right.

Decisions on applications for town and village greens ensure that changes to the Register of Town or Village Greens comply with the legal requirements and achieves the Corporate Plan objectives of:

Enabling Economic Growth

- Work in partnership to ensure the good management of our natural and historic environment
- Encourage tourism to our unique county

Promoting Health, Wellbeing and Safeguarding

- Actively promote physical activity and sport
- Improve the provision of, and access to, green, open spaces close to where people live

Arrangements for future meetings

- 7 The opportunity was taken to ensure that members knew that the reserve date of Thursday 17 August 2017 would be required to be used for a Committee meeting.

Questions from County Councillors

- 8 No questions were received from Members under Standing Order 20(2).

Meeting Duration: 11.45 am - 1.00 pm

Agenda item:

Regulatory Committee

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Dorset County Council



Date of Meeting	13 July 2017
<u>Local Member(s):</u> Cllr William Trite - Member for Swanage <u>Lead Officer</u> Phil Hobson, Senior Definitive Map Officer	
Officer	Director for Environment and the Economy
Subject of Report	Application for the registration of a town or village green at Herston Fields, Swanage
Applicant	Stephen Foote on behalf of 'The Friends of Herston Fields' (now represented by Mr Jenson).
Executive Summary	Following a Public Inquiry held by the County Council at Worth Matravers Parish Hall during April 2016, this report considers the conclusions and recommendation reached by the Inspector in respect of an application to amend the Register of Common Land and Village Greens by the addition of an area of land at Herston Fields, Swanage as shown on Drawing 14/36/1 (Appendix 1).
Impact Assessment:	Equalities Impact Assessment: An Equalities Impact Assessment is not a material consideration in considering this application.
	Use of Evidence: The applicant submitted user evidence forms from users of the claimed green in support of the application. The landowner has submitted evidence in objection as well. Any relevant evidence provided was discussed in the previous report to the Regulatory Committee on 30 July 2015 (Appendix 2).

	<p>Budget:</p> <p>A decision whether or not to accept the application to record the claimed area as Town Green may result in a challenge through the Courts by way of judicial review.</p>
	<p>Risk Assessment:</p> <p>As the subject matter of this report is the determination of a town or village green application the County Council's approved Risk Assessment Methodology has not been applied.</p> <p>Other Implications:</p> <p>Public Health/Physical Activity – if registered it would provide an area of recreation for the residents of Herston.</p>
<p>Recommendations</p>	<p>That:</p> <p>(a) The application be considered afresh following the Public Inquiry;</p> <p>(b) The application to register land at Herston Fields, Swanage as shown on Drawing 14/36/1 as a town or village green is accepted; and</p> <p>(c) The land be recorded on the Register of Town and Village greens.</p>
<p>Reason for Recommendations</p>	<p>The evidence presented to the County Council and considered by the Inspector appointed by the County Council demonstrates that the application should be accepted and the land registered as a town or village green.</p> <p>Decisions on applications for town or village greens ensure that changes to the Register of Town and Village Greens comply with the legal requirements and supports the corporate plan objectives of:</p> <p>Enabling Economic Growth</p> <ul style="list-style-type: none"> • Work in partnership to ensure the good management of our natural and historic environment • Encourage tourism to our unique county <p>Promoting Health, Wellbeing and Safeguarding</p> <ul style="list-style-type: none"> • Actively promote physical activity and sport • Improve the provision of, and access to, green, open spaces close to where people live
<p>Appendices</p>	<p>1 - Drawing 14/36/1 – Area of land, which is the subject of the application</p> <p>2 - Report to the Regulatory Committee 30 July 2015 and an extract from the minutes</p>

Application for the registration of a town or village green at Herston Fields, Swanage

	<ul style="list-style-type: none">3 - Inspector's report March 20174 - Inspector's Supplementary Report June 20175 - Plan of neighbourhood of Herston submitted with the application6 - Plan to show the Inspector's amended area of the neighbourhood of Herston
Background Papers	The file of the Director for Environment and the Economy (ref. RW/VG AP1/2013).
Report Originator and Contact	Name: Phil Hobson Senior Definitive Map Officer Tel: (01305) 221562 Email: p.c.hobson@dorsetcc.gov.uk

1 Background

- 1.1 Dorset County Council is the Commons Registration Authority for the purpose of exercising functions under the Commons Act 2006. An application dated 17 May 2013 was made by Stephen Foote on behalf of 'The Friends of Herston Fields' for the registration of land at Herston Fields, Swanage (as shown on Drawing No. 14/36/1, Appendix 1) as a town or village green. An objection to the application was received from the landowner, the Scott Estate.
- 1.2. Following an investigation of the application a report was presented to the Regulatory Committee on 30 July 2015 (Appendix 2) and the Committee resolved that the determination of the application be deferred pending the outcome of a local Public Inquiry to be conducted by an independent Inspector on behalf of the County Council. The Inspector has now provided his report and a supplementary report into the application following the Public Inquiry, which set out his recommendation to the County Council. The decision to accept or refuse the application rests with the Regulatory Committee. Given this, it is recommended that the Committee considers the application afresh in the light of the Inspector's report, supplementary report and recommendation rather than as a deferred matter.

2 Description of the land

- 2.1 A full description of the land can be found at paragraph 2 of the previous report (Appendix 2). Briefly, the area of land, which is the subject of the application ("the Land"), is shown in red on Drawing 14/36/1 attached as Appendix 1. It consists of approximately 8.32 hectares of land, located in Herston, Swanage to the north of the A351 High Street and Victoria Avenue and east of Washpond Lane.

3 Law

Commons Act 2006

- 3.1 Under Section 15(1) of the Commons Act 2006 any person may apply to the Commons Registration Authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies (according to whether the use continued at the date of the application or not).
- 3.2 This application was made under Section 15(2) which requires that:
- (a) A significant number of the inhabitants of any locality, or of any neighbourhood in 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.

The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

- 3.3 These Regulations set out the procedure to be followed by the County Council on receipt of an application:

Application for the registration of a town or village green at Herston Fields, Swanage

- (a) The Regulations require that the application is publicised, giving at least six weeks for any objections to be made. Following the end of the objection period, the County Council is required to proceed to the further consideration of the application as soon as possible and the consideration of statements (if any) objecting to that application.
- (b) The Regulations also require that the County Council:
 - (i) Consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application; and
 - (ii) May consider any such statement which it receives on or after that date before the authority finally disposes of the application.
- (c) The County Council must not reject the application without giving the applicant a reasonable opportunity of dealing with –
 - (i) The matters contained in any statement of which copies are sent to him...; and
 - (ii) Any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.

Human Rights Act 1998

3.4 The Human Rights Act 1998 incorporates into UK law certain provisions of the European Convention on Human Rights. Under Section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a convention right. A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) and that he is (or would be) a victim of the unlawful act, may bring proceedings against the authority under the Act in the appropriate court or tribunal, or may rely on the convention right or rights concerned in any legal proceedings.

- (a) Article 8 of the European Convention, the Right to Respect for Private and Family Life provides that:
 - (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
 - (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
- (b) Article 1 of the First Protocol provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

4 The Public Inquiry

- 4.1 A non-statutory Public Inquiry was held at Worth Matravers Parish Hall following the Committee's resolution on 30 July 2015. The Inquiry took place over a period of eight days commencing on 4 April 2016 and concluding on 14 April 2016. The Inspector held a site visit on 18 April 2016, being accompanied by representatives of both parties. The Inspector undertook two further unaccompanied site visits. The applicant was represented by Mr Jenson (who had taken over promoting the application after the applicant, Mr Foote, moved away) and the objector by leading and junior counsel (Ms M Ellis QC and Mr A Greaves). The closing submissions were made on 20 April 2016.
- 4.2 The Inquiry heard from a number of witnesses for the applicant and for the objector, with these witnesses also being subject to cross examination. A summary of this evidence is set out in sections 3 and 4 of the Inspector's report (Appendix 3).
- 4.3 Following the Public Inquiry (between November 2016 and February 2017) the Inspector undertook further consultation with the applicant and the objector in respect of the extent of the locality or neighbourhood from where the users came.
- 4.4 The Inspector's report was circulated to the parties in March 2017 and subsequently representations were received from the objector. The applicant was given the opportunity to comment on those representations. Those representations were considered by officers and the Inspector and have been dealt with either by the Inspector in his Supplementary Report or by officers in this report.
- 4.5 The Inspector's final report was received on 20 March 2017 and forms Appendix 3. His supplementary Report is at Appendix 4.

5 The Test for Registration

- 5.1 The application, which was made under Section 15(2) of the Commons Act 2006, claims that:
 - (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.
- 5.2 Alternatively the County Council has the discretion to consider the application under Section 15(3), which has the same test as under paragraph 5.1(a) but required, at the time of the application, that they ceased doing so no longer than two years before the application.

- 5.3 The Inspector has produced a full and reasoned report to the County Council in which he sets out the evidence presented at the Public Inquiry. The evidence consisted of oral and written evidence from witnesses and documentary evidence. The objector criticised the previous version of the Inspector's report for reaching allegedly contradictory and unreasoned conclusions. Those particularly related to agricultural activity and the area of use. The Inspector has addressed these criticisms in his Supplementary Report, which do not affect his overall conclusion.
- 5.4 A summary of the Inspector's comments and conclusions in respect of each part of the Section 15 test follows, together with officers' views on the Inspector's conclusions.
- 5.5 It is for the Regulatory Committee to determine the application, having considered the Inspector's report and recommendations. The burden of proof is on the applicant and the decision should be made on the balance of probabilities.

Locality or Neighbourhood within a Locality

- 5.6 The Inspector determined that Herston does exist as a "separate cohesive, identifiable entity, capable of being defined by a set of boundaries". He further concluded that, in principle, the area defined by the applicant (outlined with a bold black line on the plan at Appendix 5) was capable of being described as a neighbourhood and, on the evidence, considered Swanage a locality within the meaning of Section 15 of the 2006 Act and consequently, Herston is a neighbourhood within a locality.
- 5.7 However, the Inspector also considered that the area identified by the applicant on the plan as a neighbourhood was, to an extent, defective. He recommended that further consultation be undertaken to re-identify the area with particular attention to its eastern boundary. He was satisfied that the evidence presented during the Inquiry and held at the Dorset History Centre, which he viewed after the Inquiry, demonstrated that the area he identified as the neighbourhood (see plan at Appendix 6) was only marginally different to that identified by the applicant and on that basis was satisfied that the area identified as the neighbourhood of Herston conformed, more or less, to that identified on the plan of the neighbourhood submitted with the application.
- 5.8 The Inspector also concluded that, historically, Herston was a settlement in its own right and separate to Swanage. On that basis he concluded in the alternative that if Herston does not constitute a neighbourhood within a locality then it constitutes a locality in its own right.
- 5.9 The objector criticises the Inspector's conclusion on the basis that the material held at Dorset History Centre was not produced to the Inquiry. So, the objector says, it was deprived of the opportunity to challenge it. Officers do not agree that the objector was prejudiced. The Inspector held a consultation after the Inquiry into the issues of neighbourhood and all of the material considered by the Inspector was sent to the applicant and the objector. The objector chose not to make any representations on the evidence but confined itself to submitting that the process was unfair. Officers do not agree that there has been any procedural unfairness.

- 5.10 Officers consider that the Inspector's conclusions on this issue are correct for the reasons he gives in his report.

Significant Number of Inhabitants

- 5.11 There were 92 evidence forms from users of the application site, 20 users gave oral evidence at the Inquiry and 7 provided written statements. The Inspector was satisfied that, although there were a number of discrepancies between the oral and written evidence, on balance, he found this did not affect the overall picture, which he found credible and persuasive. He found that the vast majority of users came from Herston although there was some use by others.
- 5.12 The Inspector found that there had been sufficient user and went on to say that this could not be described as trivial or sporadic. The Inspector also considered this use was sufficient for the landowner to realise that town or village green rights were being asserted.
- 5.13 The Inspector considered the objector's evidence that use was not extensive until a local campaign in 2010. He was not persuaded that this evidence outweighed the applicant's evidence. The Inspector considered that the aerial photographs produced by the objector were of little assistance, being only a snapshot in time of when they were taken.
- 5.14 The Inspector rejected the suggestion that people using the public footpath would have remained on the footpath rather than deviating from it, finding that until restricted in April 2011, use by the inhabitants of Herston was more wide, ranging over all three fields and, in particular, the Southern Field. He also discounted user of only the public footpath.
- 5.15 The Inspector found that the number of witnesses using the application site were significant. There is no reason to question the conclusions the Inspector reached on the credibility of witnesses. Further, the Inspector concluded that any inconsistencies in evidence, such as they were, were insignificant and did not affect the overall picture. Also the majority of users were local inhabitants of Herston and there was a low level of user by people from outside Herston. The Inspector has clarified in his Supplementary Report that he discounted use by residents during any times when they had moved away from Herston and discounted use by people who have never lived in Herston. These conclusions appear entirely reasonable.

Lawful Sports and Pastimes throughout the Statutory Period

- 5.16 The Inspector has included bar charts summarising use. However, these are a simplistic representation of use and do not distinguish, for example, periods when a particular witness lived inside of Herston or had moved away but continued to use the path. However, officers consider that the Inspector has fully considered the evidence as set out in his report and that the graphs merely go towards confirming his detailed conclusions.

- 5.17 On the balance of probability the Inspector judged that the evidence provided by the applicant had made a compelling case that the recreational activities indulged in by the inhabitants of Herston constituted lawful sports and pastimes. He found that these activities included informal walking, dog walking, playing with children, picnicking and kite flying. He considered that there was limited use, which fell outside of being a lawful sport or pastime, namely school lessons on the application site, but that such use was not significant.
- 5.18 He also found that there was sufficient evidence to demonstrate that throughout the statutory period, namely April 1991 to April 2011, and indeed prior to this period, people had consistently made use of the whole of Herston Fields for such lawful pursuits and pastimes.
- 5.19 The Inspector rejected the assertion by the objector that use of the area for recreational activities had not been consistently indulged in by the local inhabitants. He concluded that the evidence examined revealed that farming activity was sporadic and with the exception of those times when use was constrained by such things as ploughing and cropping or the presence of horses or cattle, the public had used the broader acreage for recreation activities until being restrained from such use in April 2011.
- 5.20 As set out in paragraph 5.14 above, the Inspector discounted user of the public footpath. However, he considered that, in line with recent case law, circular and perimeter walks are a legitimate Village Green use. He therefore included that user as within the definition of lawful sports and pastimes.
- 5.21 Officers consider that the uses identified by the Inspector are lawful sports and pastimes under Section 15 of the Commons Act. Officers' view is that they are also typical of those normally carried out on town or village greens. Officers also consider that the Inspector's conclusions that any farming activities did not prevent or interrupt such lawful sports and pastimes is reasonable.

As of Right

- 5.22 The Inspector concluded that the evidence examined revealed that the inhabitants of Herston have used Herston Fields as of right, without stealth, secrecy or force and without the permission of the Scott Estate for lawful sports and pastimes for the statutory period.
- 5.23 He concluded that the level of use by the inhabitants of Herston was at such a level that the objector should have become aware of it. Historically, that land was tenanted, including by Dorset County Council for the County Farm Estate, although the Inspector found that the objector had still retained some responsibility for the land, such as 'drive by visits'.
- 5.24 The Inspector acknowledged that there was some evidence of steps taken by the objector's tenants to prevent use. However, he concluded that such evidence was not sufficient to demonstrate that use was not as of right.

On the Land

- 5.25 The objector suggests that the Inspector did not consider whether any use as of right took place over the whole application site or whether it was over a smaller area. The Inspector points out in his Supplementary Report that he did consider this issue and his findings are set out in paragraphs 38-40. He concluded that use was over the whole application site.

For a period of at least 20 years

- 5.26 It was agreed at the Inquiry that the 20 year period ended in April 2011 when the application site was ploughed. The application is therefore being considered under Section 15(3) as it was made within two years of April 2011.
- 5.27 The Inspector found that there was some low level agricultural use of the land during the 20 year period. He found that it was ploughed once in 2002 but, because nothing else was done, that was not sufficient to be an interruption to use. He also found that livestock and horses were present on the application site for significant periods during the 20 years. However, he found that the Village Green user co-existed with the agricultural use and as such did not interrupt use. The Inspector sets out in detail in his Supplementary Report why he concluded that the ploughing in 2002 was not sufficient to interrupt use whereas the ploughing carried out in 2011 did interrupt use and indeed bring user as of right to an end.
- 5.28 The Inspector found that the objector had not produced sufficient evidence to counter the applicant's evidence about the user of the land. Indeed, some of the tenants and unlawful occupiers were aware of the use of the land by the 'public'. Insofar as the objector's evidence sought to diminish the applicant's evidence, the Inspector concluded that the applicant's evidence should be preferred.
- 5.29 Officers consider that the Inspector's finding and conclusions on this issue are reasonable. Indeed, the Inspector reached his conclusion and recommendation with the benefit of hearing from the witnesses appearing for both parties.

6 Other Issues raised by the Objector

Effect of Leasing the land ('user against the fee')

- 6.1 It is the objector's contention that prior to the early 2000s the landowner, the Scott Estate, had no reason to know of any 'untoward' use of Herston Fields because prior to this time they did not control the land, it being let to tenants, including Dorset County Council. Consequently, it was not in a position to control or acquiesce to such use of it and the application must fail. The objector contends that this is because the statutory test relies on the common law of prescription and case law on prescription suggests that a landowner cannot have rights granted over their land whilst they are not in possession of it, for example, if it was tenanted. The objector has also provided counsel's opinion (from a barrister who did not represent the Estate at the inquiry) to further support its argument.

- 6.2 The Inspector concluded, from the evidence provided by the witnesses on behalf of the Scott Estate that, even while the land was let, the objector retained some responsibility for it, including intermittent 'drive by visits' by representatives of the objector.
- 6.3 He noted that, had more frequent visits been made, particularly outside of business hours and at weekends, then the widespread use of Herston Fields for recreational activities should have become apparent as such use would have been over and above the normal use of the public footpath.
- 6.4 In the Inspector's judgement the landowner, the Scott Estate, did have the means at their disposal to have been aware of the quality of the user as of right over Herston Fields in significant numbers throughout the statutory period and could have intervened. He also found that the Scott Estate would have been able to take steps against its tenant for use by the public albeit not against the public themselves. Thus he concluded that the objector (the Scott Estate) should have known about the level of use and could have taken steps to prevent it.
- 6.5 Officers consider that this is a reasonable conclusion for the Inspector to reach. Further, even if it is wrong, on officers' analysis of Section 15, the issue of whether a landowner is not in possession of the land during the 20 year period, is not relevant.
- 6.6 The objector contends that because, under common law, an easement (e.g. a private right of way) cannot be obtained by long use if the land is tenanted, a town or village green cannot come into existence if the land is tenanted. Officers do not consider that it is appropriate to import the common law on prescription into the statutory town or village green test as the objector suggests. It is true that the courts have referred to the case law on prescription in town or village green cases but they have never stated the law as submitted by the objector. Officers consider that firstly, the common law on prescription should not be read across into the law of town and village greens in the way that the objector suggests and secondly, this would fundamentally erode parliament's intention in enacting Section 15 of the Commons Act 2006 and its predecessors.

Procedural Unfairness

- 6.7 The objector has also submitted that the consultation after the public inquiry was flawed and has resulted in procedural unfairness to the objector such that the application should be refused. That is on the basis that the Inspector put forward his provisional view as to the extent of the neighbourhood, which amounted to a 'fait accompli'. The objectors also contend that they have not had the opportunity to test the material considered by the Inspector in reaching his conclusions on neighbourhood.

- 6.8 The Inspector did indeed put forward his provisional conclusion as to the extent of the neighbourhood he found. However, the consultation expressly invited representations on whether he, and Dorset County Council, are entitled to find a different neighbourhood to that in the application. Both parties were provided with the documents considered by the Inspector after the inquiry and with the Inspector's provisional conclusion on this issue and both parties were given the opportunity to make representations. The objector had the opportunity to make representations and it did so but declined to make any representations relating to the documents considered by the Inspector. The objector's representations on the issues were considered by the Inspector before he provided his Report. The Inspector does not consider that there has been any procedural unfairness.
- 6.9 Officers were involved in the Inspector's consultation on this issue. Officers consider that both parties were given a fair opportunity to comment on the Inspector's provisional conclusion and so it cannot be considered to be a 'fait accompli', nor that the objector has been deprived of the opportunity to make representations upon the documents considered by the Inspector after the inquiry.
- 6.10 The objector also raises a concern that it has been accused of suppressing evidence by the Inspector and the solicitor for the objector has produced a statutory declaration to counter this. This stems from one of the objector's witnesses stating in evidence that he has seen a sworn statement in the early 2000s from people supporting the objector's case but which were not produced to the public enquiry. Officers do not agree with the objector's take on this issue. It is correct that the Inspector recorded this evidence and commented that it would have been useful to see the statements referred to but which were not produced to him. However, that is as far as he went. Officers do not consider that he drew any adverse inferences from this and he is certainly not suggesting that evidence was suppressed by the objectors.

7 Conclusion

- 7.1 The Inspector concluded that, having regard for the legal principles and having analysed both the documentary and oral evidence presented during the Public Inquiry, the case has been made for the registration of Herston Fields as a town or village green. This being on the basis that there has been a significant number of the inhabitants who have indulged in lawful sports and activities for the requisite 20 year period of statutory prescription. Officers do not consider that the objector's representations on the Inspector's Report change this conclusion and, indeed, the Inspector has responded to the objector's representations in his Supplementary Report.
- 7.2 The Inspector had the benefit of hearing all witnesses who gave oral evidence at the Inquiry and so is best placed to consider issues of witness credibility and honesty. Officers agree with the conclusions reached by the Inspector in his Report and Supplementary Report and do not see any flaws in his reasoning.

Application for the registration of a town or village green at Herston Fields, Swanage

- 7.3 For the reasons set out above and within the Inspector's Report and Supplementary Report, it is recommended that Herston Fields, as shown on the accompanying plan 14/36/1 (Appendix 1), be registered as a town or village green.

Andrew Martin

Service Director, Highways and Emergency Planning

June 2017

Agenda item:

Regulatory Committee

8

Dorset County Council



Date of Meeting	30 July 2015
Officer	Director for Environment and the Economy
Subject of Report	Application for the registration of a town or village green at Herston Fields, Swanage
Executive Summary	This report considers an application to amend the Register of Town and Village Greens by the addition of an area of land at Herston Fields, Swanage as shown on Drawing 14/36/1 (Appendix 1).
Impact Assessment:	<p>Equalities Impact Assessment:</p> <p>An Equalities Impact Assessment is not a material consideration in considering this application.</p>
	<p>Use of Evidence:</p> <p>The applicant submitted user evidence forms from users of the claimed green in support of the application. The landowner has submitted evidence in objection as well. Notices explaining the application were erected on site. Any relevant evidence provided has been discussed in this report.</p>
	<p>Budget/risk implications:</p> <p>The financial implications of the courses of action available to members are referred to in the report.</p> <p>The cost of determining this application by way of a local public inquiry could cost in excess of £10,000.</p> <p>A decision whether or not to accept the application to record the claimed area as town green may result in a challenge through the Courts by way of judicial review.</p>

	<p>Risk Assessment:</p> <p>As the subject matter of this report is the determination of a town or village green application the County Council's approved Risk Assessment Methodology has not been applied.</p>
	<p>Other Implications:</p> <p>None</p>
<p>Recommendation</p>	<p>That:</p> <p>(d) Determination of the application is deferred pending a local public inquiry to fully consider the evidence; and</p> <p>(e) The Committee delegates to officers the administrative arrangements for the local public inquiry; and</p> <p>(f) An independent Inspector be appointed to conduct the non-statutory public inquiry.</p>
<p>Reasons for Recommendation</p>	<p>(a) and (b) The nature of the evidence submitted means that the application should not be determined without some public inquiry process.</p> <p>(c) As Dorset County Council has an interest in this application as a former tenant of the application site it would be appropriate for a public inquiry to be conducted by an independent Inspector.</p> <p>Decisions on applications for town and village greens ensure that changes to the Register of Town or Village Greens comply with the legal requirements and achieves the corporate plan objectives of:</p> <p>Enabling Economic Growth</p> <ul style="list-style-type: none"> • Work in partnership to ensure the good management of our natural and historic environment • Work with partners and communities to maintain cycle paths, rights of way and disabled access • Encourage tourism to our unique county • Support community transport schemes • Ensure good management of our environmental and historic assets and heritage <p>Promoting Health, Wellbeing and Safeguarding</p> <ul style="list-style-type: none"> • Actively promote physical activity and sport • Develop and maintain safe, convenient, efficient and attractive transport and green infrastructure that is conducive to cycling and walking • Improve the provision of, and access to, green, open spaces close to where people live

Application for the registration of a town or village green at Herston Fields, Swanage

<p>Appendices</p>	<p>1 - Drawing 14/36/1 – Area of land, which is the subject of the application</p> <p>2 - Drawing 14/37 – Showing addresses of users</p> <p>3 - User evidence table and matrix showing activities in which users participated</p> <p>4 - Charts to show periods and level of use</p> <p>5 - Drawing 15/24 – Location plan</p>	
<p>Background Papers</p>	<p>The file of the Director for Environment and the Economy (ref. RW/VG AP1/2013).</p>	
<p>Report Originators and Contacts</p>	<p>Name: Vanessa Penny Regulation Team Leader Tel: (01305) 224719 Email: v.penny@dorsetcc.gov.uk</p>	<p>Phil Crowther Solicitor Tel: (01305) 225108 Email: p.crowther@dorsetcc.gov.uk</p>

1 Background

- 1.1 Dorset County Council is the Commons Registration Authority for the purpose of exercising functions under the Commons Act 2006. An application has been made by Stephen Foote on behalf of 'The Friends of Herston Fields' for the registration of land at Herston Fields, Swanage as a town or village green.

2 Description of the land

- 2.1 The area of land, which is the subject of the application ("the Land"), is shown in red on Drawing 14/36/1 attached as Appendix 1. It consists of approximately 8.32 hectares of land, which forms an open grassy area. It is bounded to the south by the A351 High Street and Victoria Avenue, to the west by Washpond Lane and Swanage Middle School, to the north by the railway line (Swanage Railway) and to the east by the residential area of Ancaster Road and Aigburth Road.
- 2.2 The Land consists of one section, crossed from north west to south east by Footpath 78, Swanage.
- 2.3 The Land is owned by the Scott Estate of Corfe Castle. Other interested parties are the current tenant of the Land, Mr Derek Smith and Coombe Farm, Knitson farm, Prospect Farm and the Swanage Railway Company.
- 2.4 Dorset County Council held a lease of the Land from 1953 for 35 years and then continued as tenant until 2013.

3 Law

Commons Act 2006

- 3.1 Under Section 15(1) of the Commons Act 2006 any person may apply to the Commons Registration Authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies (according to whether the use continued at the date of the application or not).
- 3.2 This application was made under Section 15(2) which requires that:
- (a) a significant number of the inhabitants of any locality, or of any neighbourhood in 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.

The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

- 3.3 These Regulations set out the procedure to be followed by the County Council on receipt of an application:
- (a) The Regulations require that the application is publicised, giving at least 6 weeks for any objections to be made. Following the end of the objection period, the County Council is required to proceed to the further consideration of the application as soon as possible and the consideration of statements (if any) objecting to that application.

- (b) The Regulations also require that the County Council:
 - (i) Consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application; and
 - (ii) May consider any such statement which it receives on or after that date before the authority finally disposes of the application.
- (c) The County Council must not reject the application without giving the applicant a reasonable opportunity of dealing with –
 - (i) The matters contained in any statement of which copies are sent to him...; and
 - (ii) Any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.

Human Rights Act 1998

3.4 The Human Rights Act 1998 incorporates into UK law certain provisions of the European Convention on Human Rights. Under Section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a convention right. A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) and that he is (or would be) a victim of the unlawful act, may bring proceedings against the authority under the Act in the appropriate court or tribunal, or may rely on the convention right or rights concerned in any legal proceedings.

- (a) Article 8 of the European Convention, the Right to Respect for Private and Family Life provides that:
 - (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
 - (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
- (b) Article 1 of the First Protocol provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

4 General Issues

- 4.1 The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 set out the procedures to be followed in respect of such applications. In accordance with those Regulations, advertisements on site and in the local press invited objections to the application within the period specified in the Regulations: in this case the objection period expired on 30 November 2014. Objections were received from the Scott Estate and the Applicant has made comments on those objections.
- 4.2 In its capacity as Registration Authority, the County Council is required to adjudicate on the application and to register the application land if there are sound reasons for doing so or, if not, to reject the application. It is for the applicant to prove his or her case and there is no requirement for the Registration Authority to instigate its own research into the application. Nonetheless, there may be disputes of fact and/or issues of law to be resolved or considered before a decision can properly be made. Further, the County Council has discretion to deal with the application on the basis of the evidence available to it and not necessarily solely on the basis applied for.
- 4.3 Unlike decisions made on applications for rights of way (which are in several ways governed by similar principles of law), decisions made by this Committee on town or village green applications are not subject to review by the Secretary of State through a prescribed statutory and public process: the decision to accept or reject an application rests with the County Council alone and can only be challenged through the Courts by way of judicial review. It is therefore particularly important that the Registration Authority's scrutiny of the application and any objections is thorough and that this Committee is well informed and advised before the application is finally determined.

5 The application

- 5.1 The application was received on 17 May 2013. It states that the Land should be registered as a town or village green because it has been used "by a significant number of inhabitants of Herston as of right for lawful sports and pastimes for at least 20 years under Section 15(2) of the Commons Act 2006, as witnessed by ...signed statements by a total of 92 people over a period extending from 1931 to 2012". The application is "duly made" for the purposes of the Commons Act 2006.
- 5.2 The application was accompanied by a map showing Herston Fields, a "Justification for the village green application" including an "analysis of information contained in the evidence forms in support of the application", video footage of local people engaging in activities including a cross country run, various photographs demonstrating the use by the public and 92 forms of evidence detailing use of the Land. In addition, six other witness statements were submitted. Drawing 14/37 illustrates the addresses of users who completed evidence forms and statements in relation to the Land and is attached as Appendix 2.

5.3 The user evidence is summarised together with a matrix showing the activities in which people participated at Appendix 3 and charts showing periods and level of use from Appendix 4. Typical uses described by witnesses are walking, playing family games, picking berries and picnicking, most of which are certainly lawful sports, pastimes and activities capable of supporting registration of land as a town or village green; there is debate about whether picking berries is a lawful pastime.

6 **Objections to the application**

6.1 Wilsons Solicitors LLP made a submission objecting to the application on behalf of the owner of the Land, the Scott Estate on 28 November 2014. They raise two key preliminary points as well as more detailed evidence:

- (a) The relevant locality/neighbourhood has not been sufficiently defined in accordance with Section 15.
- (b) For a large part, if not all, of the claim period, the land was out of possession because the application site was leased to the County Council. Therefore the landowner cannot have acquiesced or tolerated the claimed user because it had no knowledge of such use. Also, the terms of the lease of the land to the County Council specifically required the tenant to prevent easements from being acquired over the Land.

6.2 The objection is accompanied by 12 witness statements.

6.3 Two of the witness statements were completed by employees of the County Council in their capacity as managers of land owned and leased by the County Council. They raise a number of issues including:

- (a) No use of the Land was witnessed during site visits.
- (b) No tenants ever raised concerns about use of the fields for public recreation.
- (c) There were periods of time when the fields were uneven and overgrown and were not suitable for activities such as cricket or football.

6.4 The remaining witnesses include those who worked the land and/or acted on behalf of the Scott Estate. They raised the following key points:

- (a) A previous tenant allowed the funfair and circus access to the Land in the 1950s.
- (b) The same tenant would not allow local children "to get out onto the fields".
- (c) Other tenants have told people to stick to the footpath.
- (d) Cattle would have prevented people using the fields other than access along the footpath.
- (e) No organised recreational activities have been witnessed.

- (f) The fields have been used to produce haylage in the past and the crop was never trodden down as it would have been if people were using the area.
- (g) People have been seen walking their dogs around the edge of the fields.
- (h) Gates had to be wired shut to prevent people using them as access. On occasions the wire was cut and cattle escaped through open gates.

7 Response to objections – ‘The Friends of Herston Fields’

7.1 The applicant’s response to the objections raised by the landowner is summarised below:

- (a) The application provides sufficient evidence to support the case for registration
- (b) With regard to the issue of locality, Herston is now a neighbourhood of Swanage, but the area was once a village in its own right. The application map was intended to comply with the historically established residential boundaries of the village of Herston and therefore the map as a whole should be regarded as the definition of Herston.
- (c) The objector claims that the application should be dismissed as the landowner was not in control of the land during the qualifying period. The applicant feels that whilst the owner may have attempted to protect themselves from the creation of an easement through terms included in the lease documents, it appears that the tenants and sub-tenants did not comply with this.
- (d) There is a conflict of interest as Dorset County Council was landlord during the period that the Village Green Application relates

8 Issues to be considered

- 8.1 The objector has raised preliminary points which need to be addressed. The locality or neighbourhood issue is considered at paragraph 8.3 below. The issue of whether the landowner had actual knowledge of the use is not relevant; rather the issue is whether use was as of right in which case the landowner ought to have known about the use, whether or not it actually knew.
- 8.2 It is important to note that any potential breaches by the County Council of its obligations under the lease from the landowner are not relevant to determining this application.
- 8.3 The main issue is whether the test in section 15(2) of the Commons Act set out in paragraph 3.2 has been satisfied: that the Land has been used by a significant number of inhabitants of the locality (or neighbourhood within the locality) as of right for sports and pastimes for at least 20 years. The constituent parts of the test are considered in more detail below.

Locality or neighbourhood within a locality

- 8.4 The locality or neighbourhood within a locality should be identified by reference to a recognised administrative area or an obvious geographical characteristic. For example, a particular parish or a housing estate.
- (a) The applicant has identified the locality in respect of which the application is made as 'Herston see map and description in attached justification document'. The map has a thick black line identifying the locality or neighbourhood. A location plan of Herston is attached at Appendix 5.
 - (b) Objectors consider that the locality has not been adequately defined.
 - (c) Officers do not consider that the applicant has identified a locality or neighbourhood in the application because it is defined at least partially by the constraints of the chosen map area. However, the County Council has discretion to consider whether the evidence shows that a locality or neighbourhood can be identified.

Significant number of inhabitants

- 8.5 A significant number does not need to be a considerable or substantial number. The number of people using the Land has to be sufficient to signify that the Land is in general use by the local community. The users do not all need to be from the locality or neighbourhood. The amount of use submitted with the application is considered to be sufficient on the basis of the application if a proper locality or neighbourhood is identified. However, the level of use is challenged by the objector.

Use as of right

- 8.6 Use is as of right if it is without force, without secrecy and without permission. The use evidenced in support of the application indicates that use was as of right. Witnesses opposing the application, however, suggest that force was used to gain access through gates and also that those accessing the fields away from the public footpath were challenged.

Lawful sports and pastimes

- 8.7 The use evidenced in support of the application indicates that the activities qualify as lawful sports and pastimes. However, the objector disputes that the claimed activities have taken place.

For a period of 20 years

- 8.8 The test for a continuous period of use over 20 years appears to be satisfied on the basis of the applicant's evidence.

Use continued at the date of application

- 8.9 Use continued at the date of application.

9 Discussion

9.1 There are three main options available to the Committee:

- To accept the application;
- To refuse the application;
- To defer a decision pending a public inquiry.

9.2 Officers consider that there are significant and detailed matters of fact and law which need to be considered in more detail, including: -

- (a) Whether a locality/neighbourhood can be identified.
- (b) The extent to which the landowning trust or Dorset County Council as tenant acquiesced to use.
- (c) The conflict in evidence regarding the level of use and whether use was as of right.

9.3 Conflicts in personal evidence should be tested at a public inquiry where witnesses may attend to give evidence and be available for cross-examination. The Committee is not in a position to hear evidence in this way. This will ensure that a decision is made in the knowledge that the evidence has been fully tested and both the applicant and the objector have had the opportunity of exploring the evidence in public.

9.4 There is also a potential conflict regarding the County Council's role in determining the application. The County Council is the Commons Registration Authority for the application. However, it has given evidence in support of the objection in its capacity as a former tenant of the application site. A public inquiry heard by an independent Inspector would overcome any apparent conflict.

9.5 If a public inquiry is held, the Inspector will hear all of the evidence from the applicant and objector and prepare a report setting out his or her conclusions on the evidence and whether the test for registration is satisfied. The Inspector's report will recommend to the Committee how the application should be determined. The ultimate decision remains with the Committee and so a further report would be made to the Committee following receipt of the Inspector's recommendation.

10 Costs

10.1 To appoint a suitably qualified independent inspector to hold a non-statutory public inquiry would cost in the region of £10,000. In addition there will be a cost to the County Council of booking the hall, publishing notices and other administrative arrangements.

11 Conclusion

- 11.1 The nature of the application is unsuitable for a decision without a public inquiry process. In the interests of fairness it is appropriate to test thoroughly the evidence both for and against the application. It is therefore recommended that the matter is considered at a public inquiry before being reported back to Committee for a final decision.

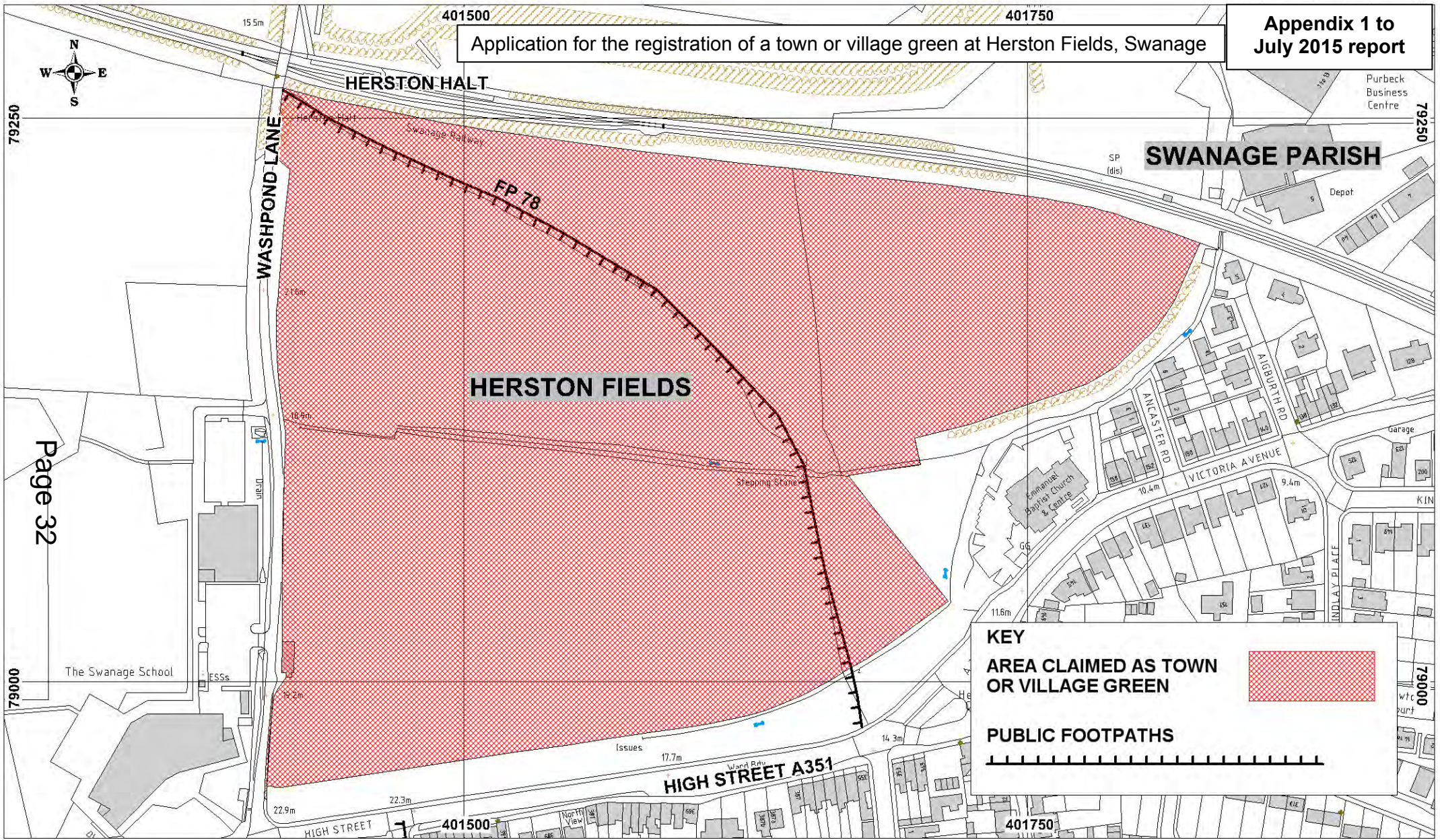
Mike Harries

Director for Environment and the Economy

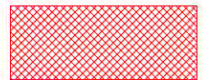
June 2017


Application for the registration of a town or village green at Herston Fields, Swanage

Appendix 1 to July 2015 report



KEY

AREA CLAIMED AS TOWN OR VILLAGE GREEN 

PUBLIC FOOTPATHS 

SECTION 15, COMMONS ACT 2006

APPLICATION FOR THE REGISTRATION OF LAND AS A TOWN OR VILLAGE GREEN AT HERSTON FIELDS, SWANAGE

Application reference: VG AP 1/2013

Plan ref: 14/36/1

Date: 17/06/2015

Scale 1:2250 A4

Drawn By: AP

Cent X: 401614

Cent Y: 79115

GEOGRAPHICAL INFORMATION SYSTEMS



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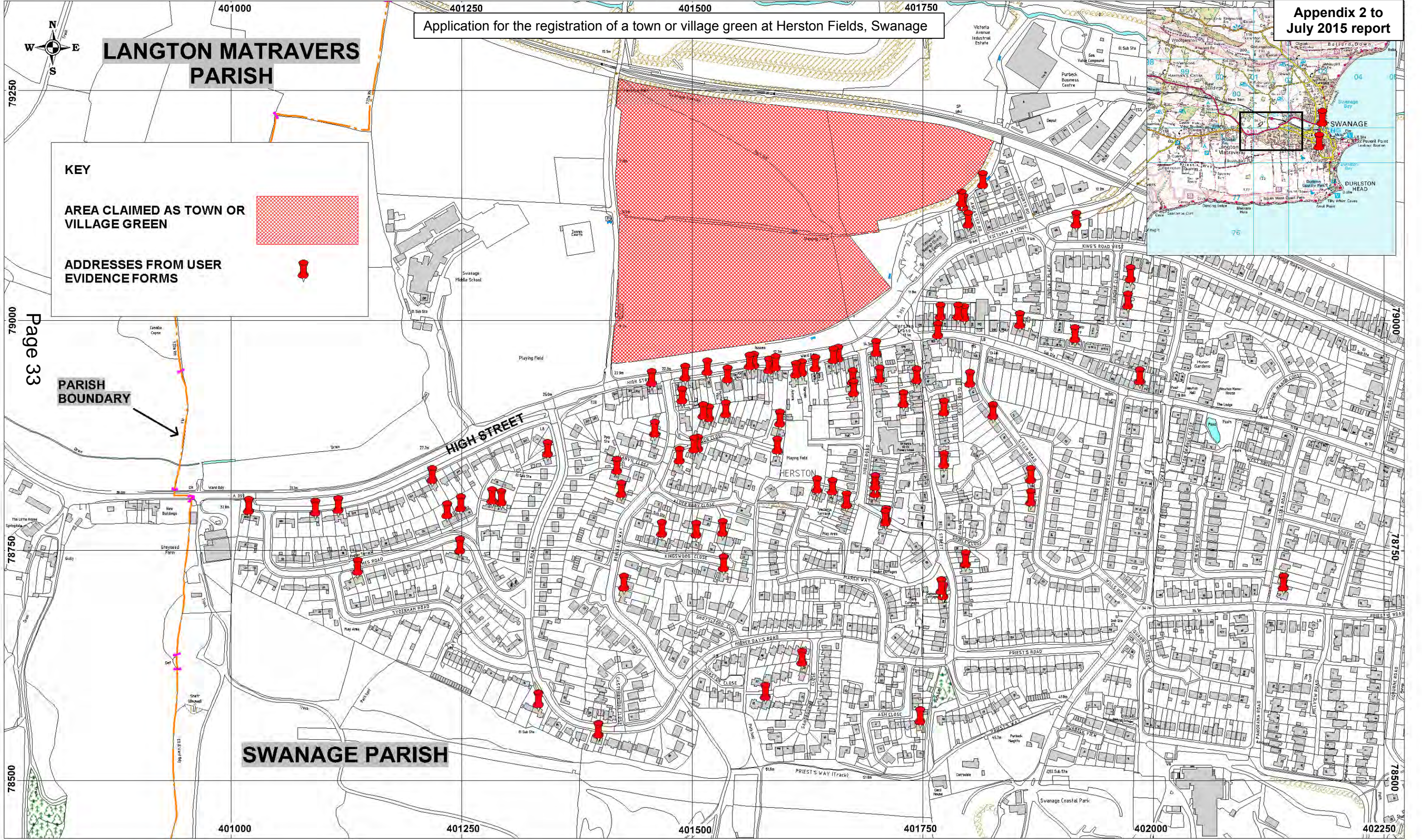
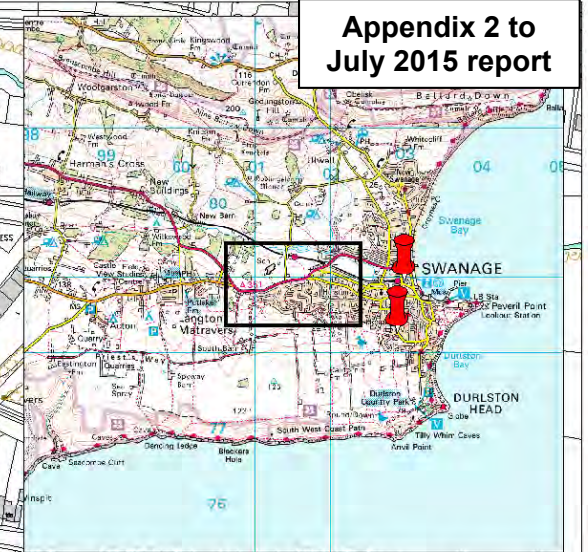
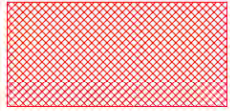
Application for the registration of a town or village green at Herston Fields, Swanage

LANGTON MATRAVERS PARISH

KEY

AREA CLAIMED AS TOWN OR VILLAGE GREEN

ADDRESSES FROM USER EVIDENCE FORMS



Page 33

SECTION 15, COMMONS ACT 2006

APPLICATION FOR THE REGISTRATION OF LAND AS A TOWN OR VILLAGE GREEN AT HERSTON FIELDS, SWANAGE

Application reference: VG AP 1/2013

Plan ref: 14/37

Date: 20/06/2014

Scale 1:4500

Drawn By: AP

Cent X: 401513

Cent Y: 78892

GEOGRAPHICAL INFORMATION SYSTEMS



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User evidence table

Name	Dates of use	Details of use
J Allsop	1958 - 2011	Used for swimming, walking, gardening and open gardens. Annual fair.
Mrs P Andrews	1942 to present (form completed in 2010)	Used for walking, picnics and picking blackberries. Seen people playing sports, fishing and kite flying.
P Andrews	2004 - 2010	Used for dog walking. Also walked with family when they visited. Seen people playing sports, picnicking, picking blackberries and kite flying.
Mr M Angell	1988 - 2010	Used for walking, kite flying and playing cricket. Seen others playing sports, picking blackberries, picnicking and kite flying.
R S B Aplin	1940 - 2010	Used for walking. Seen others picking blackberries, playing sports, picnicking and kite flying. Other activities include fair/circus.
Mr L Ashton	1969 Onwards (form completed in 2011)	Used for exercise. Seen others picking blackberries, drawing and painting, playing sports, bird watching, kite flying and cycling.
Mr C Baines	2001 to date (form completed in 2010)	Used to play with family. Seen others playing sports, picnicking, kite flying, picking blackberries, drawing and painting.
J Baird	1944 - 2010	Used for walking, playing with family, team sports and picking blackberries. Seen others kite flying, picnicking, bird watching and train spotting. A circus also used the site.
Mrs M Barlow	1971 No end date but form completed in 2010	Used for walking, picnicking and bird watching. Seen others picking blackberries, kite flying and children playing.
Mrs A Beagley	2002 - 2011	Used for walking, with family and spotting wildlife. Seen others playing team sports, picking blackberries, picnicking and kite flying.
Mrs J Beagley	1999 - 2011	Used for walking. Seen others fishing, picking blackberries, bird watching, picnicking and kite flying.
Mrs J Byron *2 types of handwriting	1980 - 2010	Used for walking, running, playing games with family and watching wildlife. Seen others playing team sports, picking blackberries, bird watching, kite flying, cycling, drawing and painting.
Mr E & Mrs L Castle	1977 - 2010	Used for walking, picnics, picking blackberries, wildlife spotting and activities with family. Seen others playing team sports, kite flying, cycling, drawing and painting.
Clarke	1976 - 2010	Used for walking. Seen others kite flying, team games and picking blackberries.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
Mr & Mrs Clements	1985 - 2010	Used for walking, picnics, going to see trains, playing with family and blackberry picking. Seen others flying kites.
J Coad	1990 to date (form completed in 2011)	Used for walking. Seen others picking blackberries and children playing.
Mrs Collins	1964 to now (form completed in 2010)	Used for walking, playing sports with family, flying kites and picking blackberries. Seen others picnicking, drawing and painting.
L Crabb	As long as can remember (no specific dates)	Used for playing games with children, flying kites, watching trains and picnics. Seen others picking blackberries, dog walking and playing football.
Mr B Craker	2004 - 2011	Used for walking and running. Seen others picking blackberries, bird watching and flying kites.
B Crisp	1987 to present (form completed in 2010)	Used for kite flying with children, blackberry picking and watching the steam train. Seen others dog walking and children playing.
Mrs S Dines	1960 - 2011	Used for walking. Seen others playing team games, bird watching and picking blackberries.
S Dobson	1945 – 1957 1975 – 2010	Used for walking, ball games and kite flying. Seen others playing team games, picking blackberries, mushroom picking, bird watching and picnicking. A circus has also used the site.
C Dowling	1997 to date (form completed in 2011)	Used for walking and jogging. Seen others picking blackberries, flying kites, drawing and painting.
Mrs J Duncan	2006 - 2011	Used for walking and ball games. Seen others playing team sports, picking blackberries, picnicking, bird watching, bonfire parties and cycling.
Mrs M Dwen	1960 to present (form completed in 2010)	Used for walking. Seen others playing team sports, picking blackberries, bird watching, flying kites, drawing and painting.
Mr D Eggleton	1993 - 2010	Used for walking. Seen others picking blackberries, playing team sports, bird watching, flying kites and practicing golf.
Mr P Emery	1987 - 2010	Used for walking. Seen others picking blackberries, playing football, bird watching, picnicking and kite flying.
B & J Enticknap	1996 - 2011	Used for walking and blackberry picking. Seen others playing team sports, bird watching, picnicking, kite flying, drawing and painting. Also been used for fair and circus.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
C Fairchild	1987 - 2011	Used for walking and running. Seen others picking blackberries and cycling.
E Feast	2003 - 2010	Used for walking and jogging. Seen others picking blackberries, playing team sports and bird watching. Fetes also used the site.
Mrs A Fellows	1998 - 2010	Used for walking and looking at wildlife. Seen others picking blackberries, bird watching and kite flying.
Mrs P Fenwick	1972 - 2010	Used for walking with family. Seen others picking blackberries, playing team sports, drawing and painting.
R & C Foot	1958 - 2010	Used for walking and berry picking. Seen others playing team sports, picnicking, kite flying, picking blackberries, golf, den making and camping. Local school used site also.
Mr B Gallagher	1999 to present (form not dated)	Used for walking. Seen others picking blackberries, playing team sports, bird watching, picnicking and kite flying.
L & B Gooding	2002 - 2010	Used for walking and playing with family. Seen others, playing team sports, camping, horse grazing, bird watching, picnicking, kite flying, cycling, drawing and painting.
G Gray	1984 to present (form completed in 2010)	Used for walking, picking mushrooms and catching the train. Seen others fishing, team games, picking blackberries, community celebrations, bird watching and picnicking.
M Hamilton	1970 - 2010	Used for walking. Seen others picking fruit, bird watching and children playing.
Mr P Hardy	1961 to present (form completed in 2010)	Used for walking, bird watching and playing with family. Seen others playing team sports, picking blackberries, train spotting, picnicking, kite flying and cycling.
Mrs Herriott	1984 - 2010	Used for walking and watching the railway. Seen others picking blackberries, bird watching, picnicking and kite flying.
S Hoare & Mr M Hopper	1984 - 2010	Used for walking, train spotting, picnics and watching nature. Has also used the land with family. Seen others practising golf, cycling and picking blackberries.
M Hobbs	2005 - 2011	Used for walking, berry picking and playing with family. Seen others playing team sports, bird watching, picnicking, kite flying, drawing and painting.
R Holland	1979 - 2010	Used for walking, picnicking, bird watching and picking blackberries. Seen others flying model aircraft, playing team sports, flying kites, drawing and painting.
R & L Hosegood	2003 to present (form completed in 2011)	Used for walking, bird watching and berry picking. Seen others playing team sports, picnicking and kite flying.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
Mr B J Howells	1997 - 2011	Used for walking and picking blackberries. Seen others playing team sports, cycling, picnicking, bird watching, kite flying, drawing and painting.
Mr & Mrs James and Mrs D Taylor	1934 to present (form completed in 2010)	Used for walking, bird watching, train spotting, kite flying and ball games. Fair/circus used to use the land. Seen others playing team games, cycling, drawing and painting.
Mrs J Joyner	1976 - 2010	Used for picking blackberries, walking, bird watching. Seen others playing team games, picnicking, flying kites, drawing and painting.
L Kennedy	2004 - 2012	Used for walking. Seen others picking blackberries, bird watching, picnicking, kite flying and cycling.
J Kowalewski	1996 to now (form completed in 2011)	Used for walking, picking blackberries, nature watching also used with family. Seen others playing team sports, cycling, flying kites, drawing and painting.
Mr J Lander	2004 - 2011	Used for walking. Seen others playing team sports, kite flying and picking blackberries.
T Lovell	1973 to now (form completed in 2011)	Used for walking, watching wildlife family used to play football. Seen others playing team sports, flying kites, picking blackberries, picnicking, cycling, drawing and painting.
Mr M Lyons	1978 to present (form completed in 2010)	Used for walking. Seen others picnicking, bird watching, train spotting, kite flying, drawing and painting.
L McMorrow	2003 to present (form completed in 2010)	Used for walking. Fete has taken place in the past. Seen others picking blackberries and playing team sports.
L Mawson & P Youssef	1993 – present 1958 to present (form completed in 2011)	Used for walking. Seen children playing and others picking blackberries.
Mr & Mrs Maycock	1984 – 1987 2006 - 2011	Used for walking and playing with family.
G Mayo	1950 to present (form completed in 2011)	Used for walking and berry picking. Community bonfire in the past. Seen others bird watching and picnicking.
M J Meaden	1977 to present (form completed in 2010)	Used for walking. Seen others playing team sports and kite flying.
Mr N Moody	1990 - 2011	Used for walking, kite flying and playing football. Seen others picking blackberries and picnicking.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
Mrs K J Morris	1986 - 2011	Used for walking, playing with family and picking blackberries. Seen others playing team sports, bird watching, picnicking, kite flying and cycling.
E Mutter	1981 - 2010	Used for walking and picking blackberries. School used land for runs. Seen others playing team sports, picnicking and kite flying.
Mr D Norman	1955 - 2011	Used as playing field. Family used for walking. Used for fair ground. Seen others playing team sports, bird watching, picking blackberries, kite flying and bonfires.
C Osborne	1986 to present (form completed in 2011)	Used for walking and bird watching. Used for cross country runs by the school. Seen others playing team sports, fishing, picking blackberries, bird watching, picnicking, kite flying, cycling, drawing and painting.
Mr S Payne	1987 to present (form completed in 2010)	Used for walking, cross country running and football. Local school also used it. Seen others playing team sports, picking blackberries, picnicking and kite flying.
Mr & Mrs Phillips	1995 to now (form completed in 2010)	Used for walking and picking berries. Seen others flying kites.
Mr S Poultney	1992 to present (form completed in 2010)	Used for walking. Guides and Scouts use the land. Seen others playing team sports, bird watching, cycling, picking berries, golf practice, drawing and painting.
Quaddy	1957 to date (form completed in 2011)	Used for fruit picking and exercise. Local school also used the land. Seen others playing team sports, bird watching, kite flying, picnicking, cycling, drawing and painting.
C & S Radestock	1970 - 2010	Used for walking, blackberry picking, access to steam trains. Circus and fair have used the land. Seen others playing team sports, bird watching and flying kites.
T R Read	2001 - 2011	Used for walking. Seen others playing team sports and children playing.
Mrs Reeves	1998 - 2008	Used for walking. Seen others picking blackberries, playing cricket, bird watching and picnicking.
J Richards	1987 - 2010	Used for walking, watching wildlife and blackberry picking. Seen others playing team sports, picnicking, kite flying, cycling, drawing and painting.
Mr F Riley	1931 - 2011	Used for walking. Circus, fairs & bonfire nights have also used the land. Seen others playing team sports, picking blackberries, bird watching, picnicking, kite flying, cycling, drawing and painting.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
J Riley	1949 - 2011	Used for walking and playing with family. Seen others playing team sports, picking blackberries, community celebrations, bird watching, picnicking, kite flying, bonfires, cycling, drawing and painting.
Mr F Roberts	1997 to present (completed in 2010)	Used for walking. Seen others picking blackberries, community celebrations, kite flying, team games, drawing and painting.
A Scott	1970 - 2010	Used for walking, playing with family. Seen others playing team sports, picking blackberries, kite flying and picnicking.
Mrs P Shirley & Mr T Dew	1985 - 2010	Used for walking, picnics, bird watching and picking berries. Used the land with family playing football. Local school also used the land.
L Smith	2008 - 2011	Used for walking. Seen others picking blackberries. Family have also used the land.
Miss L Smits	1989 to present (form completed in 2010)	Used for walking, picking blackberries, watching wildlife and sketching. Seen others playing team sports, picnicking, kite flying, drawing and painting.
B Stephenson	1981 to date (form completed in 2010)	Used for walking, picking blackberries, playing ball games, picnics and train watching. Seen others playing team sports, bird watching, kite flying, drawing and painting.
D Taylor	1967 to present (form completed in 2011)	Used for walking, playing sports, berry picking and bird watching. Circus and school cross country run in the past. Seen others picnicking, cycling, flying kites, playing team sports, drawing and painting.
J Taylor	1973 to present (form completed in 2010)	Used for walking and playing with family. Seen others picking blackberries, playing team sports, bird watching and picnicking.
Mrs B Tomes	1947 to present (form completed in 2010)	Used for walking. Seen others playing team sports, picking blackberries, bird watching, picnicking, kite flying and cycling.
Mr N Tomes	1961 - 1982	Used for walking. Seen others walking dogs.
M Tomlinson	1954 - 2011	Used for walking, bird watching and picking blackberries. Bonfire parties and summer fairs have been held there in the past. Seen others playing football, kite flying, drawing and painting.
Mr C Twilley	1998 - 2010	Used for walking. Seen others fruit picking and picnicking.

Application for the registration of a town or village green at Herston Fields, Swanage

Name	Dates of use	Details of use
Mr & Mrs Warrington	2005 - 2010	Used for walking, playing with family, picnics, blackberry picking and watching wildlife. Seen others playing team sports, bird watching, kite flying, cycling, drawing and painting.
D J White	1941 - 2010	Used for walking. Fairs and circuses in the past. Seen others picking blackberries, bird watching, kite flying and cross country running.
Mr M Whitfield	1977 - 2010	Used for walking, bird watching and blackberry picking. Seen others using the land for similar purposes.

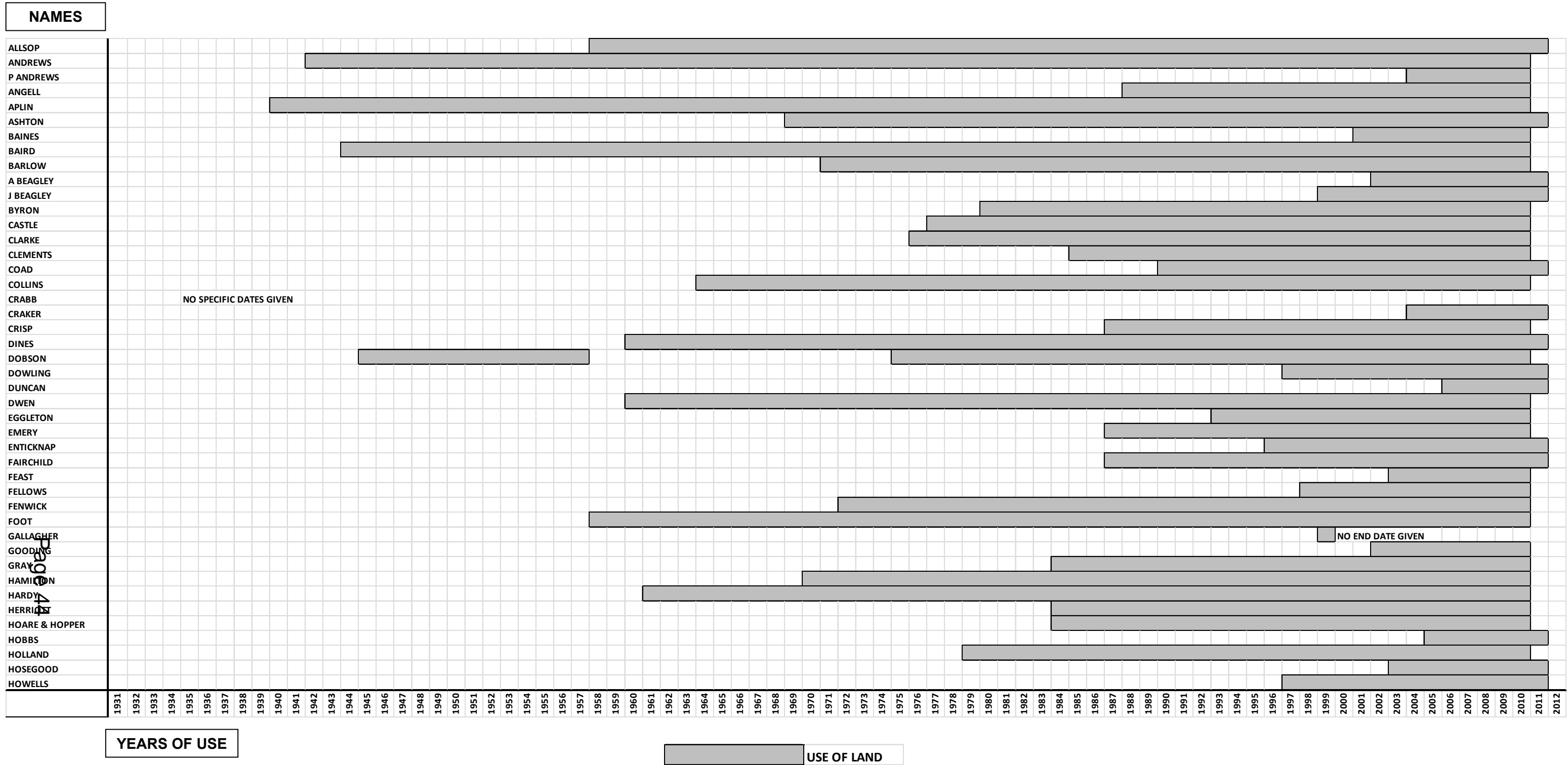
Other submissions made – witness statements

Name	Dates of use	Details of use
C Dowling	2009 - 2012	Play with friends and walking.
L Peacock	2009 to present (form completed in 2012)	Walking with friends and picnics.
I Hobbs	2005 - 2012	Walking, watching butterflies and art project.
P J Hobbs	2006 to present (form completed in 2012)	Walking, watching birds and reading.
B Townsend	2004 - 2012	Playing football, metal detecting and train watching.
J L Thomas	2007 - 2012	Metal detecting, walking and picnics.

Application for the registration of a town or village green at Herston Fields, Swanage

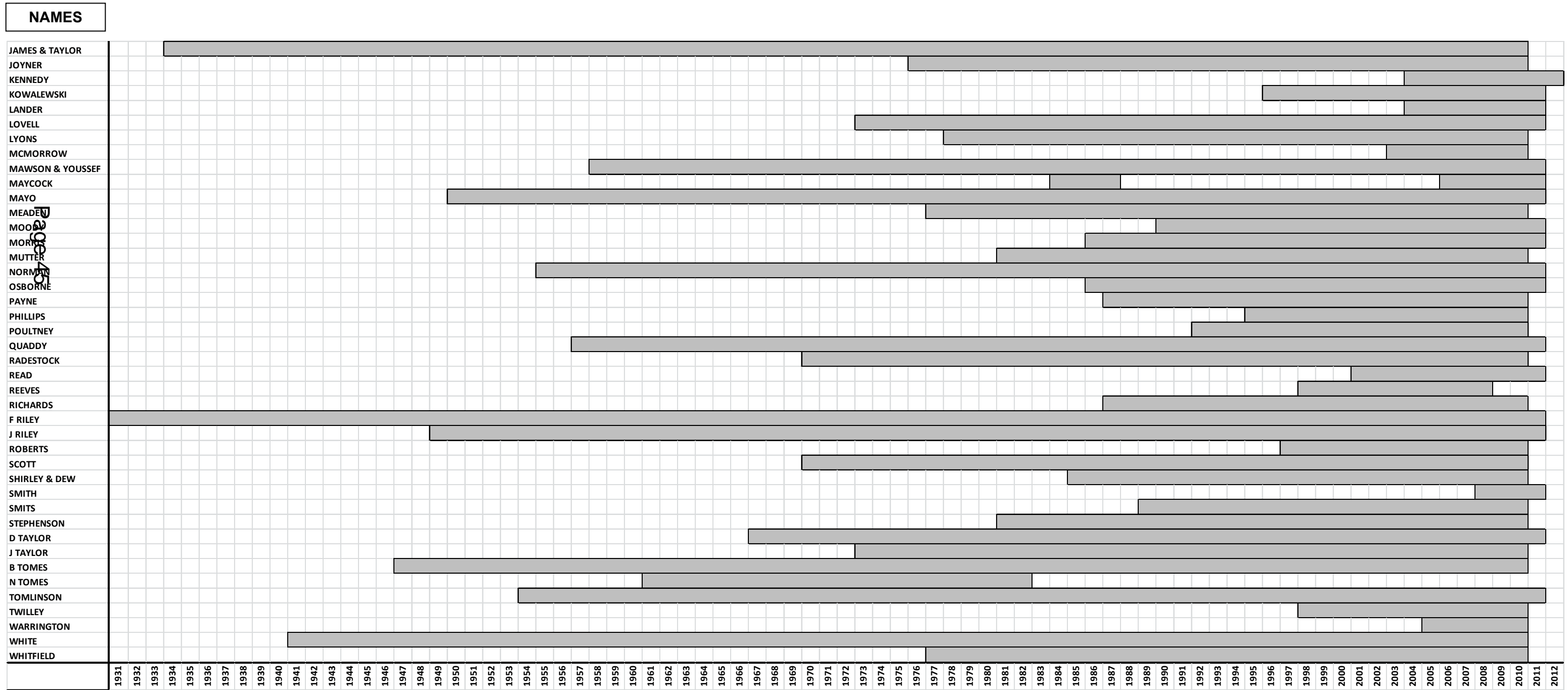
Cont'.																																															
ACTIVITY	NAMES																																														
	Mr B J Howells	Mr & Mrs James & Mrs Taylor	Mrs J Joyner	L Kennedy	J Kowalewski	Mr J Lander	Mr M Lyons	L McMorrow	L Mawson& P Youssef	Mr & Mrs Maycock	G Mayo	M J Meaden	Mr N Moody	Mrs K J Morris	E Mutter	Mr D Norman	C Osborne	Mr S Payne	Mr & Mrs Phillips	Mr S Poultney	Quaddy	C & S Radestock	T R Read	Mrs Reeves	J Richards	Mr F Riley	J Riley	Mr F Roberts	A A Scott	Mrs Shirley & Mr Dew	L Smith	Miss L Smits	B Stephenson	D Taylor	J Taylor	Mrs B Tomes	Mr N Tomes	M Tomlinson	Mr C Twilley	Mr & Mrs Warrington	D J White	Mr M Whitfield	TOTAL				
CHILDREN PLAYING	✓	✓	✓	✓	✓	✓	✓	✓	✓	N	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	81			
FOUNDERS	✓	✓								O						✓	✓				✓					✓	✓									✓									19		
FISHING										T							✓																													6	
DRAWING AND PAINTING	✓	✓	✓		✓		✓										✓				✓	✓			✓	✓	✓	✓							✓	✓				✓		✓			29		
DOG WALKING	✓	✓	✓	✓	✓	✓	✓	✓	✓	C	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	84	
TEAM GAMES		✓								O				✓			✓			✓		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓								24		
PICKING BLACKBERRIES	✓	✓	✓	✓	✓	✓	✓	✓	✓	M	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓		✓	✓	✓	✓	78		
COMMUNITY CELEBRATIONS										P																	✓	✓																		3	
FETES										L																✓																				1	
FOOTBALL	✓	✓	✓		✓	✓		✓		E		✓	✓	✓	✓		✓	✓			✓	✓	✓	✓	✓	✓	✓	✓						✓	✓	✓				✓		✓			53		
CRICKET		✓	✓							T				✓	✓		✓							✓	✓	✓	✓		✓													✓				25	
BIRD WATCHING	✓	✓	✓	✓	✓		✓			E	✓			✓		✓	✓				✓	✓	✓	✓	✓	✓	✓		✓					✓	✓	✓	✓	✓			✓		✓	✓	✓	55	
PICNICKING	✓	✓	✓	✓			✓			D	✓		✓	✓	✓		✓	✓					✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓	✓				53	
KITE FLYING	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	63
PEOPLE WALKING	✓	✓	✓	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	82	
BONFIRE PARTIES											✓					✓										✓	✓															✓					6
BICYCLE RIDING	✓	✓		✓	✓									✓			✓				✓	✓		✓	✓	✓											✓		✓			✓				22	
CAROL SINGING																																															0
OTHER		✓		✓			✓	✓																																		✓			✓		19

Chart to show periods of use



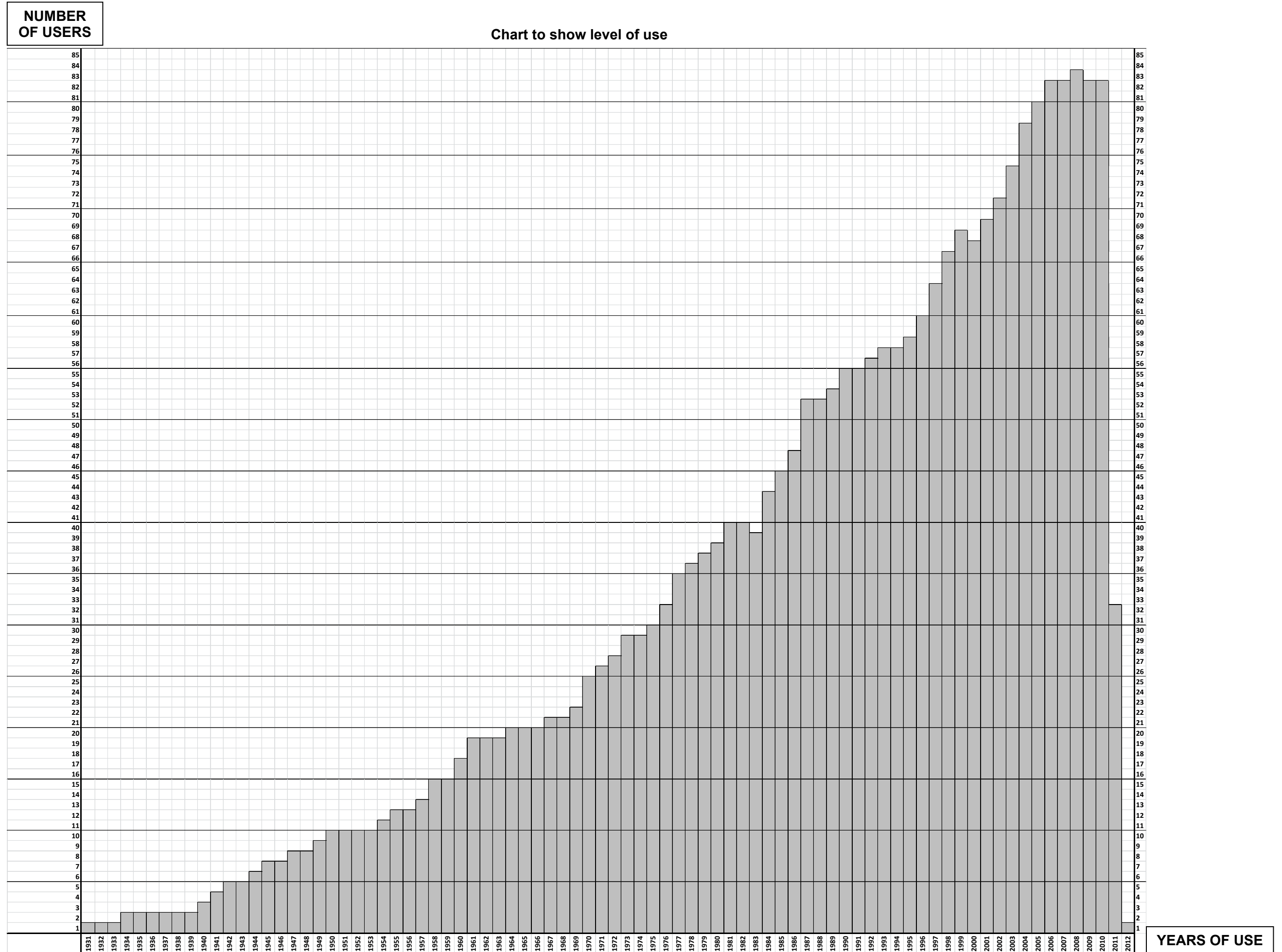
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Application for the registration of a town or village green at Herston Fields, Swanage



YEARS OF USE

USE OF LAND





Location plan - Herston Fields, Swanage

Ref: 15/24
 Date: 17/06/2015
 Scale 1:25000
 Drawn By: JLC
 Cent X: 402034
 Cent Y: 79015

GEOGRAPHICAL INFORMATION SYSTEMS



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Application area - Herston Fields

**Extract from the minutes of the Regulatory Committee
30 July 2015**

Town and Village Green Matters

Application for the Registration of a Town or Village Green at Herston Fields, Swanage

101.1 The Committee considered a report by the Director for Environment and the Economy which considered an application to amend the Register of Town and Village Greens by the addition of an area of land at Herston Fields, Swanage, as shown on Drawing 14/36/1 accompanying the report.

101.2 With the aid of a visual presentation, and having regard to the Update Sheet appended to these minutes, the basis for the application was explained and what it entailed. Photographs and plans were shown to the Committee by way of illustration. This showed the claimed application area, its character and setting within the landscape and its relationship with development in Herston and Swanage. Photographs showed where the site was traversed by a footpath and depicted the site from various directions, showing features and entrances. A graphic showed the addresses of those who had completed user evidence forms. Councillors were informed of the status of Herston and how, historically, it had been a village settlement in its own right, before being subsumed within the town council boundary, as it was now.

101.3 The background to the application was explained by officers. This was made in 2013 by the 'Friends of Herston Fields' with the claim that the site had been used, as of right, throughout a period of 20 consecutive years. The Committee's attention was drawn to the user evidence summarised in the report, together with a matrix showing the activities in which people participated and charts showing periods and level of use.

101.4 Officers confirmed that objections to the application had been made by the legal representatives of the landowner, the Scott Estate, on their behalf, disputing the claim being made in so far as the site had not been used as of right nor continuously for 20 years. They raised two key preliminary points, as well as more detailed evidence, in that they considered:

- the relevant locality/neighbourhood had not been sufficiently defined in accordance with Section 15 of the Commons Act 2006.
- for a large part, if not all, of the claim period, the land was out of possession because the application site was leased to the County Council. Therefore the landowner could not have acquiesced or tolerated the claimed usage because it had no knowledge of such use. Also, the terms of the lease of the land to the County Council specifically required the tenant to prevent easements from being acquired over the Land.

101.5 Moreover, those in support of the landowner's position were of the view that farming activities which would have taken place as a consequence of the land being part of the County Farms Estate would have practicably prevented the activities taking place, as claimed by the 'Friends of Herston Fields'.

101.6 The report set out the responses to this from the 'Friends of Herston Fields', including how they considered that the application provided sufficient evidence to support the case for Registration and their perception of the way in which the land had been managed in demonstrating that the use was as of right.

101.7 Arrangements for how the land had been managed over the years were described by officers, including the basis for its lease to Dorset County Council as a former tenant and its subsequent use as part of the County Farms Estate, and what was and was not provided for under the terms of the lease. Having regard for this, the Scott Estate claimed that they had no means of being aware of any use of right or easements which might have given rise to the application now being claimed or what activities had taken place to support this.

101.8 Given the nature of the application and, particularly, the relationship between the County Council and the use of the application site and with the Estate, officers were now recommending that consideration of the application by the Committee should be deferred and pending a Public Inquiry held before an independent Inspector to consider and evaluate all the relevant evidence in terms of the level of use; how it was used; and whether it was as of right; how the land had been managed and; to determine whether the definition of the locality for registration purposes had been properly addressed.

101.9 Gerard Jensen, 'Friends of Herston Fields', considered that the application had fulfilled the requirements of Registration and that those who had submitted objections were not necessarily aware of the activities described in support of the application as the land had not been in the direct control of the landowner at that time. Given the involvement of the County Council in proceedings, he considered that the recommendation was appropriate given that there were a number of issues which still needed to be addressed.

101.10 Henry Scott, the Scott Estate, maintained that the Estate were not satisfied that the process to delineate the application area had been properly defined for registration purposes and the practical constraints associated with the field being farmed would have prevented the activities taking place as described. He too supported the Director's recommendation as it would provide the opportunity for the facts and the law to be tested by an independent Inspector.

101.11 The Committee's attention was drawn to the receipt of correspondence from the County Councillor for Swanage who could see no reason to argue with the principle of the officers' recommendation but asked who would bear the costs of any Public Inquiry and how this procedure would be instigated. Officers confirmed that the County Council would bear the costs and that the officers' recommendation was agreed, arrangements would be put in place by the County Council to initiate proceedings.

101.12 Officers drew the Committee's attention to the critical issues under consideration in terms of locality definition, management of the land, and how it had been used. The Committee considered that, in the circumstances, the recommendation contained in the Director's report was wholly appropriate as a means of independently determining the outstanding issues of law and fact.

Resolved

102.1 That determination of the application be deferred pending a local Public Inquiry to fully consider the evidence.

102.2 That the Committee delegate to officers the administrative arrangements for holding the local Public Inquiry.

102.3 That an independent Inspector be appointed to conduct the non-statutory Public Inquiry.

Reasons for Decisions

103.1 In respect of 102.1 and 102.2 above, the nature of the evidence submitted meant that the application should not be determined without some Public Inquiry process.

103.2 In respect of 102.3, as Dorset County Council had an interest in this application as a former tenant of the application site, it would be appropriate for a Public Inquiry to be conducted by an Independent Inspector.

Decisions on applications for town and village greens ensure that changes to the Register of Town or Village Greens comply with the legal requirements and achieved the corporate plan objectives of:

- Enabling Economic Growth
 - Work in partnership to ensure the good management of our natural and historic environment
 - Work with partners and communities to maintain cycle paths, rights of way and disabled access
 - Encourage tourism to our unique county
 - Support community transport schemes
 - Ensure good management of our environmental and historic assets and heritage

- Promoting Health, Wellbeing and Safeguarding
 - Actively promote physical activity and sport
 - Develop and maintain safe, convenient, efficient and attractive transport and green infrastructure that is conducive to cycling and walking
 - Improve the provision of, and access to, green, open spaces close to where people live

IN THE MATTER OF THE COMMONS ACT 2006

**AND IN THE MATTER OF AN APPLICATION TO REGISTER
LAND AS A NEW TOWN OR VILLAGE GREEN**

**AND IN THE MATTER OF KNOWN AS HERSTON FIELDS,
SWANAGE, DORSET**

REPORT TO DORSET COUNTY COUNCIL

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SECTION 1

INTRODUCTION

I was appointed by Dorset County Council, the Registration Authority for town or village greens in Dorset to act as an Inspector and to hold a non-statutory public inquiry. This was pursuant to a resolution of the Registration Authority's Regulatory Committee on 30 July 2015 that a public inquiry should be held prior to determination of the application.

1. THE APPLICATION FOR REGISTRATION

The Application

- 1.1. By an application ("the Application") dated 17th May 2013¹ made pursuant to section 15(2)² of the Commons Act 2006 ("the 2006 Act") Mr Stephen Foote applied to Dorset County Council ("DCC"), in its capacity as the Commons Registration Authority, to register three agricultural fields known as Herston Fields ("the Application Site")³ as a town or village green ("TVG"). The Application was made by Mr Foote on behalf of a group of local residents known as the "Friends of Herston Fields". For the purposes of the Report this group of residents of Herston⁴ will be referred to as "the Applicants",⁵ and the Application Site as "Herston Fields".

¹ It appears that the Application made on the prescribed Form 4 was originally lodged in September 2012 by Mr Stephen Foote. Historically, Mr Foote was the main protagonist for the Applicants. However, Form 4 was returned to the Applicants for the completion of further documentation. The Application was re-submitted on 23rd April 2013 with a statutory declaration in support made by Mr Stephen Foote dated 23rd April 2013. It was registered by DCC on 17th May 2013. In the accompanying letter dated 23rd April 2013 Mr Foote refers to the position that the Friends of Herston Fields had been asked by DCC to provide a definition of what was meant by Herston. Hitherto it had not been defined sufficiently by "...any existing parish or other boundaries. For this purpose, we have added a heavy black line around the map that delineates the residential sections of what we consider to be Herston." A reduced copy of the plan appears at page 11 of the first bundle of Key Documents (KD1/11). This has been referred to as Map A during the Public Inquiry. A larger version of Map A was hung on the wall of the Hearing Centre for the duration of the Public Inquiry. The original Map A bore 92 signatures. Reference will also be made to the plan referred to as Appendix 2 to the report produced for the Regulatory Committee by DCC held on 30th July 2015 ("the July 2015 Committee Report"), see KD/2/614, and see footnote 13, below.

² As the evidence developed during the course of the Inquiry the Applicants sought to rely upon the provisions of section 15(3) of the 2006 Act, the significance of which will be addressed, below.

³ In this Report the "Application Site" and "Herston Fields" are used interchangeably.

⁴ Originally the campaign was known as "Save Herston Fields", but following a public meeting it was subsequently re-named as "the Friends of Herston Fields". It can be described as a single purpose interest group formed in order to promote the registration of Herston Fields as a Town or Village Green.

⁵ More recently Mr Gerald Jensen took over as the representative for the Friends of Herston Fields, and Mr Foote has played no further part.

- 1.2. The Application contained a number of entries, the two most important ones being Entry Number 7 – where the justification for the Application was set out, and Entry Number 11 - where the box seeking “any other information relating to the Application” was completed with the words “the land is under threat from development on the basis that the Scott Estates (and Savills, their agents) had produced an outline scheme for development”. The Applicant is supported by evidence contained in a number of source documents referred in to a List of Supporting Documents,⁶ to which further reference is made, below.⁷
- 1.3. The Application was subsequently publicised by DCC in accordance with regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.⁸ Objections were invited, but only one was received, that being the Trustees of the Scott Estate comprising a family trust (“the Scott Estate”) dated 28th November 2014.

The Application Site

- 1.4. The Application Site consists of three agricultural fields situated on the outskirts of Swanage, in an area known as Herston. The Scott Estate is the registered proprietor of Herston Fields at HM Land Registry under Title No DT402511. Herston Fields comprise three fields, described in the Public Inquiry as the Southern Field, Northern Field, and the Eastern Field, respectively:-
- (1) The Southern Field is a low lying rectangular-shaped field bounded by a small stream which separate it from the Northern Field. On its southern side it is bounded by a stone wall and hedge which lies on the northern edge of a wide grass verge forming part of the High Street to the south. This verge is maintained by the local authority. On its western side it is bounded by Wasborough Lane, and on its eastern side lies Emmanuel Church and car-park;
 - (2) The Northern Field is a rectangular-shaped field and rises over a ridge towards the Swanage to Corfe Castle heritage railway line to the north.

⁶ See KD1/12.

⁷ See Section 3, paragraph 3.1.

⁸ SI 2007/457.

There it is bounded by a hedge lying on a west/east trajectory. On its western side it is bounded by Wasborough Lane, and on its eastern side it is bounded by the Eastern Field.

- (3) The Eastern Field is triangular-shaped field which lies immediately to the east of the Northern Field, and is bounded by the Swanage to Corfe Castle Railway line on its northern side. On its southern, third, side it is largely bounded by a strip of land which does not form part of the Application Site. This parcel of land has relatively recently been fenced and gated, and forms part of the Swanage flood alleviation scheme. It lies within the registered title of the Scott Estate.
- (4) The Northern and Eastern Fields comprise improved grassland, and the Southern Field has from time to time been used for haylage, or occasionally a cereal crop.
- (5) A public footpath (Footpath No 78) runs on north-west/south-east trajectory across the Southern and Northern Fields to Herston Halt on the Corfe Castle to Swanage railway line. Pedestrian access to Herston Fields is maintained by two stiles where the footpath joins the roads at either end. There is a wooden stile for the footpath separating the Southern Field and the Northern Field.
- (6) At the date of the Application each field comprising Herston Fields was bounded by hedges and some old post and wire fencing with a stone wall along the High Street frontage. The current tenant of Herston Fields has recently cut back the hedging and renewed the fencing.⁹

1.5. Evidence was adduced during the course of the Public Inquiry from a number of witnesses, particularly from the more long-standing members of the Herston community, that Herston Fields have had historic names ascribed to them, the origins of which are completely obscure.¹⁰ The Southern Field and Northern Fields are otherwise known as First Geniss (or Genis), and Second Geniss (or Genis). The Eastern Field is known as Brimbalong.

⁹ This paragraph is based upon a set of facts agreed between the parties before the Public Inquiry.
¹⁰ See e.g. the evidence of Mrs Dobson, Section 3, paragraphs 3.83ff.

THE PUBLIC INQUIRY

- 1.6. The Public Inquiry was held in Worth Matravers Parish Hall, near Swanage' during the month of April 2016. The Applicants were represented by Mr Jensen.¹¹ Ms Morag Ellis QC and Mr Alexander Greaves, of Counsel, represented the Scott Estate. Evidence was adduced in the matter over eight days during a two-week period between 4th April 2016 and 14th April 2016. An extensive conducted site view in the presence of representatives of the parties took place on 18th April 2016. Two unaccompanied site views were undertaken in the absence of the parties. The following day was set aside for preparation of the parties' closing submissions, which were made orally on 20th April 2016 by reference to pre-prepared written submissions.
- 1.7. Prior to the Public Inquiry a number of documents were prepared by the parties. Further documents were supplied during the course of the hearing. The principal documents forming the evidence adduced at the Public Inquiry are as follows:
- (1) Bundle containing 27 witness statements relied upon by the Applicants, 20 of whom were called to give oral evidence
 - (2) Bundle containing 12 witness statements relied upon by the Scott Estate, of whom 10 were called to give oral evidence¹²
 - (3) Bundle of Key Documents¹³ submitted by Wilsons (the Objector's solicitors). This included the Application to which was appended 92 Evidence Forms, and supporting evidence
 - (4) Bundle containing colour copies of the Evidence Forms submitted by the Applicants in support of the Application and relating to those witnesses called to give evidence at the Public Inquiry
 - (5) Agreed chronology
 - (6) Agreed statement of facts
 - (7) Agreed statement of issues to be decided by the Inspector¹⁴

¹¹ Mr Jensen acted in a representative capacity for the Applicants as a litigant in person, and was treated as such. His assistance in the presentation and conduct and of the case for the Applicants was invaluable. Mr Jensen also gave evidence in the case on behalf of the Applicants.

¹² For a detailed analysis of the evidence for the respective parties, see Sections 3 and 4, below.

¹³ Hereafter referred to as KD/1 and KD/2.

¹⁴ This List is reproduced in Annex 1, and the questions posed are answered in Section 6 – Conclusions.

- (8) Bundles of authorities relied upon by the Applicants and the Scott Estate
- (9) A “Brief Statement of Arguments” lodged in support of the Applicants’ case, together with an Opening Statement
- (10) Skeleton Argument and Opening Submissions lodged in support of the Scott Estate prepared by Leading and Junior Counsel
- (11) Closing submissions lodged in support of the Applicants’ case, referred to as the Applicant’s as “Oral Summation of the Evidence”
- (12) Closing submissions lodged in support of the Scott Estate prepared by Leading and Junior Counsel
- (13) The Application also contained bar chart analyses, and photographic evidence reproduced on video, CDs, and image print-outs now contained in two USB memory sticks.
- (14) The July 2015 Committee Report produced by DCC for the meeting of the Regulatory Committee, and in particular the appendices thereto.¹⁵

PROCEDURAL STAGES SINCE THE PUBLIC INQUIRY

- 1.8. Following the Public Inquiry held in April 2016 I decided to hold a consultation on the issue whether Herston could be considered as constituting a “*locality*”, or a “*neighbourhood within a locality*”. The reason for this was that some considerable disagreement had been manifested between the parties on this issue during the course of the evidence adduced at the Inquiry, and subsequently during Closing Submissions, particularly with regard to the delineation of the boundaries of the “*neighbourhood*” proposed by the Applicants. In the course of considering the evidence after the Inquiry and also considering relevant material at Dorset History Centre I reached an initial view that Herston is a *locality* or a *neighbourhood within a locality* with definite boundaries. The purpose of the consultation process was to enable the parties to make representations on this initial view.
- 1.9. Accordingly, on 18th November 2016, upon further consideration of the question of the delineation of the boundaries of the “*neighbourhood*” of Herston, I arranged for

¹⁵ For the purposes of this Report particular reliance is place upon the contents of the July 2015 Committee Report (KD1/603/638, and in particular to the following - drawing 14/37 in appendix 2 which illustrates the addresses of users who completed evidence forms and statements (KD1/616/622); appendix 3 which summarises the user evidence (KD1/623/624; and appendix 4 which comprises bar charts indicating periods and levels of use.

a Discussion Note¹⁶ to be produced setting out my provisional views based upon the evidence adduced during the Public Inquiry and the historic mapping of Herston village, and the surrounding area based upon the historical evidence, as identified in the Note.

- 1.10. Written representations were sought by the Registration Authority from the parties on the issue, and a consultation period was provided for written representations to be produced by no later than 5pm on 30th November 2016. My provisional version of this report was sent to the parties as part of this consultation.
- 1.11. In the last paragraph of the Discussion Note reference is made to the discretion accorded to Registration Authorities to which reference was made in the Opinion of Lord Hoffmann in *Oxfordshire County Council v Oxford City Council*.¹⁷
- 1.12. A document entitled “Additional Representations” was then received from the Objector dated 19th December 2016.¹⁸ No representations were made by the Applicants at that stage.
- 1.13. Subsequently, on 16th December 2016 the solicitors instructed by the Objector asked to be provided with the extracts from the various documents forming part of the historical source material referred to the section headed “*What is Herston?*” contained in this Chapter of the Provisional Report.¹⁹ At their request, and as part of the consultation process, that historical reference source material was then supplied to the Objector’s solicitors on 25th January 2017.
- 1.14. On reconsideration of the historical material, and the representations made by the Objector’s legal advisers, the section entitled “*What is Herston?*” in Chapter 1 has now been reformulated²⁰ to provide a more detailed analysis of the available historical evidence, referred to in the original version of that section contained in Chapter 1. This re-formulation has now been incorporated in this Final Report.

¹⁶ A copy of the Discussion Note is annexed to this Report as Appendix 4.

¹⁷ [2006] UKHL 25.

¹⁸ This is annexed to the Report at Appendix 5.

¹⁹ Formerly paragraphs 1.23 to 1.31, now 1.31 – 1.40..

²⁰ A few typographical errors have also been corrected in this re-formulation.

- 1.15. On 13th February 2017 the Applicants served a Response on the issue as to whether Herston constituted a “*neighbourhood*”, or the “*neighbourhood within a locality*”.²¹

SUMMARY OF THE CASES FOR THE PARTIES²²

The case for the Applicants

- 1.16. In essence, the Applicants seek to register Herston Fields as a Town or Village Green on the basis that a significant number of the inhabitants of Herston have indulged as of right in lawful sports and pastimes on Herston Fields for a period of at least 20 years, and they continued to do so at the time of the Application, thereby satisfying the requirements of Section 15 of the 2006 Act.
- 1.17. However, during the course of the Public Inquiry it became apparent that as Herston Fields were ploughed in April 2011. The inhabitants of Herston were thereby prevented from indulging in their claimed user as of right in lawful sports and pastimes on Herston Fields at that point in time. Accordingly, the Applicants submitted that they would seek to rely on section 15(3)(b) and (c). The reason for this is that in September 2012 the original Application was lodged, but not registered. It was then re-submitted on 23rd April 2013 and registered by DCC on 17th May 2013. This being so, it could have been argued that the Application was not made within the period of two years (now one year) beginning with the cessation of lawful sports and activities on Herston Fields by reason of the ploughing in April 2011.
- 1.18. However, Mr Greaves on behalf of the Scott Estate accepted that for the purposes of timing, the relevant date for the purposes of the Application was September 2012 and as at that stage the 2-year period specified in Section 15(3)(c) had not been amended by subsequent legislation.²³ In these circumstances as Herston Fields had

²¹ See Appendix 6.

²² There were a number of procedural stages which included Directions and Further Directions made on 10th August 2015, and 27th January 2016, respectively, for the preparation prior to, and the conduct of the Inquiry.

²³ See s. 14 of the Growth and Infrastructure Act 2013, which amended the specified relevant period contained in s. 15(3)(c) of the 2006 Act from two years to one year. See also Art 6 the Growth and Infrastructure Act 2013 (Commencement No 2 and Transitional and Savings Provisions) Order 2013, which brought s. 14 into force on 1st October 2013. Thus, for the purposes of the Application the un-amended s. 15(3)(c) applies to the Application.

been ploughed in April 2011, the qualifying period of at least 20 years commenced in April 1991, and terminated in April 2011.

- 1.19. All the evidence adduced by the Applicants was directed to demonstrating that Herston was a *locality*, or a *neighbourhood within a locality*, the inhabitants of which had indulged as of right in lawful sports and pastimes from at least April 1991 for the period of 20 years.²⁴

The case for the Scott Estates

- 1.20. For their part, the Scott Estates sought to demolish the evidence presented by the Applicants in support of their case on the basis that the burden lay upon the Applicants to prove, on the balance of probabilities, that the statutory requirements contained in the 2006 Act are not met, there being no compelling evidence in support of the Applicants' case. It is submitted that in order to achieve registration as a TVG, all the relevant legal requirements have to be met, otherwise the application must fail. It is submitted that particular care must be taken when considering the written evidence provided in any of the questionnaires and/or witness statements which have not been tested in cross-examination irrespective of the general considerations as to what weight should be accorded to untested material. It is submitted by Leading Counsel that the Applicants cannot demonstrate that a significant number of inhabitants of Herston have indulged in lawful sports and pastimes.
- 1.21. The Scott Estate also submits that evidence of user in the period prior to 1991 can only be of relevance insofar as it is appropriate to draw inferences from it about use continuing into and throughout the statutory period. Whether or not it is appropriate to draw such inferences depends on the facts of the case. It is the case for the Scott Estate that whilst the evidence establishes that there has been agricultural use of the land at all times, before, during and after the statutory period of 20 years, the details of that user have not remained constant. It is therefore submitted that it is not

²⁴ Some doubt was manifested as to whether the Applicants were relying upon Herston being a "*locality*", or a "*neighbourhood within a locality*", for the purposes of the Application; see paragraph 1.9.

appropriate to infer that any pre-1991 patterns simply continued throughout the subsequent 20 years.²⁵

- 1.22. Also, it is unclear as to precisely what is being said about Herston, namely whether it is a *locality*, or a *neighbourhood within a locality*. It is contended that clarification of the demarcation of the boundaries of the claimed neighbourhood was never fully provided by the Applicants. Much of the area claimed as Herston is in fact indistinguishable from the rest of Swanage, so it is said. Further, there is no compelling evidence on the part of the Applicants as to the use by local inhabitants of the claimed neighbourhood, nor can it be demonstrated that there is sufficiency of user over the claimed area. In essence, therefore, the Application must fail.

HERSTON FIELDS

Description²⁶

- 1.23. Herston Fields comprise some 8.59 hectares (20.89 acres) in extent. The fields are bounded by hedges, and some old post and wire fencing, although prior to the more recent renewal of post and wire fences by the current tenant in 2011, such fences had been in a somewhat dilapidated condition.²⁷ The hedges have also been recently cut back by the current tenant, Mr Dicker. There are two gated field accesses to the west of the Southern Field. A public right of way on foot runs through the Southern and Northern Fields, lying on a north-west to south-east trajectory. At the southern end of the Southern Field there is a stile leading from the High Street. At the northern end of the Application Site the public footpath leads to a railway station known as Herston Halt situated on the Swanage to Corfe Castle heritage railway line. To the west of the Application Site lies Washpond Lane. To the south of the Application Site lies the High Street, Herston, together with a wide strip of land maintained by the local authority as a verge. This verge lies between a stone wall on the northern side of the High Street and the hedge at the south side of the Southern Field. To the east and south of Herston Fields there is a predominantly urban development forming part of the area known as Herston. It is to be noted that there is one strip of land which is excluded from the Application Site. This is an area which lies on the

²⁵ See the evidence of Mr Alan Smith on how this affected the nature of use at paragraph 6 and 9 of his witness statement.

²⁶ See also paragraph 1.4, above.

²⁷ The condition of the hedges and fencing, and the use made of Herston Fields, over the decades was the subject of some considerable debate during the course of the evidence at the hearing.

northern part of the eastern boundary of Herston Fields. This has been recently fenced and gated as part of the Swanage Flood Alleviation Scheme.

1.24. The Northern and Eastern Fields have, at all material times, comprised improved grassland. The Southern Field has, from time to time been used to grow temporary grass or cereal crop. The precise nature of the husbandry of Herston Fields over the decades will be dealt with in more detail below.

1.25. Although the precise date is somewhat uncertain, in about the late 1950s, or early 1960s the boundary of the Southern Field was adjusted to its current position, resulting in an unusually wide verge on the north side of the High Street, Herston. A number of buildings were demolished during the course of this road-widening.

Tenure

1.26. In its capacity as landowner²⁸ DCC held leasehold interests in a number of farm holdings within what is known collectively as the County Farm Estate. The Application Site formed part of one of these holdings. This was the subject matter of a lease dated 21st May 1954 granted by Lieutenant Colonel Harold Eldon Scott to DCC for the term of 35 years from 6th April 1953 (“the Lease”). The purpose of the grant of the Lease was to enable the creation of a number of smallholdings over the land pursuant to the provisions of the Agricultural Acts 1947 and 1970. The contractual term demised by the Lease expired on 5th April 1988. Thereafter DCC held over as a statutory tenant. In 1985 Lieutenant Colonel Scott died, and by dint of statutory succession the Scott Estate became his freehold successor in title. On 20th November 2013 DCC surrendered the statutory tenancy to the Scott Estate.

The Lease provisions

1.27. The covenants contained in the Lease are of some relevance to the case. Five farms were demised by the Lease, and there are therefore five main parts to the demise. The three fields which comprise Herston Fields are contained within the fifth part, by reference to the description in the Fifth Schedule. Plan Number.2 identifies Herston Fields, namely the two fields lying south of the Corfe Castle to Swanage

²⁸ In contradistinction to the role of DCC as the Commons Registration Authority.

railway line which bisects the holding, and the third field lying to the north of the railway line. The Eastern Field does not appear to fall within the defined area of Herston Fields. The reason for this is revealed in the evidence adduced during the Public Hearing in that when the Herston Fields holding was originally identified the Eastern Field was included, and the field lying to the north of the railway line was excluded.²⁹

1.28. Clause 2 of the Lease provided that the rent payable under the terms of the Lease by DCC was £791.3s.0d per annum for the term of 35 years payable by equal half-yearly payments on the 11th day of October and the 6th day of April in every year. Clause 4(n) provide that there should be no assignment of the demised farms or any part thereof without the previous consent in writing of the Lessor. Clause 4(o) provides that the premises were demised to the Lessee in order that DCC might during the said term use the demised farms for agricultural purposes only and to let or dispose of the same in as or for smallholdings under the Agricultural Act 1947, and any breach of covenant could not be capable of remedy by injunction but be in damages only.

1.29. It was provided in Clause 4(q) that DCC was to do its best to prevent trespass over any part of the demised farms, and to give notice to the Lessor or any continued act of trespass and not to allow any footpath to be created and allow the Lessor to make use of the name or names of the sub-tenants in any proceedings against trespassers. Also it was provided that the Lessee should lay information and give evidence and sign if required notices to trespassers and others to keep off the demised farms. In Clause 4(r) it was provided that the Lessee should manage and cultivate the demised farms in a good and husband-like manner.

1.30. During the period of the Lease several sub-interests were granted by DCC.³⁰

²⁹ See the evidence of Mr Alan John Smith where he spoke of the Scott Estate “re-adjusting” the holding in 1954 so as to include all three fields south of the railway line as the Herston Fields holding. See Section 4, paragraph 4.75, at page 119.

³⁰ The parties produced a number of helpful summaries for use at the Public Inquiry, which included two chronologies, and an analysis of sub-interests, including sub-tenancies.

WHAT IS HERSTON?

The area defined by Map A

- 1.31. An essential feature of the submissions and evidence adduced during the Inquiry related to the status of Herston as a *locality* or *neighbourhood within a locality*. Map A,³¹ to which the attention of many of the witnesses at the Inquiry was directed, was said by Leading Counsel for the Scott Estate to be an arbitrary assessment of the identified area, in particular in relation to the eastern boundary of the claimed neighbourhood. It is submitted by the Scott Estate that the Applicants had failed to provide evidence of any current administrative boundary, or other recognisable area known to law, which corresponds with any identified boundary of Herston.
- 1.32. It is therefore submitted that the Applicants must rely on Herston as a *neighbourhood within a locality* rather than a *locality*. It is said that the area on the Map A identified by a thick black line was selected simply because that is where the line of the rectangular Ordnance Survey map lay, rather than by reference to obvious features or clear boundaries on the ground which delineated Herston from the rest of Swanage. It is said that, as a consequence, the claimed boundary of the *locality/neighbourhood* cuts directly through the middle of roads, gardens and residential properties in a wholly unsatisfactory manner. In particular this is illustrated by the way in which the identification of Hillsea Road has been treated on Map A. Houses at the northern end of the road fall outside the claimed area, whilst those further down the road to the south, and their gardens are included within the area defined by the thick black line.

History of Herston Village

- 1.33. A brief tour of the historical roots of Herston indicates that Herston is of considerable antiquity. Historically it has been perceived as a self-contained hamlet separated

³¹ KD/1/11. In fact, two maps appear to have been created for the purposes of the Application. For the purposes of the Public Inquiry it is the second map produced when the revised Application was submitted to DCC upon which a thick black line had been drawn which is treated as the Application Map for the purposes of the Application, see footnote 1, above.

from Swanage. Hutchins³² in 1774 so describes Herston as “...an hamlet and tything, of near 50 houses, W. of Swanwich...” In Hutchins (3rd Edition³³) this observation is repeated, and Herston is said to lie at the western extremity of the parish of “Swanwich”. It is further stated in that work that the name “Herston” derives its name from “Her”, a Saxon who held part of it in the time of Edward the Confessor. “It is now divided into several properties, held by different proprietors, the history of which is very difficult to trace...” It is also to be noted that Herston was mentioned in the Domesday Book as Herestone and was held by Roger Arundel, Lord of the Manor of Worth.

1.34. In “*Swanage Past*”³⁴ there are a number of references to Herston.³⁵ The following points should be noted:

- (1) In the Iron Age and the Celtic periods it is probable that the first settlements were along a line of springs emerging from the limestone hills, such settlements being Swanage, Newton, and Herston;
- (2) There is a reference to the Manor of Herston, and Herston Farm, otherwise known as California Farm;
- (3) The road from Swanage through Langton Matravers, Kingston and Corfe Castle to Wareham was “turnpiked” in 1766, and there was a turnpike gate at Herston, which was eventually removed in 1876;
- (4) In the Returns dated 14th October 1803 produced at the time of the threatened Napoleonic invasion of England, Herston is treated as a separate entity for those purposes, 11 of which applied to Herston and Langton Matravers, and 28 to Swanage;
- (5) Herston is identified on the 1839 Swanage Tithe map;
- (6) Herston House was apparently constructed in the 18th century and purchased by John Mowlem (the famous builder) in 1849 but the house was eventually demolished in 1967;

³² *History and Antiquities of the County of Dorset*, 1st Ed., two volumes, 1774. The works of Hutchins on the history of Dorset appear in a number of editions, much of which was published posthumously

³³ At page 670.

³⁴ By David Lewer and Denis Smale, published by Phillimore 1994.

³⁵ At pages 10, 26, 27, 53, 61, 95, 96, 102, 103, 107, and 145. Sections are devoted to Herston at pages 27 and 102, and Herston House is described at page 95.

- (7) Herston is described in the following quotation, as follows: “This hamlet was largely a ‘poor man’s home, being almost entirely occupied by quarrymen’s families. The cottages were mostly poor, but the grouping of stone-tiled buildings, which included the ancient *Globe* inn at the foot of Bell Street, must even then have been quaintly attractive, at least to the visitor...”³⁶. West of the turnpike gate on the south side of the High Street there was a straggle of more cottages, where there was another old inn, the Royal Oak.
- 1.35. Insofar as St Mark’s Parish Church is concerned, according to the records held by Dorset History Centre, the Parish of St Mark, Herston, was created as a separate parish in 1869 and the construction of the Church of St Mark commenced at that time.³⁷ It was consecrated on 25th April 1872. In a document produced in 2012 mention is made that before St Mark’s Church was established, Swanage and Herston were two separate communities.³⁸ A Methodist Chapel was opened before this in Bell Street in 1861, and followed by a Reading Room in 1864.
- 1.36. In 1854 there was no school in Herston, although the population at that time was said to comprise about 300 people. In 1855 an infant’s school was constructed in Bell Street next to what became St Mark’s Church. It was apparently extended to accommodate older children. Further extensions to the school were made in 1871 and 1888.
- 1.37. The 1811 Ordnance Survey one-inch map refers to Herston as Easton, this being a corruption. In subsequent Ordnance Survey maps Herston appears as a separate entity, the core of which lies at Herston Cross being the crossroads between the High Street and Victoria Avenue.³⁹

³⁶ *Ibid*, at page 102.

³⁷ See also “*Swanage Past*” at pages 102/103.

³⁸ “*The Church in a Quarry: An informal social history of St Mark’s C of E Church and School at Herston in Purbeck*”, by Audrey Pembroke, 2012.

³⁹ See, in particular, the Ordnance Survey Map revised in 1900, based upon the 1886 survey.

Application for the registration of a town or village green at Herston Fields, Swanage

- 1.38. At a much later date Herston was absorbed into the westward extension of Swanage. This absorption probably occurred in the 1920s when the Herston area was chosen as a location for development of social housing.⁴⁰
- 1.39. During the course of the Public Inquiry some evidence was produced by the Applicants as to the status of Herston insofar as Parliamentary Elections are concerned. An extract of the Register of Electors was produced in evidence⁴¹ which tended to demonstrate that Herston had been a separate entity insofar as the electoral system was concerned.⁴² However, as Leading Counsel for the Scott Estate submitted, such evidence was somewhat unsatisfactory and raised more questions than answered. The Street and Index provided in evidence did not include a number of streets off Benlease Way and it was apparent that this evidence indicated a much wider area than that claimed by the Applicants as forming part of the *locality/neighbourhood*.
- 1.40. The conclusions to be drawn as to whether Herston/Herston Village is an entity and can be described as a *locality* or a *neighbourhood within a locality*, are set out below.⁴³

⁴⁰ See the references contained in the material in support of the Application at KD/1/35 forming part of the “Justification for Application to Register” at *ibid.* 23/34; and see “*Swanage Past*” where there is a reference to the Greyseed (Greasehead) Council Estate.

⁴¹ KD/2/639. See also paragraph 1.4, above, where it is noted that the Swanage West (Herston Area) Ward no longer exists as an electoral ward, as agreed between the parties

⁴² It was agreed between the parties’ legal representatives that the Swanage West (Herston Area) no longer exists as an electoral ward.

⁴³ See Section 5.

SECTION 2

2. **THE LEGAL FRAMEWORK TO THE APPLICATION**

Statutory provisions

2.

2.1. The Application has been made under section 15 of the 2006 Act. Section 15 provides as follows:

"15 Registration of greens

- (1) *Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
- (2) *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.*
- (3) *This subsection applies where –*
- (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) *they ceased to do so before the time of the application but after the commencement of this section; and*
 - (c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b).⁴⁴*
- (4) *This subsection applies (subject to subsection (5)) where –*
- (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) *they ceased to do so before the commencement of this section; and*
 - (c) *the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*

⁴⁴ Now one year, see Section 1, paragraph 1.18, footnote 24.

Power to amend and material prejudice and procedural unfairness

- 2.2 The 2007 Act and 2007 Regulations make no specific provision for the amendment of application. The application form for registration of a new TGV requires applicants either to name the *neighbourhood* or *locality*, or clearly mark it on a map. In the case of *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council*⁴⁵ HHJ Waksman QC referred to the fact that under the 2008 Regulations the entry on the register of a new TVG will specify the *locality* or *neighbourhood* referred to in the application.⁴⁶ “*And that can be amended to take account of the adoption of an Inspector’s recommendation to base the registration upon a different neighbourhood than that claimed*”.
- 2.3 In of *Oxfordshire County Council v Oxford City Council*⁴⁷ the House of Lords has held that a Registration Authority may allow an amendment to an application (e.g. to modify the area of land the subject of the application), provided that no prejudice would be caused by the amendment. Or, if any prejudice could be prevented, then an adjournment to allow the objectors to deal with points for which they had not been prepared.
- 2.4 Lord Hoffmann⁴⁸ at [61] stated as follows:

There remain, however, more general questions about the power of the Registration Authority (acting by its Inspector) to allow amendments to the application form and to register an area of land different from that originally claimed. It is clear from the New Land Regulations, that the procedure of registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objection (whether from the landowner, third parties or the Registration Authority itself) and the opportunity to deal with them. Against this background it seems to me that the Registration Authority should be guided by the general principle of being fair to the parties. It would

⁴⁵ [2010] EWHC 530 (Admin).

⁴⁶ Model Entry 18.

⁴⁷ [2006] 2 AC 674. This was made in the context of the predecessor Commons Registration Act 1965, and the Commons Registration (New Land) Regulations 1969, which also contained no express provision for amendment of applications.

⁴⁸ At [61].

be pointless to insist upon a fresh application (with a new application date) if no prejudice will be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. I agree with the approach taken by Mr Chapman and the general remarks of Carnwath LJ.⁴⁹ First, there is no rule that the amended application must be for substantially the same land as the original application if it relates to a larger or different piece of land, the Inspector or Registration Authority may well think that fairness requires re-publication of a new application. But the matter remains one for the exercise of discretion. Secondly, the Registration Authority has no investigative duty which requires it to find evidence or reformulate the applicants' case. It is entitled to deal with the application and the evidence as presented by the parties."

2.5 Thus, there is no requirement in the application form or regulations for an applicant to commit himself to a legally correct (or any) definition of *neighbourhood*. The form is not to be treated as though it is a pleading in private litigation. It is within the powers of the Registration Authority to determine the relevant *neighbourhood* whose inhabitants are entitled to exercise the right, having regard to all the available evidence. This may involve consideration of its extent of, and reliance may be placed on a different *neighbourhood* or *locality*.⁵⁰

2.6 In essence, it is therefore apparent that whether an amendment to the application is allowed, or not, remains entirely within the discretion of the Registration Authority. The procedure adopted in a Public Inquiry established under the 2006 Act, is very similar to that conducted in a planning inquiry. The Inspector appointed by that Authority, is able to deal with the matter as he thinks fit, provided that there is no prejudice occasioned to either party. The Registration Authority should be guided by the general principle of being fair to the parties. However, the Registration Authority has no investigative *duty* that requires it to reformulate the case presented by the Applicant, and is entitled to deal with the Application, and the evidence, as presented by the parties.

⁴⁹ [2006] Ch.43, [73] – [75].

⁵⁰ See Sullivan J in *R (Laing Homes) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin), at [142], and [143].

- 2.7 A number of points were made by the Objector in the Additional Representations⁵¹. Broadly, these representations related to the ability, or otherwise, of the Registration Authority to allow amendments to the Application following its submission. It is said, amongst other points, that such a proposed amendment to the neighbourhood boundary in the absence of being sought, or supported, by the Applicants, meant that the Objector had suffered prejudice, or to put it another way, procedural unfairness. It is said that the proposed amendment to the neighbourhood boundary is the product of the Inspector's own independent research carried out after the Public Inquiry had concluded, and not tested through the evidence. It is also stated that the Registration Authority is not under any duty to undertake its own investigations or reformulate the Applicant's case. Other apparent errors are identified in paragraphs 9 to 13 of the Additional Representations.
- 2.8 The Objector's legal advisers also made the unsubstantiated assertion that unfairness had been manifested by the Inspector on the basis that the Objector "...has no idea whether [he] has made any other researches or consulted any other, unacknowledged, documents."⁵² This is not so. No other historical source material has been included to which specific reference has not been made.
- 2.9 The concept of procedural unfairness,⁵³ and how the principle operates in the context of a planning inquiry,⁵⁴ has been the subject of consideration in the case of *Secretary of State for Communities and Local Government v Hopkins Developments Limited*.⁵⁵ In *Hopkins* Jackson LJ reviewed a number of first instance decisions of particular relevance to the case. He referred to the phrase formerly in vogue whether a person had had "*a fair crack of the whip*". This was a phrase which the Learned Lord Justice stated had somewhat "*strange overtones*". The more pedestrian phrase '*procedural unfairness*' is to be preferred.

⁵¹ See paragraph 1.22.

⁵² See paragraph 5.

⁵³ It is said that natural justice is an aspect of the concept of natural justice.

⁵⁴ under the *Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure (England)) Rules 2000*.

⁵⁵ [2014] EWCA Civ 470.

2.10 Jackson LJ referred to the judgment of Sullivan J the case of *R (Poole) v Secretary of State for Communities and Local Government*.⁵⁶ At [58] Sullivan J gave valuable guidance on the interaction between the common law rules of procedural fairness and the procedural rules governing the conduct of planning inquiries.

"However, it is most important when deciding whether the parties at an inquiry have had a fair opportunity to comment on an issue raised by an Inspector of his or her own motion, and whether they could reasonably have anticipated that an issue had to be addressed because it might be raised by an Inspector; to bear in mind the highly focussed nature of the modern public inquiry where the whole emphasis of the Rules and the procedural guidance contained in circulars is to encourage the parties to focus their evidence and submissions on those matters that are in dispute."

Sullivan J added that in deciding whether there had been unfairness the Court should take into account the importance of the issue in respect of which the Inspector was differing from the position agreed in the statement of common ground.

2.11 At [62] Jackson LJ derived a number of principles, three of which are the following:

- "(1) any party to a planning inquiry is entitled*
 - (a) to know the case which he has to meet; and*
 - (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.*
- (2) if there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision."*

2.12 In the subsequent recent case of *Edward Ware Homes Limited v Secretary of State for Communities and Local Government and Bath and North Somerset Council*,⁵⁷ Holgate J referred to the first principle set out in *Hopkins* at [62], and stated that the Court of Appeal had reiterated that procedural unfairness as a vitiating error depends

⁵⁶ [2008] EWHC 676 (Admin).
⁵⁷ [2016] EWHC 103 (Admin).

upon whether the Claimant thereby suffered material prejudice. The judge also referred to [58] of Sullivan J in *Hopkins*, to which reference has been made above.

2.13 In essence, therefore, the question arises as to whether or not it can be demonstrated that a party has suffered material prejudice or procedural unfairness. Ultimately, it is a matter for the discretion of the Registration Authority.

2.14 The representations received deal with the question as to whether the Registration Authority is entitled, as a matter of law, to accept a different “*neighbourhood*” to that set out in the Application, or that directly explored in evidence of the Public Inquiry. Reference is made to the *Oxfordshire* case and to part of the Speech of Lord Hoffmann, to which reference has been made above.

2.15 It is my position that, contrary to the submissions made by the Objector’s legal representatives, no prejudice has been occasioned to the Objector by the course of action adopted. Further, neither the Registration Authority nor I are precluded from amending or correcting the Application, “*if it is considered reasonable to do so*” and does not prejudice either party. This in my judgment does not do so. No further representations have been made on behalf of the Objector.

PRINCIPLES ARISING FROM CASE LAW

Significant number of inhabitants

2.16 “*Significant number of inhabitants*” is a phrase which is not defined in the legislation. The words “*significant number*” were introduced into section 22 of the Commons Registration Act 1965 by section 78 of the CROW 2000, and subsequently retained in the 2006 Act. The purpose of the amendment in section 98 was explained by Baroness Farrington in the House of Lords in the following terms:

“It makes it clear that qualifying use must be by a significant number of people from a particular locality or neighbourhood. That removes the need for inhabitants to demonstrate that use is predominantly by people from the locality and means the use from people outside that locality will no longer have to be taken into

account by registration authorities. It will be sufficient for a number of local people to use the site.”

2.17 In *R. (McAlpine Homes) v Staffordshire County Council*⁵⁸ Sullivan LJ stated as follows:

*“... In my judgment the inspector approached the matter correctly in saying that ‘significant’, although imprecise, is an ordinary word in the England language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.”*⁵⁹

2.18 Thus Sullivan LJ concluded that the word “*significant*” needed no further definition. Whether the use had been by a *significant number* of local inhabitants was held to be very much a matter of impression. He went on to state that the number might not be so great as to be properly described as considerable or substantial, and held that a *significant number* meant a number that was anything more than *de minimis*, and sufficient to indicate that the land is in general use by the local community for informal recreation. However, the Judge did go on to say that “it would be difficult to see how six out of twenty thousand or one out of two hundred could be said to be significant.”

2.19 In *Leeds Group PLC v Leeds City Council*⁶⁰ Sullivan LJ stated that only use by a significant number of the inhabitants of the *locality* or *neighbourhood* would suffice to satisfy the definition of a green. He went on to state that in that case the use was

⁵⁸ [2002] EWHC 76 (Admin).

⁵⁹ At [71].

⁶⁰ [2011] 2 WLR 1010.

clearly of such an amount and manner as would reasonably be regarded as the assertion of a public right.⁶¹ This approach echoed the words of Lord Hope in the case of *R (Lewis) v Redcar and Cleveland BC*⁶² who said that the use of the land must be “*such amount and in such a manner as would reasonably be regarded as being the assertion of a public right.*”⁶³

The predominance test

- 2.20 In *Sunningwell*, Lord Hoffmann stated that it would be sufficient if the land was used predominantly by inhabitants of the village.⁶⁴ This was in response to a point that had been taken during the course of the case to the effect that the land was used not only by the villagers but also by other people. It had been said during the course of argument that the use had gone beyond the custom. Thus, although there had to be a coincidence between the *locality* and the users, it did not have to be used exclusively by the inhabitants of the village in order to provide proof of user.
- 2.21 In *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council*⁶⁵ HHJ Waksman QC decided that the predominance test had not been carried through into the amendments made by section 98 of the CROW 2000 into that section.⁶⁶ The Judge concluded that provided a significant number of the inhabitants of the *locality* or *neighbourhood* are among the users, it matters not that many or even most come from elsewhere.⁶⁷ As he stated, the amendment to the legislation was designed to make qualification for a town or village green status much easier. The significant number requirement meant a change from a requirement of the users predominantly come from the *locality* (or *neighbourhood*), to a requirement that the users include a significant number from it. This is to establish a clear link between the *locality* (or *neighbourhood*) and the proposed green even if such people did not comprise most of the users.

⁶¹ At [32].

⁶² [2010] UKSC 11.

⁶³ At [67]. See also Lord Walker at [36].

⁶⁴ [2000] 1AC335 at 358.

⁶⁵ [2010] EWHC 530 (Admin).

⁶⁶ At [68].

⁶⁷ At [71]. See also *Paddico (267) Ltd the Kirklees MBC* [2011] EWHC 1606 (Ch) at [97].

2.22 Thus, in short, as a matter of law it does not matter if some people came from outside the *locality* (or *neighbourhood*) provided that a significant number did so as to establish the clear link between the two.

Spread and Fit

2.23 In the *Paddico* case Vos LJ rejected the argument that there was a need for the distribution of users to be adequately spread over the claimed locality. It stated that it would not be an appropriate reason for the rejection of an application for registration, and that to do so would be illogical and unfair.⁶⁸ He observed that not surprisingly the majority of the users giving evidence in that case lived closest to the land.

2.24 Further, it was held at first instance in the *Leeds* case⁶⁹ in relation to a *neighbourhood* in a locality it was not necessary for both the *neighbourhood* and the *locality* to be small enough to accommodate a proper spread of qualifying users.⁷⁰ As stated, the test is simply that set out in section 15 and no more and no less.

Locality/neighbourhood within a locality

2.25 The inclusion of the word “*locality*” in section 15 of the 2006 Act has its origins in the law of custom. Historically it is a rule operating from time in memorial in a particular locality which has achieved the force of law within it. It provides the basis by which those who may exercise the rights that attach to land registered as a TGV are identified. The customary right to indulge in lawful sports and pastimes only exists for the benefit of some legally recognised unit of the country, and Parliament had used the word “*locality*” in the CRA 1965 to employ the same concept.⁷¹ Thus the identified area must be by reference to the limits of an administrative division known to law. It is an administrative district or an area with legally significant boundaries.⁷² Identified areas include a county, a hundred, a parish, a township within a parish, a hamlet, and a manor. Other such units include electoral wards,

⁶⁸ At [106] and [111].

⁶⁹ See footnote 4, above.

⁷⁰ At [90].

⁷¹ See *Paddico (267) Ltd v Kirklees MBC* [2011] EWHC 1606 at [82].

⁷² *Ibid* at [97].

and polling districts. In *Paddico*, Vos J was prepared to regard a conservation area designated under Town and Country Planning legislation as a *locality*.⁷³ However, it is clear that it must connote something more than a place or geographical area.⁷⁴

2.26 Thus, in short, the word “*locality*” in the context of section 15 must relate to a defined administrative unit known to law.

2.27 The restrictive requirement provided by the word “*locality*” has meant that a number of applications for TVG status failed by reason of what Lord Hoffmann described as the “*pinch-point*”.⁷⁵ An amendment was then introduced into the legislation by the introduction of the words “*or of any neighbourhood within a locality*” into the original definition of a green which had been retained in section 15 of the 2006 Act. However, if a “*neighbourhood*” is to be relied upon it must be a neighbourhood within a *locality* (or localities), so that the need to identify a *locality* has not been removed. Thus, the argument goes that Herston is a *locality*, and the area benefitting from the prescriptive rights over the Application Site is a *neighbourhood* within that *locality*.

2.28 For the purposes of the present case, therefore, the definition of the word “*neighbourhood*” is of paramount importance as it appears to have been accepted by the parties that if indeed there is any merit in the Application, it must be on the basis of a “*neighbourhood within a locality*”, rather than a *locality* itself.

2.29 As a starting point, a “*neighbourhood*” is not a sub-division of a *locality*, and need not be a recognised administrative unit. In other statutory regimes the phraseology that has been utilised is whether particular areas are “*sufficiently distinctive to constitute a neighbourhood of its own*”,⁷⁶ and whether there is a feeling of a *community* or *neighbourhood*.⁷⁷ Other factors that have been noted as being of assistance to identify whether or not an area comprised in a *neighbourhood* has the following features – whether it has natural boundaries or distinct boundaries formed

⁷³ At [106].

⁷⁴ See *R v Suffolk CC, Ex p. Steed* (1996) 71 P&CR 463 at 477, per Carnwath J.

⁷⁵ In the *Oxfordshire* case, at [11].

⁷⁶ Re *Ling's application* (1957) 7 P&CR 233, R 235.

⁷⁷ See *Re Davies's application* (1973) 25 P&CR 115 at 131-132.

by a large road such as a motorway; the presence or otherwise of facilities which might be expected to exist in a given *neighbourhood* including shops, primary schools and a post office; or whether it is a relatively self-contained sector of a larger urban area. As Sullivan J in the *Cheltenham Builders* case stated:

*"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 has 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."*⁷⁸

- 2.30 Thus, it is apparent that the requirement to qualify as a "*neighbourhood*" is quite wide. It is a more fluid concept than a "*locality*" and connotes an area that may be much smaller than a "*locality*"⁷⁹. "*Any 'neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrast with the insistence of the old law upon a locality defined by legally significant boundaries.*"⁸⁰ However, it is said that in order to constitute a *neighbourhood* that it must have a "*sufficient degree of (pre-existing) cohesiveness*"⁸¹. In the *Paddico* case, Vos J summarised the position by saying that a *neighbourhood* is understood as being a cohesive area which must be capable of meaningful description in some way.⁸²
- 2.31 In the *Leeds Group Plc* case ⁸³, it was held that the term "*neighbourhood within a locality*" was to be applied in a straightforward manner, untrammelled by any pre-

⁷⁸ *R (Cheltenham Builders) v South Gloucestershire Council* [2003] EWHC 2803 (Admin), at [85].

⁷⁹ Per HHJ Waksman QC in the *Oxfordshire & Buckinghamshire NHS Trust* case, at [69].

⁸⁰ *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, at [27]. This was a case where the submission that the neighbourhood could comprise two separated areas was rejected.

⁸¹ See the *Oxfordshire & Buckinghamshire NHS Trust* case, per HHJ Waksman QC at [79] referring to the phrase used by Sullivan J. in the *Cheltenham Builders Case*, at [85]. "*The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to a locality....to qualify therefore, it must be capable of meaningful description in some way.*"

⁸² At [97].

⁸³ [2011] 2 WLR 1010.

existing common law technicalities, and that Parliament had intended to dispense with any “*common law baggage*” by the introduction of these words. A distinction was identified between the term “*neighbourhood within a locality*” which marked a new concept, and “*locality*” which was not a new concept.⁸⁴ The court had regard to the underlying objective of the amendment, namely, to make it easier for local communities to protect community recreational assets.

Indulgence as of right

2.32 User, or to be more accurate in the statutory context, “*indulgence as of right*”, derives from customary rights of prescription.⁸⁵ The quality of user which would justify recognition of such a prescriptive or customary right has to be *nec vi, nec clam, nec precario* i.e., not by force, nor stealth nor the licence of the owner. As Lord Hoffmann stated in *Sunningwell*:

*“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.”*⁸⁶

2.33 Thus, the rationale behind the words “*as of right*”, is acquiescence. The landowner must be in a position to know that a right is being asserted, and to acquiesce in the assertion of such right (i.e. not resist or permit the use). It is settled law that what matters is how it would appear to the owner of the land.⁸⁷ The subjective belief of the users of the land is irrelevant in the circumstances.⁸⁸

⁸⁴ [2011] 2 WLR 2010.

⁸⁵ Customary rights no longer play a part in the registration of TVGs because the period for registration of such greens ended in July 1970. New greens can now only be created by way of statutory prescription, or voluntary registration by the landowner.

⁸⁶ At 350H to 351A, cited with approval by Lord Hope and Lord Rodger in *Lewis* at [18] and [91], respectively. The principle has been established by high authority, see *Lewis* at [20], *per* Lord Walker. In *R (o.a.o Cornwall Council) v Secretary of State for Heath* [2014] UKSC 31 Lord Neuberger questioned the phrase “*for a limited period*”, and that it clearly included an indefinite period, and that the word “*limited*” was meant to be contrasted with “*permanent*”.

⁸⁷ *Ibid per* Lord Hoffmann at 352H. See also *Lewis* at [36] *per* Lord Walker.

⁸⁸ *Ibid* at 356A-D.

2.34 In *Lewis* Lord Walker referred to the words of Leading Counsel that if the public is to acquire a right by prescription they must by their conduct “*bring home*” to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.⁸⁹

2.35 In the same case Lord Hope stated that: -

*“the first question to be addressed is the “quality of the user during the 20-year period”....If the user for at least 20 years was of such an amount and in such manner as would reasonably be regarded as the assertion of a public right...., the owner will be taken to have acquiesced in it – unless he can claim that one of the vitiating circumstances applied in his case.”*⁹⁰

Nec vi, nec clam, nec precario

2.36 Insofar as *nec vi* is concerned, the crucial test must be:

*“... not whether those using the land knew that their user was being objected to or had become contentious, but how the matter would have appeared to the owner of the land, since in cases of prescription the presumption arises from the latter’s acquiescence.”*⁹¹

2.37 Thus, the effectiveness of actions taken by landowners who protest against the user, or to communicate that the user is contentious, must be assessed against how the matter would appear to a reasonable observer.

2.38 Insofar as *nec clam* is concerned, the user must be without stealth or secrecy. Thus in order for lawful sports and pastimes to be carried on as of right, the activity must be open and undertaken in the manner to be expected of a person rightfully entitled to carry on such activity. For rights to be acquired, the landowner must be in a

⁸⁹ At [30].

⁹⁰ *Ibid* at [67].

⁹¹ See the *Cheltenham Builders* case, *per* Sullivan J, at [69].

position to know of the user,⁹² or the means of acquiring such knowledge. It is unlikely that any significant use of the land by the local community would have been carried out *nec clam*.

- 2.39 Insofar as the third vitiating circumstance is concerned *i.e. nec precario*, this is not of relevance to the present case.

Knowledge/Mean of knowledge

- 2.40 Thus, of paramount importance for the present case is the question of knowledge, or the means of knowledge, on the part of the landowner, *i.e.* the Scott Estate in easement cases. It is therefore appropriate to undertake an analysis of the authorities on the subject. Many of the historic cases are bound up with dealing with circumstances where the freehold owner of the purported servient tenement is out of possession as the land is tenanted, either in the possession of a tenant for life, or a tenant for years. These circumstances give rise to consideration of where the burden of proof lies, and to what has been referred to the “*user against the fee*”. This involves the consideration of fundamental tenent of English common law that the necessary enjoyment for a prescriptive claim to be made out is that it has claimed by or on behalf of a fee simple owner against a fee simple owner. Some of the reported cases arose before the enactment of the Prescription Act 1832.

- 2.41 An early case is that of *Daniel v North*⁹³ where there was obstruction of ancient lights and the existence of a tenancy rebutted the presumption of a grant. In the subsequent case of *Cross v Lewis*⁹⁴ it seems that proof of enjoyment of an easement for 20 years is in all cases *prima facie* evidence of a title, which must be rebutted by the owner of a servient tenement. In *Davies v Stephens*⁹⁵ where the servient tenement had been in the possession of a tenant for years, but an easement over it has been enjoyed for a long time, it was held that the landlord may be presumed to have been aware of it.

⁹² See *Sunningwell* at 351A, *per* Lord Hoffmann.

⁹³ (1809) 11 East 372.

⁹⁴ (1824) 2 B & C 686.

⁹⁵ (1836) 7 C&P 570.

2.42 In *Sturges v Bridgman*⁹⁶ Thesiger LJ stated that: -

*“...consent or acquiescence of the owner of the servient tenement lies at the route of prescription, and of the fiction of a lost grant, and hence the acts of user, which go to the proof of one or the other, must be, in the language of the civil law, nec vi, nec clam, nec precario; for a man cannot, as a general rule cannot be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses.”*⁹⁷

2.43 In *Dalton v Angus*⁹⁸ Fry J in delivering his Opinion to the House of Lords in answer to several questions posed, observed that in his opinion “... *the whole law of prescription and the whole law which governs presumption or inference of a grant or covenant rests upon acquiescence.*” In the case of a right of way there were five essential ingredients relating to acquiescence. The third of these is that knowledge of the person affected by the act done was one of the constituent ingredients of the claim in prescription, the fourth ingredient being that the power to prevent such act. In the case of a right to light there were three essential ingredients, knowledge of the acts done the first to demonstrate, and the second being the ability to stop the acts, or to sue.⁹⁹

2.44 The Lord Chancellor, Lord Selborne, in his judgment dealing with the question of *nec clam* as applied to the easement of support, stated that the inquiry related to: -

“...the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man’s building is claimed. He cannot resist or interrupt something of which

⁹⁶ (1879) 11 Ch D 852, at 863

⁹⁷ Secret user will not found a prescriptive claim. In *Liverpool Corporation v H Coghill and Sons Ltd* [1918] 1Ch 307 the right claimed was secret and unknown and unsuspected in that it was exercised underground into the local authority’s sewers. It was therefore not of such a character as would establish a prescriptive right, see at 314.

⁹⁸ (1881) 6 App Cas 740, a right of support case.

⁹⁹ At 774.

he is totally ignorant. But there are some things of which all men ought to be presumed to have knowledge...”

He then cited that lateral support for a building was one of those things, having regard with the laws of nature.¹⁰⁰

2.45 In *Union Lighterage Co v London Graving Co*¹⁰¹ the Opinions and Judgments in *Dalton v Angus*¹⁰² were considered, and in particular the question of knowledge, or means of knowledge. The requirement of actual knowledge, as such, is not essential to acquiescence, but imputed knowledge is sufficient. In the words of Romer LJ: -

*“Now on principle, it appears to me that a prescriptive right to an easement over a man’s land should only be acquired when the enjoyment has been open – that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interest, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.”*¹⁰³

2.46 For his part, Stirling LJ in the same case referred to the judgment of Lord Selborne, where he stated that *“a man cannot resist that of which he was wholly ignorant”*, and then said as follows: -

*“I think that Dalton v Angus establishes that there must be some knowledge or means of knowledge on the part of the person against whom the right is claimed.”*¹⁰⁴

2.47 Vaughan Williams LJ provided a dissenting judgment in the case, but expressed the same view as to the means of knowledge.¹⁰⁵

2.48 In the case of *Lloyds Bank v Dalton*¹⁰⁶ it was held that constructive as opposed to actual knowledge is enough to prevent the owner of the servient tenement from

¹⁰⁰ At 801.

¹⁰¹ 1902] 2 Ch 557.

¹⁰² (1881) 6 App Cas 740.

¹⁰³ At 571.

¹⁰⁴ At 574.

¹⁰⁵ “...acquiescence, and therefore knowledge, is the basis of the easement of the easement [of artificial support]”; “It is sufficient if the owner of the servient ought to have known”, at 568/569.

¹⁰⁶ [1942] Ch 466.

promoting the defence that the enjoyment of the easement claimed was *clam*. As Bennett J held that: -

“It is notorious that the owners of land and buildings are interested in their boundaries, and my judgment, the facts proved at trial of this case lead irresistibly to the conclusion that the successive owners of the dye-works, assuming them to be have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have to have had reasonably opportunity of becoming aware of the fact that the dye-works were supporting the north-east part of the plaintiffs’ yard and of the outbuildings standing thereon.”

2.49 Insofar as where the land is tenanted the case of *Pugh v Savage*¹⁰⁷ provides a further gloss on the issue as to the burden of proof. As identified in that case a distinction is to be drawn in cases where a tenancy was in existence at the beginning of the period of user, and cases when the tenancy came into existence in the course of the period of user. Cross LJ had regard for the earlier authorities of *Cross v Lewis*, and *Palk v Shinner*, and then set out the position, as follows:

“That a distinction may be made in cases where a tenancy was in existence at the beginning of the period of user, and cases when the tenancy came into existence in the course of the period of user, is surely only common sense. If a tenancy is in existence at the beginning of the period of user, it may well be unreasonable to imply a lost grant by the owner at the beginning of the user. He might not have been able to stop the user even if he knew about it. If, on the other hand, you get a period of user against an owner or owners without any evidence that they did not know about it when they were in possession, and then afterwards the grant of a tenancy, though undoubtedly such a tenancy during the period of user is a matter to be considered, it would be quite wrong to hold that it is a fatal objection to presuming a rant, or a claim under the Prescription Act.” a tenancy during the course of the period of user, the grant of the tenancy would not, in the absence of evidence that the servient owner had no knowledge of the user while the tenant was in possession, be a fatal objection

¹⁰⁷ [1970] 2 QB 373.

to the presumption of a grant or to a claim made under the Prescription Act...

*When long user - here user for 36 years – of a way has been shown, I think, that the law should support it, if it can, and that we ought to presume, in the absence of any evidence to the contrary, that the owners of 457 in the period 1932/1940 knew of the user and the Ralphs knew of it.”*¹⁰⁸

2.50 In the case of *Diment v NH Foot Limited*¹⁰⁹ the judgment of Pennycuick V-C was concerned with a claimed right of way, and involved issues relating to the burden of proof, and the presumption arising from long user of an alleged right of way, and the role of agents employed by the landowner. The judge held that although, as a matter of principle, in the case of long user the burden of proof was on the owner of land to rebut the presumption that he had knowledge of long user of a way over his land, where an owner employed an agent to act in connection with his property, the burden of establishing the agent’s knowledge or means of knowledge rests on the party wishing to establish it, and that did not extend to the owner’s agents, and that burden had to be discharged by inference from all the surrounding circumstances. Since there was no evidence as to the precise activities carried on by the surveyors employed by the freehold owner of the land, other than arranging tenancies and dealing with rents, there was no ground for holding that the firm had knowledge or the means of knowledge of the user.

2.51 Accordingly, before it became apparent to the claimant of such use was being made (this was in 1964) the claimant had no knowledge or means of knowledge either by herself or through her agents of the user of the way over the field in question, the Judge having accepted that the user of the way was capable of creating a right of way.

2.52 In that case the Vice-Chancellor applied the judgments in *Dalton v Angus*, and *Union Lighterage Co v London Graving Co*, and considered the judgments in *Pugh v Savage*, referred to above, where the requirement of knowledge was subsequently

¹⁰⁸ [1970] 2 QB 373, 384.

¹⁰⁹ [1974] 1 WLR 1427.

expanded by judicial authority to include imputed knowledge, or some knowledge, or means of knowledge.

- 2.53 The learned judge then went on to state that as the claimant herself did not have such knowledge, and therefore rebutted the presumption, the question then arose as to whether or not her agents who entered into tenancy agreements with successive tenants had any such knowledge or imputed knowledge which could be treated as the claimant's own knowledge as principal. The Vice-Chancellor found against this proposition and did not consider that the presumption could legitimately be carried on so far where a landowner employs an agent in connection with a property.

"There cannot, I think, be a presumption, merely by reason of that relation and without reference to the particular circumstances, that the agent had knowledge or means of knowledge of any particular act upon the land. That would be carrying this presumption altogether beyond anything that was said in Pugh v Savage and would, I venture to think, lead to some very odd consequences. It seems to me that where one is concerned with an agent, the role of establishing knowledge or means of knowledge must rest on the other party concerned, who might discharge that burden by direct evidence or by inference – the inference depending upon all the particular circumstances."

The learned judge then went on to state that there was no evidence in the case as to the precise activities carried on by the agents, apart from the fact that they were responsible for making the tenancies and dealing with matters of rents and so forth. There was no evidence as to what members of that firm or their representative did physically upon the farm in question by way of inspection. The judge could see no ground upon which he would be entitled to hold that the agents had knowledge or means of knowledge of the user of this way of the defendants.

- 2.54 More recent words on the subject are contained in the judgment of Chadwick LJ in the case of *Williams v Sandy Lane (Chester) Limited*.¹¹⁰ There he summarised the law as follows:

¹¹⁰ [2006] EWCA Civ 1738; [2007] 1 P & CR 27.

" In my view it is possible to derive from the decision of this Court in Pugh v Savage the following principles applicable to cases where the servient land is, or has been, subject to a tenancy. First, in a case where the grant of the tenancy of the servient land predates the user by or on behalf of the owner of the dominant land, it is necessary to ask whether, notwithstanding the tenancy, the freehold owner of the servient land could take steps to prevent user during the tenancy. The answer to that question is likely to turn on the terms of the tenancy. Second, if (notwithstanding the tenancy) the owner of the servient land could take steps to prevent the user, then it is necessary to ask whether (and, if so, when) the freehold owner had knowledge (actual or imputed) of that user by the owner of the dominant land. The fact that the freehold owner of the servient land was out of possession when the user began and throughout the term of the tenancy may well lead to the conclusion that knowledge of that user should not be imputed. But if, on the facts, the owner of the servient land does have knowledge of the user and could (notwithstanding the tenancy) take steps to prevent that user, but does not do so, then (prima facie) acquiescence will be established. Third, in a case where user of the servient land by the owner of the dominant land began before the grant of the tenancy, it is necessary to ask whether the freehold owner of the servient land had knowledge (actual or imputed) at or before the date of the grant. If so, then it is likely to be immaterial whether the terms of the tenancy are such that the owner of the servient land could (or could not) take steps to prevent that user. That is because if (with knowledge of the user) the owner of the servient land grants a tenancy of that land on terms which put it out of his power to prevent that user, he can properly be said to have acquiesced in it. Fourth, if the owner of the servient land did not have knowledge of the user at the date of the grant, then the position is the same as it would be if the grant had pre-dated the user. It is necessary to ask whether (notwithstanding the tenancy) the freehold owner can take steps to prevent the user; and, if so, whether (and if so when) the owner had knowledge of the user."

2.55 The final statement on the subject is that expressed by Lord Neuberger in the case of *Lawrence v Fen Tigers Limited*¹¹¹ where he said that:

¹¹¹ [2014] UKSC 13 [43].

“time does not run for the purposes of prescription unless the activities of the owner (or occupier) of the putative dominant land can be objected to by the owner of the putative servient land”.

User against the fee

2.56 The Scott Estate have made a further submission that if having come to the conclusion that the evidence in the case is considered to demonstrate sufficient qualifying use throughout the relevant period of 20 years so as to satisfy the statutory prescription test, it is then necessary to consider whether town or village green rights can be acquired by prescription against a landowner who is not in possession of the land throughout any of the relevant period. This raises a somewhat difficult issue in the contextual framework of the case.

2.57 For the purposes of this submission the relevant period is from April 1991 to April 2011. By the time the statutory prescriptive period commenced, the Lease had been in being for about 40 years. The statutory agricultural tenancy that arose after the determination of the fixed term of the Lease continued on the same terms until the Lease was surrendered by DCC to the Scott Estate in September 2013. The Application had been registered with DCC in April 2011.

2.58 As stated above, it is a fundamental tenet of English common law that the necessary enjoyment for a prescriptive claim has to be claimed by or on behalf of a fee simple owner against a fee simple owner.¹¹² This has been defined in case law as “*user against the fee*”. In the case of *Wheaton v Maple & Co*¹¹³ it is stated that

“...the whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with anyone except an owner in fee”.

2.59 This principle has been perceived as being illogical. As *Megarry & Wade*¹¹⁴ has noted, the theory of prescription does not deal properly with cases where the servient land is in the hands of a limited owner, whether a tenant for life, or a tenant for years.

¹¹² See *Bright v Walker* (1834) 1 Cr. M. and R. 211 at 219, 221 – prescription at common law.

¹¹³ [1893] 3 Ch 48 at 63, per Lindley LJ.

¹¹⁴ *The Law of Real Property* 8th edition, at paragraph 28.055.

It is said that it seems irrational to allow prescription against land if occupied by an owner in fee simple, but not if occupied under e.g. a 999-year lease by a tenant. In the law of Ireland prescription against limited owners is allowed, and is said to be more satisfactory.¹¹⁵

2.60 Thus where the servient land is let, the question to be asked is whether the freehold owner of that land acquiesced in the relevant user. As indicated above, this requires consideration of whether the freehold owner could have taken steps to prevent the user, and whether the freehold owner had knowledge, actual or constructive, of that user, or the means of acquiring such knowledge.¹¹⁶ If it can be demonstrated that user as of right began against the freehold owner, it will not be less effective because the land was later let,¹¹⁷ and user against the fee simple will be presumed, unless the servient owner can show the contrary.¹¹⁸ However, where the tenancy pre-dates the commencement of user it is more difficult, although not impossible, for the claimant to show acquiescence on the part of the freehold owner of the servient land.

It is said by the Scott Estate that this is a separate issue as to whether DCC as Leaseholders were in breach of their covenants contained in the Lease. Thus consideration needs to be directed as to whether, as a matter of law, such prescriptive rights can accrue in such circumstances.

2.61 It is therefore submitted by Leading Counsel that the Scott Estate was out of possession of Herston Fields for the whole of the relevant prescriptive period. As a consequence, the Scott Estate was neither in a position to control, or acquiesce in, the claimed user over the servient land. An essential plank of the case for the Scott Estate is that it was not until the last few years of the relevant period, i.e. from about the early 2000s, that the Estate had any reason to consider that such user that apparently had occurred was sufficient to engage the covenants of the Lease whereby the Scott Estate could seek to invoke such provisions on the basis of breach of

¹¹⁵ Megarry and Wade, at paragraph 28.054, cite a judgment of Lord Millett in the Hong Kong Court of Final Appeal where he stated that this rule was “*counter-intuitive and contrary to the policy of the law.*”

¹¹⁶ See *Pugh v Savage* [1970] 2QB 373; *Williams v Sandy Lane (Chester) Limited* [2006] EWCA Civ 1738 [24], [2007] 1 P&CR 27. This may be dependent upon the terms of the tenancy [24].

¹¹⁷ *Palk v Shinner* (1852) 18 QB 215.

¹¹⁸ See *Davis v Whitby* [1973] 1 WLR 629, aff’d [1974] Ch.186.

covenant by DCC requiring the tenant to control the land in accordance with such covenants.

Summary

2.62 Thus, the issue raised by Leading Counsel for the Scott Estate as to user against the fee gives rise to consideration of a question of some complexity. The question of knowledge, or the means of knowledge, on the part of the landowner, i.e. the Scott Estate, is of paramount importance.

2.63 The law of prescription and the law governing presumption or inference of a grant or prescription rests upon acquiescence. From an early stage the authorities have recognised the importance of not only actual knowledge on the part of the servient owner, but also the means of acquiring such knowledge i.e. imputed knowledge. In the *Union Lighterage* case the words used in the judgment were that the prescriptive right: -

“should only be acquired when the enjoyment has been open – meaning, of such a character that an ordinary owner of the land, diligent in the protection of his interest, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.”

The words “*diligent in the protection of the landowner’s interests*” or “*must be taken to have, a reasonable opportunity of becoming aware of that enjoyment*” been emphasised in subsequent authorities.

2.64 As to the question of the burden of proof, although in some case it has been stated that, as a matter of principle, in the case of long user the burden of proof was on the owner of land to rebut the presumption that he had knowledge of long user of a way over his land, this presumption would only appear to lie in the “*user against the fee*” cases where the period of prescription arose prior to the grant of the tenancy. In the present case, the grant of the tenancy pre-dates the user by or on behalf of the owner of the dominant land. Therefore, the burden of proof must lie upon the Applicants to prove the requisite user as of right for the qualifying period up to April 2011.

- 2.65 Then the question arises as to whether the owner of the servient tenement could have taken steps to prevent such user. In the case of *Williams v Sandy Lane (Chester) Ltd* it was stated that the answer is likely to turn of the terms of the tenancy. In the present case Scott Estate undoubtedly had to power to pursue breaches of covenant on the part of DCC for acts of trespass¹¹⁹.
- 2.66 This then gives rise the question of knowledge, or the means of knowledge, on the part of the Scott Estate. The Scott Estate submits that it was not until about the early 2000s that it had any reason submits that any untoward was occurring to its estate, it was neither in a position to control, or acquiesce in, the claimed user over the servient land. However, this begs the question as to whether the Scott Estate had the means of acquiring such knowledge prior to the early 2000s.

Lawful sports and pastimes

- 2.67 The meaning of the word “lawful” is interpreted by reference to old case law, in particular the case of *Fitch v Fitch*.¹²⁰

*“If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers.”*¹²¹

- 2.68 The word “lawful” therefore has a broader meaning than simply a sport or pastime. The definition of lawful sports and pastimes includes informal recreation.¹²² As Lord Hope indicated in the case of *Lewis*:

¹¹⁹ See clause 4(q) of the Lease.

¹²⁰ (1797) 2 ESP 543.

¹²¹ At 544-545, per Heath J.

¹²² See *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] AC 335, per Hoffmann at p.356H

*"The word 'lawful' indicates that they must not be such as will be likely to cause injury or damage to the owner's property."*¹²³

Thus it is the manner in which the sport or pastime is carried out that is relevant to its lawfulness, and not merely the nature of the sport or pastime itself.

2.69 It is said by Counsel for the Scott Estate that this interpretation is of particular relevance in the present case as it is submitted that the land has been farmed during the relevant period of statutory prescription, and recreational activities would have had the potential to cause damage to agricultural crops. Examples of such damage are given, such as walking over and trampling crops which can damage the crops or inhibit growth limiting productivity of the crop. Dog excrement in silage or haylage is also mentioned.

2.70 In *Sunningwell*, Lord Hoffmann provided a broad judicial interpretation of qualifying lawful sports and pastimes. The concept is very wide. Lawful sports and pastimes are certain, reasonable and continuous recreational activities. These can be either formal and structured, such as organised team games of cricket or cross country running, horse racing, shooting and practising archery, or informal and unstructured, such as informal games of football, cricket, rounders, baseball, horse and pony riding and the like. Recreational walking with or without dogs, playing with children, and family games or children playing by themselves, and fishing all qualify, as does wandering or "promenading". Other examples include seasonal activities such as snowball fights and tobogganing in winter, maypole dancing at Midsummer, and village dancing at all times of the year. Another seasonal activity is picking blackberries in the Autumn.

Sufficiency of user

2.71 It is a matter of fact and degree in the circumstances of any individual case as to whether or not the use of the land for lawful sports and pastimes must be frequent enough to qualify as a TVG. In *Sunningwell* a qualification was placed upon the broad interpretation of lawful sports and pastimes by Lord Hoffmann in that, as he

¹²³ [67] re-iterating the judgment in the case of *Fitch v Fitch*.

stated, there may be cases where the user is so trivial or sporadic so as not to carry the outward appearance of user as of right.¹²⁴ What is clear is that the use by the inhabitants should be such as to suggest to a reasonable landowner that the users believed they were exercising a right to indulge in lawful sports and pastimes across the whole of the land when carrying out such activities. Also it is of importance that such activities should be carried out frequently so as to qualify as user capable of contributing to the acquisition of a prescriptive right.

2.72 However, differences of judicial opinion had been expressed in relation to regular, but rare, exercises of lawful sports and pastimes such as the annual 5th November bonfire on Guy Fawkes day. What is clear is that it is a question of fact and degree in the circumstances of any individual case. What matters is that users should enable a reasonable landowner to know or has the means of knowledge that local inhabitants are carrying out activities on his land. If such use is so infrequent that it is hardly noticeable, then it is probable that local people cannot be said to be asserting any kind of right to use the land that is capable, should the landowner so choose, of being resisted or licensed.

2.73 Another feature of some importance to the present case is the question of use by the local inhabitants of Herston Fields of a differing nature. For instance, as noted by Lord Hoffmann in the *Oxfordshire* case,¹²⁵ Lightman J had provided guidance in the first instant judgment as to the distinction between recreational walking and walking in the nature of a right of way from point A to point B.¹²⁶ thus, 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. However, walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses a potential TVG may be recreational use of the land as a TVG, if the use in such circumstances is to suggest to a reasonable landowner that this is exercising a right to indulge in lawful sports and pastimes across the whole of the land in question. The question is how the matter would have appeared to a reasonable landowner and in particular whether

¹²⁴ At 357D.

¹²⁵ At 702-703.

¹²⁶ [2004] Ch 253, at [102] - [103].

the use of the tracks would have appeared to be referable to use as a public footpath, or user for recreational activities, or both. Obviously, the situation is different if the users of the track 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 TVG.

2.74 As Lightman J stated, 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 longstanding to give rise to such right or rights*”.

SECTION 3

3. EVIDENCE FOR THE APPLICANTS

- 3.1. There are a number of strands to the Applicants' evidence. First, Mr Jensen, together with some 20 witnesses gave oral evidence to the Public Inquiry, and were cross-examined by Leading Counsel for the Scott Estate. Secondly, in addition to the oral evidence given by those witnesses who attended the inquiry, the Applicants also submitted 7 written statements the authors of which were unable to give evidence. I am conscious of the fact that some of these witnesses did attend the hearing on certain days to give evidence, but could not be reached. Arrangements could then not be made for their attendance at other times owing to work, and other commitments. As these witnesses gave no oral evidence and their testimony was not tested in cross-examined their evidence cannot be given the same weight as the other "live" witnesses. Thirdly, in addition to the witness evidence, reliance was also placed in the Application on bar chart analyses, and photographic evidence reproduced on video, CDs, and image print-outs contained in two USB memory sticks. Fourthly, in support of the Application a body of documentation (apparently collated by Mr Foote) was supplied by the Applicants as identified in the Application bundle as the "List of Supporting Documents". This List included 92 completed Evidence Forms.

Oral Evidence

- 3.2. It is not proposed to reproduce *in extenso* the considerable body of oral evidence adduced during the course of the Public Inquiry. However, in view of the findings contained in this Report I consider that it is necessary in the following paragraphs to provide a broad synthesis of the evidence adduced, together with a summary of such evidence. In the case where witnesses did not give oral evidence, for one reason or another, the reproduction of their evidence is more limited.

3.3. Subsequently in this Report a detailed analysis will be made of the evidence drawing together the various strands regard in the contextual framework of the principles of law, under the heading “Discussion”.

Mr Gerald Jensen

3.4. Since the Application was lodged, Mr Jensen became the spokesperson of the Friends of Herston Fields for the purposes of the Public Inquiry. His assistance in the presentation and conduct of the case for the Applicants was invaluable. Despite the fact that he has had no formal legal training (he is a surveyor by profession) he was able to conduct the case with good humour within the framework of the rules of evidence.

3.5. Apparently the original intention had been that Mr Jensen would simply confine himself to the presentation of the case for the Applicants to the Public Inquiry. However, at the commencement of the hearing an application was made by Leading Counsel for the Scott Estate that in the absence of Mr Foote someone should address a number of issues in the matter. These issues in particular were (1) to provide clarification on the precise legal test on which reliance was placed by the Applicants for the purposes of the Application in their claim to an interest in Herston Fields, namely whether it was as a “locality” or “of any *neighbourhood within a locality*” for the requisite period of at least 20 years; (2) general questions arising as to the preparation of the Application and its supporting material, and in particular as to how the Evidence Forms completed by some witnesses came to be prepared and submitted for the Public Inquiry; and (3) to identify the precise date from which the 20 years’ use should be calculated.

3.6. It was submitted, therefore, that a person should be called to address in evidence these, and other matters, as Mr Stephen Foote was no longer available. It was submitted that the ideal candidate for this role was Mr Jensen. After some discussion, and with his consent, albeit given with some reluctance, Mr Jensen duly was called to give evidence on behalf of the Applicants in order, in effect, to be cross-examined by Leading Counsel. I should state that Mr Jensen had provided no witness statement prior to giving evidence.

3.7. For the previous 6 months or so Mr Jensen has lived at 60 Bell Street, Herston. However, his knowledge of Herston Fields goes back some 50 years, and he said

was aware of the use made of Herston Fields by local people. He adduced evidence as to how the “movement” started (i.e. Save Herston Fields), which later became the Friends of Herston Fields. He made reference to parts of the document headed “Justification for the Application...” included in the List of Supporting Documents appended to the Application. This provided material identifying Herston.¹²⁷ He made particular reference to the 2008 Appraisal document produced on behalf of the Council which resulted in the Southern Field of Herston Fields being taken out of the Conservation Area,¹²⁸ and the generation of the campaign resultant upon this event. He said he thought that the Town Council was going to pursue the Village Green Application.

3.8. Mr Jensen was asked about the two Conservation Areas within the town of Swanage. He said these were critical to the character of the town. Two points were emphasised by him. First that Herston Fields were very important to the local inhabitants, and secondly, the area of Herston does exist as an entity. Mr Jensen was also asked about the map, referred to during the hearing as “Map A” which accompanied the original Application, and the circumstances surrounding the re-submission of the Application, on the basis that the original did not sufficiently define the area sought. The original map was signed by 92 local residents, but the second re-submitted map was not so signed. Reference was then made to the July 2015 Committee Report relating to the Application where the response made by the Applicants to the objections raised by the Scott Estate was set out.¹²⁹

3.9. Mr Jensen was also asked about the Register of Electors and whether it sufficiently defined the area of Herston, but he acknowledged that the Ward itself no longer existed. Mr Jensen was asked detailed questions about the apparent use by local residents of Herston Fields as set out in the written evidence (including the original

¹²⁷ Some of this material has been incorporated in the section on the History of Herston, see Section 1, paragraphs 1.26 *ff*.

¹²⁸ Purbeck District Council: Herston Conservation Area Appraisal Document, adopted July 2008.

¹²⁹ See KD/2/610 to 628, at paragraph 7.1. The July 2015 Committee Report contains 5 appendices prepared by DCC. Paragraph 5.2 of the report (KD/2/608) refers to the evidence provided in support of the Application, which include the 92 Evidence Forms detailing use of the land, together with 6 other witness statements submitted. Of particular importance for the purposes of the Public Inquiry is appendix 2 (drawing 14/37), which shows the addresses of the users of Herston Fields; appendix 3, which is the user-evidence table and matrix showing activities in which users participated; and appendix 4, which are charts showing periods and level of use, see KD/2/616 to 627. Paragraph 5.3 of the report sets out typical uses described by the witnesses, see KD/2/609.

92 witness statements), and whether it was general or occasional use. He considered that the threshold test as to a significant number had been passed, and user as of right established. He stated that at the earlier stage no one knew the identity of the landowner, and therefore there was no-one to ask permission. Mr Jensen made reference to the activities which had been conducted on Herston Fields and to the bar charts forming part of the Application,¹³⁰ and the period of use in one case going back 90 years (Mr Fred Riley). Reference was also made to a number of photographs produced in support of the Application.

- 3.10. As to the question as to whether Herston Fields was a *locality* or a *neighbourhood within a locality*, he was asked in cross-examination a number of detailed questions by Leading Counsel on this issue. Mr Jensen stated that he thought that it was a *neighbourhood*, but he acknowledged that he did not know what the word “*locality*” meant. He was also asked a number of questions about what appeared to be an arbitrary line drawn around the area claimed as the *neighbourhood (or locality)*, as indicated by a thick black line on the map contained within the re-submitted Application. Mr Jensen relied upon the thick black line as indicating the *neighbourhood*, and agreed that it was arbitrarily drawn.
- 3.11. Insofar as the issue relating to the status of Herston, Mr Jensen agreed that the Applicants were not relying upon the boundary of the Conservation Area. He was also cross-examined as to the fact that only 9 of the 88 forms completed by local residents actually identified the area as “Herston”, and others described the area differently, such as the “High Street, Swanage”. These questions were all directed to the identity of Herston as a *locality/neighbourhood* for the purposes of the 2006 Act.
- 3.12. Mr Jensen was asked a number of detailed questions with regard to the way in which the Friends of Herston Fields developed, described by Leading Counsel as a “campaigning group” and its change of name from “Save Herston Fields” to the “Friends of Herston Fields”. There was no membership fee, nor membership list. There is a Committee. The electorate was those who attended meetings.

¹³⁰ See appendices C, and D, at KD/1/39 and 40, and also the summary of Evidence Forms at appendix E at KD/1/41 to 44. These documents are not to be confused with those produced by DCC as appendices to the report annexed to the July 2015 Committee Report to which reference has been made, above

Advertisements were placed on telegraphs poles. There were active members such as Michelle and Stephen Foote. There was unease as it was thought that the Council had a scheme to develop Herston Fields. In June/July 2010 Herston Fields seemed to have been earmarked for potential development by the Council.

- 3.13. Most of the Evidence Forms were collected by the end of 2011, and there had been a public meeting in about July 2011. Mr Jensen was not involved in organising the Evidence Forms. The template for the 27 witness statements was created by Mr Jensen's wife, and was based upon the original application forms.

Summary

- 3.13.1. Herston Fields are very important to the local inhabitants, and the area of Herston does exist as an entity. Mr Jensen stated that there was unease as it was thought that the Council had a scheme to develop Herston Fields. As to the issue whether Herston was a *locality* or a *neighbourhood within a locality*, he considered that it was probably a *neighbourhood*, although he acknowledged that he did not know what the word "*locality*" meant. Mr Jensen relied upon the thick black line as indicating the *neighbourhood* of Herston for the purposes of the Application, and agreed that it was arbitrarily drawn. He considered that the threshold test as to a significant number had been passed, and user as of right established. He stated that at the earlier stage no one knew the identity of the landowner, and therefore there was no-one to ask permission. He could not provide any assistance as to the completion of the Evidence Forms as he played no part in this, although he stated that his wife did. His wife had created the template for the 27 witness statements.

Mrs Kowalewski

- 3.14. Mrs Kowalewski lives at 62 Bell Street, in the centre of Herston. She made her witness statement dated 5th February 2016 for the purposes of the Public Inquiry. In her witness statement she states that she has known Herston Fields since 1996, and considers herself to be a local inhabitant of Herston. She states that she has used Herston Fields freely without obstruction or challenge for 15 years between 1996 and 2011, and accessed the fields and public footpath by climbing the stile into the

fields. She states that she has used Herston Fields between those years at least three times a week to walk her dog. She has also used Herston Fields to go blackberry and sloe picking, walking with children, nature walks and butterfly watching. She says that her immediate family has also used Herston Fields during this time for walking, playing and visiting the horses. Mrs Kowalewski states that she has seen Herston Fields used by children and people drawing and painting, dog walking, picking blackberries, bird watching, kite flying, playing football, walking and cycling.

- 3.15. Mrs Kowalewski also makes reference to the fact that Herston Fields were included in the Conservation Area until shortly before the Application was submitted. She states that she did not know who owned or occupied the land and was never prevented from using Herston Fields. No attempt was ever made during the years of her use by notice or fencing, or any other means, to prevent or discourage the use being made of Herston Fields by local inhabitants.
- 3.16. In cross-examination Mrs Kowalewski stated that she believed that the purpose of the Application was to keep Herston Fields as it is for community use. She stated that she did not want to prevent development, but considered that it should be kept as a recreation ground, and a village hall could be built there. Again as with a number of other witnesses, Mrs Kowalewski was asked a number of detailed questions on the meaning of the various paragraphs in the Evidence Form and its provenance. She was also asked questions about a petition which apparently attracted 2439 signatures.
- 3.17. Insofar as her use of Herston Fields was concerned, Mrs Kowalewski stated that she would use Herston Fields to pick blackberries which lay on the southern side of the hedge on the hedge between the Northern and Southern fields. She also stated that she never saw anyone farming the land between 1996 to 2001, and that there were horses in the Southern Field. There was no evidence of dairy cattle in the field until about 2001, and she never saw anyone managing the land. Between 2000 and 2005 she often picked blackberries and sloes from the hedges, and she agreed that in 2001/2002 all the fields had been ploughed. A circus used to arrive periodically and be sited until it could no longer get off the road due the widening of the High Street in the late 1950s/early 1960s. Horses were put on to the Southern Field in about 2011. Mrs Kowalewski stated that children played in the holidays, mostly in the

Southern Field. She also stated that she saw one particular lady drawing and painting on the far side of the Southern Field, and there was always somebody there doing something such as bird watching, kite flying. However, she did not know if these people were local people.

- 3.18. In essence, Mrs Kowalewski states that Herston Fields has provided an important recreational amenity for then locality for many years. She, her family and others have frequently used the area for recreation, there being no alternative space available.

Summary

3.18.1. Mrs Kowalewski stated that she has used Herston Fields freely without obstruction or challenge for 15 years between 1996 and 2011, and accessed the fields and public footpath by climbing the stile into the fields. She and her immediate family has used Herston Fields between those years at least three times a week to walk her dog, and for the various activities she has described. She said that her immediate family has also used Herston Fields during this time for walking, playing and visiting the horses. She has seen Herston Fields used by children and people drawing and painting, dog walking, picking blackberries, bird watching, kite flying, playing football, walking and cycling. However, she did not know if they were local people. She believes that the purpose of the Application was to keep Herston Fields as it is for community use. She does not want to prevent development but considered that it should be kept as a recreation ground, and a village hall could be built there. Between 1996 to 2001 she has never saw anyone farming the land, and that she did not know who owned or occupied the land. She was never prevented from using Herston Fields. She never saw anyone managing the land.

Phoebe Hobbs

- 3.19. Ms Hobbs was born on 21st January 1999 and is therefore aged 17. She made a witness statement dated 9th February 2016 in which she stated that she has known Herston Fields since 2006. Since the age of 9 or 10 (i.e. 2008/2009) she would take the dogs out for exercise on the fields, and there was no electric fence there. She stated that she never forced entry onto the fields.

3.20. Ms Hobbs lives in Herston and uses the Fields to walk dogs, to take photos of biodiversity, and engages in birdwatching. She also stated that it is a nice spot to go and sit and read. In common with the other witnesses in their witness statements, Ms Hobbs stated that neither she nor any member of her family has ever been challenged or prevented from using Herston Fields, and that she is unaware of any other person being so challenged or prevented. She has used Herston Fields in the belief that she has the right to use the land as a village green.

3.21. In cross-examination she stated that there was lots of tall grass in the summer months which was sometimes cut, and she then tended to walk around the perimeter of the Southern Field in an anti-clockwise direction. She also stated that occasionally she would walk on the Northern Field.

Summary

3.21.1. From about when she was nine or ten years old (i.e.2008/2009) Ms Hobbs has used Herston Fields in order to exercise the family dogs. She has never seen any electric fences, and has never forced entry. When the grass was tall Ms Hobbs would walk around the perimeter of the Southern Field in an anti-clockwise direction. Occasionally she would walk in the Northern Field.

Mrs Michelle Hobbs

3.22. Mrs Hobbs (the mother of Ms Phoebe Hobbs) made a witness statement dated 31st January 2016. She lives at 385 High Street, Herston. Her knowledge of Herston Fields has only existed since April 2005. Since then for the six years between 2005 and 2011 she states that she has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers. Mrs Hobbs states that she has used Herston Fields daily for dog walking as well as nature walks, elderflower berry picking, and blackberry picking. Mrs Hobbs also states that her children also used Herston Fields during this time for dog walking, nature walks and berry picking. She says that during those years she has seen Herston Fields used by children playing, people drawing and painting, walking dogs, playing team games such as football and cricket, picking berries, bird watching, picnicking, kite flying and walking. During the time that she has used Herston Fields the general pattern of use has remained the same. Mrs Hobbs also states that she was never prevented from

using Herston Fields, and no attempt was ever made during that time by notice or fencing or by any other means to prevent or discourage such use.

3.23. In essence, Mrs Hobbs states that she considers that Herston Fields has provided an important recreation amenity to the locality which has been taken advantage of by her, her family and others, there being no alternative space available.

3.24. In this context it must be noted that the evidence of Mrs Hobbs encapsulates a period of time between 2005 and 2011. As she stated in answers to questions from Mr Jensen, in about 2011 there was a change in that barbed wire fencing was erected by the landowner, and more recently a five-bar gate was installed. This obviously had an impact on the activities which could occur on Herston Fields. Mrs Hobbs stated that she saw crops growing very high one year, but could not be sure if it was 2005, 2006, or 2007. She stated that she used all three fields.

3.25. In cross-examination, Mrs Hobbs confirmed that she moved to Herston in 2005. As with other witnesses, detailed questioning was directed to the way in which the Evidence Forms had been completed, and what assistance had been given by others as to the completion of individual entries in the Evidence Forms. She thought that she had picked up the Evidence Form at a public meeting. Mrs Hobbs was asked about the role of Mr Stephen Foote, and Ms Leslie Kennedy, and whether Mrs Hobbs had got involved in the “campaign” to prepare evidence and distribute leaflets. She stated that she had not helped others in this way. She was asked about the various consultation proposals for the site, such as an Ambulance Station, or a Travellers Site.

3.26. Questioning was also directed to Map A, and the way in which the thick black line had been subsequently added in place of a thinner black line, which apparently had appeared on an earlier version of the Map as submitted to the Registration Authority.

3.27. Mrs Hobbs was also asked specific questions about her children - she has 2 daughters, one of whom (Isabel) has been at university since 2014. She was asked where blackberry picking had taken place – along the northern side of the Northern Field next to the railway line, together with the picking of elderberry flowers. She stated that mostly when she accessed Herston Fields this would be from the bottom stile at the southern end of the Southern Field, but sometimes she would access the

land from the top stile. She stated that she would not always take a circular walk in the Southern Field, and stated that she walked her Basset Hound on all three fields. The Eastern Field was not a field of choice. She would go “*off piste*” with the Basset. Mrs Hobbs stated that she started using Herston Fields from April 2005 on a daily basis until it “*got difficult*” when the fencing went up a couple of years ago. When the field was ploughed it was more difficult to use, and she recalled that this event occurred on 29th April 2011 as this was the date of William and Kate’s wedding. She often saw children in all three fields who would make camps. Her daughter, Phoebe, would play by the stream together with friends (two boys and a girl) and Mrs Hobbs occasionally saw people she did not recognise on Herston Fields. She stated that her elder daughter, Isobel, painted horses in the Eastern Field in about 2010/2011. She also noticed a local botanist who lived near the High Street in the fields.

- 3.28. In terms of activities, Mrs Hobbs stated that she went dog walking on average about four times a day, firstly with her Basset Hound and then subsequently with her Spaniel. She also saw cricket being played on Herston Fields, together with bird watching. She saw a buzzard and gold finches, and also people picnicking a few times in the Southern Field. Mrs Hobbs said she saw kite flying on the Northern and Southern Fields. Insofar as cattle were concerned, she said that cattle had existed but were short lived. She also noticed hay crops.

Summary

3.28.1. Mrs Hobbs provided evidence relating to Herston Fields encapsulating a relatively short period from 2005 (when she moved to High Street, Herston) to 2011. For the 6 years between 2005 and 2011 she states that she has used Herston Fields on a daily basis for the activities described, freely, without obstruction or challenge by the landowners or occupiers. When the field was ploughed it was more difficult to use, and she recalled that this event occurred on 29th April 2011 as this was the date of William and Kate’s wedding. She often saw children in all three fields who would make camps. Her daughter, Phoebe, would play by the stream together with friends, and occasionally Mrs Hobbs occasionally saw people she did not recognise on Herston Fields. She stated that her elder daughter, Isobel, painted horses in the Eastern Field

in about 2010/2011. She also noticed a local botanist who lived near the High Street in the fields.

Mr Barnaby Quaddy

- 3.29. Mr Quaddy made a written statement dated 10th February 2012. In this statement he stated that he had used Herston Fields freely without obstruction or challenge for 54 years between 1957 and 2011 for exercise, leisure and social activities, including studying the natural history and archaeology and gathering fruits and berries. This was not on a weekly basis. Mr Quaddy also stated that his immediate family had used the Fields for the same activities. Between those years he stated that he has seen Herston Fields used by children playing and people drawing and painting, dog walking, picking blackberries, bird watching, picnicking, kite flying, walking and bicycle riding. He stated that he has also seen people playing rounders, football and cricket on the fields. The general pattern of use of Herston Fields remained basically the same throughout. Mr Quaddy stated that he was never prevented from using Herston Fields, nor did anybody during this time discourage the use of Herston Fields being made by local inhabitants. Again, Mr Quaddy reiterates the point made in the final paragraph of all the witness statements filed by the Applicants in support of their case to the effect that Herston Fields has provided an important recreational amenity to the *locality*, and that no-one has sought to interfere with such use at any stage.
- 3.30. In his oral evidence Mr Quaddy stated that his family had a long connection with Herston Fields, and had used the Fields from 1957 for holiday periods up until 1987. It emerged that for a large part of this period of time he did not reside in the *locality* until 1991 when he moved to Jubilee Road. Mr Quaddy was subjected to detailed questioning in a similar vein as had occurred in relation to other witnesses as to the completion of the questionnaire. He said that he considered Herston Fields to be a local asset or local amenity. He said that he went to one meeting, but was not part of the organising group. His wife signed the form.
- 3.31. Mr Quaddy stated that when he went into Herston Fields to have a stroll he followed no fixed routine. He used both fields for a lot of walking. He would pick elderberries and flowers from the hedges. During the course of his evidence he produced two glass bottles and a Victorian clay pipe together with a badger's skull which he stated

he had found in the stream about 100 yards up at the crossover. Mr Quaddy stated that between 1991 and 2011 there was open access to Herston Fields, and the land had various uses, sometime pasture/grass, and ploughed on occasions. The Northern Field was always left to grass and unattended and contained ragwort. The farmer was not assiduously keeping people off the Fields, and he was never challenged. The hedges and fields were unattended. It has only been in the last couple of years or so that circumstances have changed. He recalled ploughing of the Southern Field in 2008 but could not recall any earlier ploughing.

- 3.32. In relation to activities conducted on Herston Fields, he saw drawing and painting, but he could not say whether the people engaged in such activities were visitors or locals. The Fields were used as a leisure resource. There were dog walkers, and lots of them, and dogs were left off their leads, and they would run off, and not follow the footpath. He stated that he did not recall an increase of use of the fields, and such use had been consistent over 20 years. He did not notice any difference in such use.

Summary

- 3.32.1. Mr Quaddy's knowledge of Herston Fields extended from 1957 to date, but until 1991, when he moved to Jubilee Road, his knowledge was gained as a holiday maker, rather than a resident. Between 1991 and 2011 there was open access to Herston Fields, and the land had various uses, sometime pasture/grass, and ploughed on occasions. He and others indulged in all the activities he described in his evidence. Herston Fields were used as a leisure resource, and such use had been consistent for 20 years. The Southern Field was ploughed in 2008, and he could not recall any earlier ploughing.

Mr Frank Roberts

- 3.33. Mr Roberts made his witness statement on 16th February 2016. He lives at Ancaster Road, Herston, and the rear of his house looks over the Eastern Field. His witness statement contains a number of paragraphs which are in very similar format to paragraphs included in other witness statements produced by the Applicants. Mr Roberts has known Herston Fields since 1983, and states that he has used the Fields without obstruction or challenge for 14 years between 1997 and 2011. His historic

access to Herston Fields and the public footpath was routinely made via an unlocked gate at the southern corner of the Eastern Field at 8 Ancaster Road situated near to the rear of his property. He has also accessed Herston Fields from the stile at Herston Halt Railway Station where he works as a manager for the Swanage to Corfe Castle railway line. In that capacity he states that he has used Herston Fields on a daily basis to walk to the station as well as for recreational use. He also states that his immediate family used Herston Fields during this time for walking and recreational use.

3.34. Insofar as use by others is concerned, in his witness statement Mr Roberts states that he has seen Herston Fields used by members of the local community for social events, such as barbeques and playing football. He has also seen children using the fields for playing, and people drawing and painting, dog walking, playing team games, picking blackberries, kite flying and walking. During the time that he has used Herston Fields the general pattern of use of the fields remains basically the same. No attempt has ever been made during this period of time to prevent him from using Herston Fields nor was any notice or fencing erected to prevent him from doing so or the local inhabitants. In essence Herston Fields has provided an important recreational amenity to the *locality* for many years, there being no alternative space available.

3.35. In his oral evidence Mr Roberts acknowledged that there had been changes made from about 2010 when barbed wire was erected, and gates installed and hedges trimmed. He could step onto the land where the stream is. This area of land immediately to the rear of his house does not form part of the Application Land and was referred to as the “*White Land*” during the Public Inquiry. The route of the stream has now moved as a result of the remedial works undertaken in a flood alleviation scheme. Access was maintained through the gate at the southern corner of the Eastern Field which used to have an agricultural latch fitted, but then it was nailed shut, and now it is kept locked. In his evidence Mr Roberts made reference to activities he saw take place on Herston Fields, and he recognised children from nearby at No 1 Ancaster Road (the Suttle boys) and No.6 Ancaster Road (the Savage girls) playing on the Fields. He saw drawing and painting, and dog walking. In 2001 he constructed a conservatory on the first floor level at the rear of his house. This allowed him to see a range of activities on the Eastern Field more easily, and sometimes on the White Land. He often sat there to read. Prior to that he could see though a gap in the hedge line. There was continuous use ever since he can remember. He saw dogs off their leads. On one occasion he saw a dog

chasing a cow. He saw cows in the two top fields, and then horses, but he could not remember the fields being ploughed, but the Southern Field was. He also saw people picking blackberries, although he did not know who they were and did not know where they had come from, but he strongly believed that they were residents. Mr Roberts stated that he also saw kite flying once or twice a month, and walkers. He also saw people walking dogs and engaging in dog training, and occasionally couples were to be seen.

- 3.36. Mr Roberts also stated in evidence that Herston Halt Railway Station was, in effect, open on 250 days per year, and he described how on gala days the northern field could be lined with train enthusiasts who would travel far and wide to obtain photographs of the historic trains. He also stated that he encountered tourists in the Eastern Field who had deviated from the public footpath crossing the northern field. Evidence was also adduced that Herston Fields had been used by volunteer members of the Armed Forces who worked on the railway at earlier stages.

Summary

3.36.1. Mr Roberts lives at Ancaster Road and has known Herston Fields since 1983. He states that he has used the Fields without obstruction or challenge for 14 years between 1997 and 2011. His access to Herston Fields and the public footpath via a gate at the southern corner of the Eastern Field situated near to the rear of his property. His principal reason for using Herston Fields was as a means of access along the public footpath to Herston Halt Railway Station where he works. However, he states that he and his immediate family have used Herston Fields for recreational activities. He confirmed that Herston Fields were used by others throughout for all the activities he described. There has been continuous use of Herston Fields ever since he can remember.

Mr Angell

- 3.37. Mr Angell made a witness statement dated 16th February 2016. He states that he lives at 11 Benlease Way, Herston, and has known Herston Fields since 1988. As with other witnesses he describes Herston Fields as lying in the heart of Herston which has its own schools, community centre, railway station, churches, pubs, local shops and post office. He states that he has used Herston Fields freely without obstruction or challenge for 23

years between 1988 and 2011 regularly for walking with his family and dog walking. He also states that he and his immediate family also used Herston Fields for playing cricket and kite flying. He has seen the fields being used by children playing, and other members of the community playing team games such as rounders, football or cricket. He also has seen people using the fields for dog walking, picking blackberries, picnicking, kite flying and walking. During the time that he has used Herston Fields the general pattern of use has remained basically the same, and he did not know who owned or occupied the land; nor was he ever prevented from using Herston Fields.

3.38. In his oral evidence Mr Angell stated that prior to 2010 the use he made of Herston Fields remained the same, but the pattern has now been altered as a result of more fencing and the hedgerows having been trimmed, and more activity having taken place on the land. He stated that you cannot now walk in the main part of the Southern Field, and this has been like this for the last couple of years.

3.39. Again, he was asked detailed questions on the Evidence Form, and he stated that he was given the form by a neighbour who had been to a meeting which he did not attend. He said he did not follow the campaign that closely. Mr Angell also stated that he did not fill in questions 1 to 6, the boxes in relation to which appeared to have been filled in later. He also stated that he did not see Map A until later. As to access to Herston Fields, Mr Angell stated that access was via the stile, and that he would generally do circuits of the fields. Otherwise if it was a longer walk then he would go straight across. Depending on the time of year he would access both the northern and southern fields but it depended upon the time of year. There were not a lot of animals on the field sometimes on the south field and if so, he kept out of their way.

3.40. As to agricultural activity, Mr Angell stated that the fields were generally rough pasture, although he had seen cattle. He had also seen crops in the Southern Field, it could have been 8 or 9 years ago or between 6 and 8 years ago. He said that he had not seen crops very much, and the fields were just rough pasture. On a couple of occasions, he saw the fields having been ploughed and he recalled rape oil seed growing. Crops were not that regularly planted. The footpath itself was not ploughed over at any time and one could still walk around the perimeter. When pressed he stated that he walked around the Northern Field about 2 or 3 times per week, and that the use made by him and his family (he has 3 boys) was consistent, and he would take the dog for a walk. He would

generally do circuits. If there was livestock the animals were generally not in both fields at the same time. It depended on the time of year. He did not see animals a lot, sometimes on the Southern Field, in which case he would keep out of their way. There was always one field to use for recreational purposes. On two occasions he recollected that the fields had been ploughed, and in which case he walked around the edge of the field. Mr Angell was also asked about an electric fence which he said he never saw.

- 3.41. Insofar as activities were concerned, they would take place in the Southern Field to the left of the footpath, and he saw kite-flying in the Northern Field on about half a dozen to a dozen occasions before the year 2000. Mr Angell also stated that he saw cricket and football being played on about a dozen occasions. He saw picnicking and blackberry picking on occasions, together with dog walking usually every day on all three fields. Now dogs tend to be on leads, although up to about two years ago it was possible to walk dogs off leads except when there were crops or haylage, or cattle present. However, he only saw the fields ploughed on two occasions. When crops were grown they did not appear to be particularly successful.

Summary

3.41.1. Mr Angell's evidence encompasses 23 years between 1988 and 2011, when and his family have regularly used Herston Fields for the various activities he has described. He has also seen others using the Fields for similar activities. Herston Fields were for the most part rough pasture with little agricultural activity. If cattle were present they were generally not in both fields at the same time, and he would avoid them by using the other field for recreational activities. No-one sought to prevent him and his family from using the Fields for these activities.

Ms Nichola Maycock

- 3.42. Ms Maycock lives at 1 Stafford Road, Swanage, and formerly lived at 54 Victoria Avenue. Her witness statement is dated 16th February 2016. In this she states (along with a number of other witnesses) that Herston Fields lies in the heart of Herston, and is in effect an entity itself. She states that she has known Herston Fields since 1974, and has used the Herston Fields freely without obstruction or challenge for three years between 1984 and 1987, and five years between 2006 and 2011. She used Herston

Fields at least twice a day to walk her dog, and also her children used to use Herston Fields for playing. During the time she used Herston Fields Ms Maycock stated that the general pattern of use of the fields remained basically the same, and she did not know who owned or occupied the land and was never prevented from using the Fields. There was no attempt to discourage such use by notice or fencing or any other means. Again, in common with other witnesses Ms Maycock states that she considers that Herston Fields has provided an important recreational amenity and used the area for recreation, there being no alternative available.

- 3.43. In her oral evidence, Ms Maycock stated that she only moved to 154 Victoria Avenue, near Emmanuel Church, in 2006. She left the area in 2013. she is unable to use the fields now in the same way because of fencing. There were therefore two periods of time when Ms Maycock used the fields with her children when she lived with her grandparents and then latterly near Emmanuel Church. She stated that she got involved with the campaign, and it was explained that a public stand should be made and “make voices heard”, and show support to save Herston Fields from development. Ms Maycock was asked a number of detailed questions on the Evidence Form (as with other witnesses). She obtained this form from Mrs Gallagher and went through it with her.

Summary

3.43.1. Mrs Maycock’s evidence as to activities on Herston Fields was over a relatively short periods of time i.e. three years between 1984 and 1987, and five years between 2006 and 2011. However, she confirmed that she had used the Fields during these periods for dog walking twice per day, and her children had also used the Fields for playing and dog-walking.

Ms Lynn Castle

- 3.44. Ms Castle made a witness statement dated 16th February 2016. In it she states that she lives at 11 Kingswood Close, Herston, and has known Herston Fields since 1977. Ms Castle uses the same formulation as other witnesses in relation to the description of Herston Fields as lying in the heart of Herston at paragraph 1. In paragraph 2 she referred to visiting her sister in Swanage and during that period of time she states in paragraph 2 that she used Herston Fields freely, without obstruction or challenge for 31

years between 1977 and 2008. In paragraph 3 of her witness statement Ms Castle states that during that period of time she used Herston Fields for walking, dog walking, recreational activities for their children and later grandchildren. This included picnics, blackberry picking and wild life sporting. She also states that her immediate family also used Herston Fields when they visited her for walking, playing with their children, going on adventure hikes to see the steam railway, for picnics, flying kites, visiting the horses, bird and butterfly spotting and general relaxation recreation. She states that it is an especially safe area for the children to play.

3.45. Ms Castle also states that between 1977 and 2011 she had seen Herston Fields being used by children playing, people drawing and painting, walking, picking blackberries, playing football and cricket, bird watching, picnicking, kite flying, walking and cycling. During the time she used Herston Fields the general pattern of use remained basically the same. Ms Castle also stated that she was never prevented from using Herston Fields by anybody by notice or fencing or otherwise.

3.46. In essence Ms Castle considers that Herston Fields is a *“tranquil, naturally unspoiled area of outstanding natural beauty, which has provided an easily accessible place to exercise, relax and enjoy the views and countryside in our locality for many years”*.

3.47. In examination-in-chief Ms Castle stated that the Southern Field has been sub-divided by a fence, thereby impeding access. This has meant that recreational activities can no longer take place on the Southern Field. She also stated that because of barbed wire fencing blackberry picking can no longer take place. However, she stated that she has never seen electric fencing erected.

3.48. However, as it transpired during cross-examination, she only moved to Kingswood Close in 2008, and prior to that when she came to the Swanage area she stayed with her sister at Bonfields Avenue on several occasions. Subsequently she *“moved to Swanage”*.

3.49. As to the question of circuses having occurred on a couple of occasions in the past, Ms Castle accepted (probably incorrectly) that when these happened they did not take place on Herston Fields, as such.

- 3.50. Insofar as the purpose of her giving evidence, Ms Castle stated that she wished to preserve the recreational purposes of Herston Fields, and to prevent development.
- 3.51. Ms Castle stated that since the erection of the fences, one could only stick to the footpath, and picking blackberries is also now inaccessible. She saw horses in the Southern Field. As to the old barn, this fell down as it became very derelict. Ms Castle stated that she only rarely saw cattle in the fields between 2008 and 2012, and she would keep out of their way if they were there. She also stated that she has also seen sheep in the fields.
- 3.52. Insofar as activities conducted by children on Herston Fields, she could see them from her house when they were on the land, but she could not name any children or identify them as they were too far away. Similarly, insofar as kite flying was concerned, she did not know the people who engaged in that activity. Ms Castle stated that she could not see drawing and painting from the house, although on one occasion she saw a woman painting horses near the footpath, but did not know her. As to picking blackberries, she saw other people doing it, with whom in a number of cases she had a nodding acquaintance, but others not. Ms Castle also stated that she has picnicked on the Southern Field in the past, and in 2008 she stated that she thought this occurred on about four occasions. Insofar as bicycle riding was concerned, she did see this from her house.
- 3.53. In re-examination Ms Castle stated that the word “*black*” on the questionnaire was not her handwriting, and did not know when this word was added. She said that it was Mr Jensen’s handwriting. Mr Jensen came to visit and to advise her about the hearing about 4 or 5 weeks before it commenced.

Summary

- 3.53.1. Ms Castle in her evidence provides a snapshot of the described activities in which she and her family engaged on Herston Fields between 1977 and 2008, but whilst on the occasions she was staying with her sister. It was only in 2008 that she and her husband moved to Swanage and became resident.

Mr Colin Baines

- 3.54. Mr Baines signed his witness statement on 15th February 2016. The witness statement is in the same style and format used in relation to other witnesses. His current address is 5 Avon Drive, Wareham to where he moved in 2013. Prior to that he lived between 2004 and 2008 in Chapel Lane, and then moved to 351 High Street, Herston. In his witness statement Mr Baines stated that between 2001 and 2011 he used Herston Fields to play football with his children whenever the weather was dry and the grass had been cut, such use being made freely, and without obstruction or challenge. His immediate family also used Herston Fields during this time for playing football, walking and blackberrying. In paragraph 5 he stated that he has seen Herston Fields used by children playing, people drawing and painting, walking their dogs, playing team games, picking blackberries, playing football, picnicking, kite flying and walking.
- 3.55. In his oral evidence Mr Baines accepted that between 2001 and 2008 he only used Herston Fields about half a dozen times. However, between 2008 and 2013 he used Herston Fields more frequently. His children had friends in Bell Street. In cross-examination he was asked a number detailed questions relating to the completion of the Evidence Form. He stated that he did not consider himself to be a resident of Herston after he moved in 2013. He has hardly been back since. He accepted that in relation to question 9 that the answer made should have been in the past tense, and not the present tense, and stated that it was not explained to him about being a local inhabitant or its significance at the time of the completion of the Form. He thought that the Evidence Form had been e-mailed to him. Mr Baines stated that he had no recollection of hay or hay cutting or hay bales on the fields. When they went over to play football there did not seem to be anything like a crop at all on the land. He did see other people on Herston Fields, and recognised one or two by sight as living locally, but could not put names to them.

Summary

- 3.55.1. The knowledge that Mr Baines has of Herston Fields is relatively recent i.e. between 2001 and 2011. He engaged in the activities described during that period, but during the earlier period between 2001 and 2008 he only used Herston Fields on about half a dozen occasions. Following this between 2008 and 2013 his use was more frequent.

Mr Dale Crisp

- 3.56. Mr Crisp's witness statement is dated 6th January 2016, and gives his address as being 5 Anvil Close, Herston. He states that he has known Herston Fields since 1982. His wife, Brenda Crisp put her signature to Map A. He states that since his return he and his family have used Herston Fields during 24 years between 1987 and 2011. In paragraph 3 of his witness statement Mr Crisp says that his wife and he have used Herston Fields to go kite flying with their children, playing games, picnicking, blackberry picking and watching the local livestock, and seeing the steam trains. He also stated that between 1987 and 2011 he also saw Herston Fields used by many children and local people dog walking, including holiday makers, playing, picking blackberries, flying kites and walking. He has never been prevented from using Herston Fields, and no attempt was made to discourage local inhabitants from using the Fields.
- 3.57. As with other witnesses, Mr Crisp also stated that Herston Fields has provided an important recreational amenity to the *locality* for many years with (in his words) "... *its simplistic rural beauty*". He continues to use Herston Fields in the manner described together with his extended family and their children, and no-one has interfered with such use.
- 3.58. In his oral evidence he stated in examination-in-chief that his wife completed the Evidence Form, although the contents were discussed with her beforehand. The witness statement was originally drafted for her, although she was not happy to give evidence. He stated that he had a good view from his kitchen window over Herston Fields.
- 3.59. In cross-examination Mr Crisp was asked questions with regard to the witness statement signed by him. He stated that it was originally drafted for his wife, and he re-jigged it and he confirmed the words contained in paragraph 6, and that he signed the witness statement as a "*true fact*". It was his handwriting in the answer to question 3(b). On being questioned as to the contents of the Evidence Form he stated that the Southern Field was used mainly for grazing, and there were cows in the top and bottom fields since 1987. However, he had not noticed cattle in the fields over the last year or so. He had not seen grass cutting, but he had spent his working life outside. Mr Crisp explained that as he was an aircraft engineer he stayed away from home for periods over the last few years, and prior to 2014 on average he spent 3 months away

in each year. He was all over the country between 1989 and 1992. His wife and son ran the Globe Inn in Bell Street, Herston between 2007 and 2012. He emphasised the point that he flew kites with the children and also picked blackberries on Herston Fields. He considered that Herston Fields was important for the future, and that he had a lot of contact with dog walkers and other people who use Herston Fields as they would come into the Globe Inn to or from Herston Fields when walking their dogs.

Summary

3.59.1. Mr Crisp has known Herston Fields since 1982, and he and his family, and visiting family residents have used the Fields between 1987 and 2011 for the activities described. Herston Fields has provided an important recreational amenity to the *locality* for many years with (in his words) “... *its simplistic rural beauty*”. He is an aircraft engineer he stayed away from home over the last few years, and prior to 2014 on average he spent 3 months away in each year. His wife and son ran the Globe Inn in Bell Street, Herston between 2007 and 2012.

Ms Ann Fellows

3.60. Miss Fellows signed her witness statement on 10th February 2016. She lives at 24 Holmes Road, Swanage. In paragraph 3 Miss Fellows stated that between 1998 and 2011 she used Herston Fields every day for dog walking and bird watching, as well as socialising with friends, and admiring the local wildlife. When her family visited Swanage they have also used Herston Fields for picnicking and kite flying. In paragraph 5 Miss Fellows stated that between 1998 and 2011 she has seen Herston Fields used by children playing, people walking dogs, picking blackberries, taking photographs, birdwatching, picnicking, kite flying and walking. This has been the general pattern of use throughout. Again, as with other witnesses, she states that Herston Fields has provided an important recreational amenity to the *locality* for many years. This use has apparently not interfered or conflicted with the use by the owners or occupiers of the land.

3.61. In her oral evidence Ms Fellows stated that the farmer has come into haymaking during the course of the last 3 years, and in her time she has never seen the fields ploughed. Crops have been grown more recently during the course of the last two years, together

with the spraying of the Fields. More recently the Fields have been fenced off and the gate chained, and a new fence around the perimeter of the field has been erected, together with a new stile. Ms Fellows stated that the fields “*stayed like a wild pasture*”.

- 3.62. Ms Fellows was asked a number of questions in cross-examination but she was unable to provide answers, other than in very general terms for the reason, as she stated, that she has short term memory loss.

Summary

3.62.1. Ms Fellows has used Herston Fields for the activities she has described between 1998 and 2011, and has seen others do the same. The Fields have provided an important recreational amenity, and she and her family have never been prevented from using Herston Fields. She has never seen the Fields ploughed, but crops have been grown more recently, and the Fields sprayed.

Ms Jane Richards

- 3.63. Ms Richards signed her witness statement on the 12th February 2016. She lives at 1 Leeson Close, Herston. In her statement Ms Richards states that she has used Herston Fields freely, without obstruction or challenge, for the last 24 years between 1987 and 2011, such use being for walking, blackberry picking, and wildlife watching. She also stated that her immediate family used Herston Fields during this period for walking, blackberry picking and running. Ms Richards also stated that she had seen the fields used by children playing, people drawing and painting, dog walking, playing team games, football and cricket, picking blackberries, bird watching, picnicking, flying kites, walking and cycling. Also the local Middle School has used Herston Fields for cross-country running. During the time she has used Herston Fields the general pattern of use of the fields has remained basically the same, although she states that the recreational use had increased. Ms Richards considers that Herston Fields provides an important recreational amenity to the *locality* for many years, there being no alternative space available.
- 3.64. Ms Richards produced a video of her daughter engaged in a school cross-country running when she was 9 years old, and probably recorded in about 1989. Her daughter

attended the Middle School, Herston, which lies in the background of the video film. During the course of her evidence this video tape was shown, and forms part of the evidence adduced at the Public Inquiry.

- 3.65. Ms Richards was asked detailed questions on the Evidence Form with regard to the way in which the answers were completed. Mr Gallagher came to her house and went through the Form together and signed it. This questioning was in a similar manner to the questioning of other witnesses. She said that the word “*black*” in the answer to question 3(b) was not in her handwriting. Ms Richards recalled that there were two meetings at the Royal Oak Public House after she had signed the Evidence Form during which there were conversations with regard to the future Public Inquiry, and the test under Section 15 of the 2006 Act. There were posters put up on lamp posts and telegraph posts. Ms Richards stated that all the handwriting on the Evidence Form was her own (apart from the one word in question 3(b)), and there had been no additions by anybody else. Mr Jensen came around in February and probably brought round her statement. Ms Richards also went into some detail of the cross-country runs, which were apparently weekly summer events at that time *circa* 1989, and the course that those runs took.
- 3.66. Insofar as the answers to question 16 in the Evidence Form relating to activities on Herston Fields, she gave evidence as to where the blackberries were picked, namely along the bottom hedgerow and in the upper field. She had no recollection of bulls, although she did recall that every day there were cattle present, together with horses, although she has not seen horses for a few years. Ms Richards also recalls that the fields were ploughed on 3 or 4 occasions, and sprayed on a couple of occasions with a sign “*Do not cross*” erected, approximately 3 years ago. Ms Richards also stated that more use has been made of the Fields since 2010, and there are now more people walking dogs crossing the road to do so, than in the year 2000.
- 3.67. Ms Richards also stated that she saw a woman drawing by the stile, sitting on a fishing stool, but she does not know where that woman lives. She has also seen children playing, and playing cricket, with a bat and ball, together with team games. Ms Richards also stated that she has seen bike-riding on the left by the stile, and bird

watching, and picnicking, and kite flying on a few occasions in the middles of the field on the ridge.

Summary

3.67.1. Ms Richards describes how over the 24 years between 1987 and 2011, she used Herston Fields for walking, blackberry picking, and wildlife watching. She stated that her immediate family used Herston Fields during this period for walking, blackberry picking and running. She also described the activities of others during the same period of time.

Miss Elaine Mutter

3.68. Miss Mutter lives at 7 Leeson Close, Herston, and made her witness statement on 17th February 2016. The initial paragraphs of her witness statement are in common form with other witnesses. She states that she has known Herston Fields since 1977. In paragraph 3 she states that between 1982 and 2011 she used Herston Fields at least once a month for walking, dog walking, picking blackberries and to gain access to Herston Halt Railway Station. She also states that her immediate family also used Herston Fields during this time. In paragraph 4 of her witness statement she states that between 1977 and 2011 she has seen Herston Fields used by children playing, people walking their dogs, picking blackberries, playing football and cricket, picnicking, kite flying and walking. In paragraph 5 Miss Mutter states that during the time she used Herston Fields the general pattern of use of the fields remained basically the same. She was never prevented from using Herston Fields, nor was any attempt made by notice or fencing or by other means to prevent or discourage such use. As with other witnesses in the final paragraph of her witness statement Miss Mutter states that Herston Fields has provided an important recreational amenity to the *locality* for many years, there being no alternative space available.

3.69. Miss Mutter's evidence was clear in her answer to question 3(b) of the Evidence Form in that she stated that the word "*black*" was not in her handwriting, but the word "*yes*" was. She remembers picking blackberries along the hedgerow in the southern field during the season, and also dog sitting. Dogs were not kept on the lead when being exercised in Herston Fields. She did agree that there had been greater activity on the

Fields in recent years, and that a lot of people use the Fields, which looked busier than they used to.

Summary

3.69.1. Miss Mutter's evidence had limited effect. However, she states that between 1982 and 2011 she used Herston Fields at least once a month for walking, dog walking, picking blackberries, and to gain access to Herston Halt Railway Station, and that her immediate family also used Herston Fields during this time. She has seen Herston Fields used by others for the activities described.

Mrs Roberta Holland

3.70. Mrs Roberta Holland lives at 83 Steer Road, Herston, and she made her witness statement on 5th February 2016. Mrs Holland stated that she had used Herston Fields between 1979 and 2011 approximately twice a week, and she has noted the pleasure she derives from the prospect of this land when she passes it every day. She uses Herston Fields for walking her dog, picking blackberries, observing wildlife, and having picnics with her grandchildren. Mrs Holland also states that her youngest son used Herston Fields regularly to take his children there to play games, fly kites and the like. She states that between 1979 and 2011 she has seen Herston Fields used by children playing, and people drawing and painting, dog walking, picking blackberries, playing football and cricket, bird watching, picnicking, kite flying, flying model aircraft and walking. Throughout the time she used Herston Fields the general pattern of use of the fields has remained basically the same. She was never prevented from using Herston Fields, and no attempt was ever made during this time by notice or fencing or by any other means to prevent or discourage such use by local inhabitants. As with other witnesses, in the final paragraph Mrs Holland states that Herston Fields has provided an important recreational amenity to the *locality* for many years, there being no alternative space available.

3.71. In her oral evidence Mrs Holland emphasised the fact that from the very beginning, i.e. from 1979, she had used Herston Fields as it is the only recreational area for her to use. In cross-examination she was asked a number of detailed questions as to the Evidence Form completed by her, and she agreed that in paragraph 3(b) the word "*black*" and "*yes*" were not in her handwriting, but there was no way that she could account for

this. Mrs Holland stated that she never noticed any electric fencing, although new fencing was erected about one year ago. She was very much involved with St Marks's Church in Bell Street. Mrs Holland was also asked a number of questions about her family and her six grandchildren. Her husband died shortly after they moved to Herston.

- 3.72. Insofar as her Herston Fields are concerned, Mrs Holland stated that she never thought that she was prohibited from using the area away from the public footpath, and she stated that the use of the path was not "*that emphatic*" by people. She stated that she had 6 grandchildren who engaged in a number of activities on Herston Fields, such as picnics, flying model aircraft, blackberry picking, bird watching and kite flying. She stated that her memory has been affected by a series of small strokes which has rendered her memory poor. However, she was clear insofar as her children and grandchildren's use of Herston Fields was concerned in that they used to "*hop over the stile*" into the Fields, and look at birds. Mrs Holland stated that she did not often see crops on the land, nor could she remember hay crops, nor was she aware of electric fencing, just hedges. Insofar as her access to Herston Fields was concerned she stated that she would leave the footpath and mostly walk into the Southern Field with her two children, and grandchildren, and if there were fences which got in the way, she would have known about it.

Summary

- 3.72.1. Mrs Holland stated that she had used Herston Fields between 1979 and 2011 approximately twice a week for the activities described, and she has noted the pleasure she derives from the prospect of this land when she passes it every day. It is the only recreational area for her to use. She states that her youngest son used Herston Fields regularly to take his children there to play games, fly kites and the like. Between 1979 and 2011 she has seen Herston Fields used by children playing, and people drawing and painting, dog walking, picking blackberries, playing football and cricket, bird watching, picnicking, kite flying, flying model aircraft and walking. She never thought that she was prohibited from using the area away from the public footpath. She was not aware of any electric fencing, and could not remember any crops. Mrs Holland's memory has been affected by a series of small strokes.

Mrs Joanna Baird

- 3.73. Mrs Baird was born in 1944 she has resided as 222 High Street, Herston, and has known Herston Fields since that date. She made her witness statement on 17th March 2016. In it she states that she has used Herston Fields freely, without obstruction or challenge by landowners or occupiers for the 67 years between 1944 and 2011. She accessed the fields and public footpath by climbing the stile into the fields. Mrs Baird states that as a child she used Herston Fields regularly in the spring, summer and autumn, but less so between the 1960s and early 1970s. However, during the holiday periods from the mid-1970s onwards she again started to use Herston Fields regularly with her children and grandchildren. Her children and grandchildren also participate in activities and recreation on Herston Fields. The use she has made of Herston Fields has been for walking, playing and formal games with friends, exercising dogs, flower identification and blackberrying. Mrs Baird states in her witness statement that her husband has some mobility problems and Herston Fields is the only easily accessible natural space that allows him to exercise without strain.
- 3.74. In her witness statement Mrs Baird states that she remembered going to the circus that used the first part of the Southern Field annually until the mid-1950s. At that stage the Southern Field was divided by a hedge, but that division was removed in the 1960s. She states that over the period of 67 years she has seen Herston Fields being used by children playing, and members of the local community playing informal games of rounders, football, cricket and other team games. She has also seen people using Herston Fields for walking dogs, picking blackberries, trainspotting, birdwatching, picnicking, kite flying and walking. During the time she made use of Herston Fields, the general pattern of use of the fields remained basically the same. Mrs Baird also stated in her witness statement that traditionally Herston Fields, and the Southern Field in particular, has been treated as a public space, always respecting grazing cattle when present.
- 3.75. In essence, as with other witnesses, Mrs Baird states that Herston Fields have provided an important recreational amenity to the locality for many years which she, her family and others have frequently used for recreation, there being no alternative space. No-one has ever attempted during this period of time by notice or fencing, or by other means to prevent or discourage such use.

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- 3.76. In her oral evidence Mrs Baird stated that she has two children now aged 36 and 39, and she has two grandchildren aged 6 and 8. She said that alarm was raised when Herston Fields were taken out of the Conservation Area. She was asked (as with other witnesses) a number of questions on the way in which the Evidence Form had been completed by her. It had been filled in at home and a neighbour had collected it. Mrs Baird stated that she felt upset when fences were erected and the footpath is now defined. She considers Herston Fields to be "*our fields*", and now feels claustrophobic as a result of the new fencing.
- 3.77. In cross-examination in answer to the question as to whose signature appeared on question 3(b) of the Evidence Form, Mrs Baird stated that it looked very similar to her writing, and that she was sure that it was her signature. She could not remember how she received it. It might have been given to her by her neighbour, Mrs Gallagher. She said that she had written to the Council to ask them why Herston Fields had been taken out of the Conservation Area. Mrs Baird was also asked about the road widening of the High Street and she stated that she thought it was in the early 1960s not the 1950s. She said that the public footpath is now more defined than it was before, and there is also an another line crossing it. She stated that she thought that the road widening of the High Street, Herston, took place in the early 1960s, not the 1950s. She has seen cattle in the Northern Field and also in the western part of the Southern Field. Mrs Baird also stated that she was never challenged when using Herston Fields when it was suggested that Mr Tatchell and the Farm Manager were strict in preventing people from using the fields. Mrs Baird also stated that she remembers grazing by animals taking place when she was a child, and again in the last 4 or 5 years in the Southern Field. The first time that she recalled the fields being ploughed was in 2011, and could not recall any ploughing in 2001.
- 3.78. Insofar as activities are concerned, Mrs Baird stated that children kicked balls and played balls and played, but not in the Northern Field when there were cattle there. Such activities were moderated when animals were present. Blackberries were to be found around the perimeter of the Southern and Eastern fields, and mostly to the south and west side of the Southern Field. Mrs Baird stated the whole area was very safe.

- 3.79. In cross-examination Mrs Baird was also asked a series of detailed questions as to her connections with Herston. She stated that she lived at 222 High Street, Herston, between 1944 and 1963. She was married in 1974, and her husband subsequently trained to be a vicar. Between 1974 and 1988 she did not live locally, but she visited the area regularly. Her mother remained there at No 222. Her husband would come to stay on his days off. In 1988 she and her husband purchased No. 220 High Street which was the Vicarage, but between 1990 and 1993 they lived in Chandlers Ford, Hampshire where she was a teacher. She would return with the children regularly during school holidays and half the summer school holidays were spent in Herston. She would “come home” to Herston. Her husband died in 1988. Between 1993 and 2003 Mrs Baird lived away from the area. In 2013 she came back to Herston to live in 222 High Street as her permanent residence. When they lived away when her husband was a vicar elsewhere they came back mostly during the family school holidays. If her husband could not leave, she would then come back with the children without him for periods of 2 weeks at a time. Herston was very much her children’s home.
- 3.80. Mrs Baird also stated in cross-examination that she could not recall electric fencing, and she remembers kite flying took place in the Northern Field because it was higher. When her husband was at Theological College for 2 years in 1988 to 1990 Mrs Baird and her children would go over and play in Herston Fields and pick up other children as well. Herston Fields were very important for her children, and very safe. Mrs Baird also stated that she has seen horses in the Northern Field over the last 10 years or so.
- 3.81. Her description of the state of the land was that from about 1991 the land had been left wild, with weeds and dangerous ragwort. She stated that the land was used regularly by local residents. She also said that her sons have always lived away from Swanage with their children, but when they visit they exercise their dogs on the Fields. Lots of dogs were exercised on Herston Fields without leashes.

Summary

3.81.1. In her witness statement Mrs Baird used Herston Fields freely, without obstruction or challenge by landowners or occupiers for the 67 years between 1944 (the year of her birth) and 2011. However, for long periods of time she was not a resident of Herston. She lived away from Herston as her husband was a vicar living in different parishes, and for 14 years she was a school teacher in

Chandlers Ford. However, she visited Herston frequently particularly during the holidays which she would spend with her two children. When she was in Herston she would engage, with her children, in the various activities on Herston Fields that she has described. Herston Fields were very important to her and her children, and were very safe. She says that she was never challenged by anyone. The land had been left wild. Mrs Baird considers Herston Fields to be “*our fields*”, and now feels claustrophobic as a result of the new fencing.

Mrs Sylvia Dobson

- 3.82. Mrs Sylvia Dobson made her witness statement on 3rd February 2016, and gives her current address as being 3 Selby House, 10A Gilbert Road, Swanage. However, formerly she lived at 367B High Street, Herston. She originally came to Herston in 1940. Her parents lived in Swanage. She has also described Herston Fields as being known as Genis 1, and Genis 2. She states that she used Herston Fields freely without obstruction from 1945 to 1957, and then again for 48 years between 1973 and 2011. She explained in her oral evidence that between 1957 and 1973 she was in Germany as her husband was in the Forces and that she was a Forces’ wife. She stated that she accessed the fields and public footpath by climbing the stile into the fields, and used the fields regularly to walk to the railway station at Herston Halt. She also used Herston Fields for dog walking, kite flying and ball games. Her immediate family used Herston Fields for dog walking.
- 3.83. Mrs Dobson stated that years ago community activities took place on Herston Fields including a circus and a fair, which she attended. She said that she has seen children playing in the fields between 1945 and 2011, and has also seen people using the fields for dog walking, picking blackberries, mushroom picking, birdwatching, picnicking, kite flying and walking. She has also seen, as she describes, “*the local community*” using Herston Fields for playing football and cricket. No attempt was ever made by notice or fencing or by any other means to prevent or discourage the use being made of Herston Fields by the local inhabitants.

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- 3.84. In essence, she has stated, along with other witnesses, that Herston Fields has provided an important recreational amenity to the locality for many years, for her, her family and others, there being no alternative space available. Such use has not apparently interfered or conflicted with the use made by the owners or occupiers of the land in question.
- 3.85. Mrs Dobson said in examination-in-chief that in the Evidence Form the word “*black*” was her handwriting, although she questioned the word “*yes*”. She also stated that she could have put a lot more in her statement. Mrs Dobson said that she filled in the Evidence Form, and the fact that there may have been different ink was beyond her.
- 3.86. In her oral evidence Mrs Dobson stated that she played in all the fields and engaged in what she called “*childhood play*” in the 1940s. Between 1980 and 2012 she lived at 367B High Street, and that her husband went to Germany in the late 1950s. Her three sons (born in 1957, 1958, and 1961) were at boarding school. Her parents lived in Swanage.
- 3.87. Nobody ever raised any objection to her using Herston Fields, and there was no notice or fencing. She stated that she saw Mr Tatchell in the fields almost every day, but he never interfered or spoke to her. He was a solitary figure. She took books into the fields and spent time reading there and she would go about half way along the hedgerow to the west to sit in order to do this. No-one ever told her, she said, not to go off the public footpath. Whilst she was in the Southern Field, or indeed any of the fields, Mrs Dobson said that no-one ever spoke or did anything to prevent her from walking in the fields.
- 3.88. Mrs Dobson stated that she only recalled on one occasion seeing the headlights of a tractor in the Southern Field before 2009. She could not remember Southern Field being ploughed afterwards, and she had a clear view from her house, and could see everybody going over the Field. She could not recall the Southern Field being re-seeded, and only remembered the one occasion when she saw the tractor there.
- 3.89. Mrs Dobson also stated that she used the Fields daily for dog walking, sitting on the grass and talking. She thought that her dog had died in 1985 or perhaps it was a bit later in 1990, but when her sons used to come back they brought their dogs. Mrs Dobson also stated that she would often use the Fields to go to Herston Halt. When asked about straying from the footpath, she said that obviously she did not stay on the

footpath on her dog walks, which she did daily, and sometimes twice a day. The dog died in 1985, or perhaps 1990, and has had no other dog since, but her sons brought their dogs. She would also sit on the grass and talk. She is still going for walks. She would, in particular, sit in the Southern Field, on the south side, once a week, or perhaps once per fortnight, with a book. In winter months she would walk on the fields.

- 3.90. Mrs Dobson also recalled a circus during her growing-up years, which now takes place on the other side of the School. Mrs Dobson also recalled before 2009 people engaging in rough golfing practice. From 1991 onwards she saw children, and dog walkers, blackberry picking, people playing football, and people flying kites. Her grandchildren went over there from 1986 onwards. She stated that she saw people take fish and chips over to the Fields, but she could not put names to people there. Mrs Dobson stated that she saw lots of local people but would not necessarily recognise them. Mrs Dobson also stated that she never saw any electric fence on the fields.

Summary

- 3.90.1. Mrs Dobson has had a long standing connection with Herston, and has used Herston Fields freely and without obstruction for 48 years between 1973 and 2011 for the various activities she has described in her evidence. As a child in the 1940s she played in all the fields and engaged in what she called “*childhood play*”. She has also seen children playing in the fields between 1945 and 2011, and people using the fields for all the for dog walking, picking blackberries, mushroom picking, birdwatching, picnicking, kite flying and walking, and “*the local community*” using Herston Fields for playing football and cricket. Mrs Dobson had a clear view from her house, and she saw lots of local people using Herston Fields but would not necessarily recognise them, or put names to them. Nobody ever raised any objection to her using Herston Fields, and there was no notice or fencing. She stated that she saw Mr Tatchell in the fields almost every day, but he never interfered or spoke to her.

Mrs Gloria Warrington

- 3.91. Mrs Gloria Warrington provided a witness statement dated 17th February 2016. She lives at 16 Kingswood Close, Herston and has known Herston Fields since 1957. She states that she has used Herston Fields freely, without obstruction or challenge for 54 years between 1957 and 2011. In paragraph 3 of her witness statement she states that. She has used Herston Fields for walking, dog walking, recreational activities with her children and grandchildren, and visitors to Swanage, picnicking, blackberry picking and wildlife spotting. Mrs Warrington also stated that her immediate family used the “*safe environment*” of Herston Fields during this time for walking, playing with her children, visiting the horses, looking for birds and butterflies, having picnics and general relaxation and recreation. Mrs Warrington also stated that between 1957 and 2011 she has seen the fields used by children playing, people fishing, drawing and painting, dog walking, picking blackberries, playing football and cricket, birdwatching, picnicking, kite flying, walking and cycling. During the time that she used Herston Fields the general pattern of use of the fields has remained basically the same. Mrs Warrington said that no attempt was ever made by notice or fencing to prevent or discourage the use being made of Herston Fields by the local inhabitants.
- 3.92. In summary, Herston Fields has provided an important recreational amenity to the locality for many years, for her, her family and others who have frequently used the area for recreation, there being no alternative space available. Such use does not appear to have interfered or conflicted with use by the owners or occupiers of Herston Fields.
- 3.93. In her oral evidence Mrs Warrington stated that has 2 children now aged 49 and 50, and 5 grandchildren between the ages of 18 and 25. She said that she did see ploughing from time to time, and animals grazing, but has not seen crops growing.
- 3.94. In cross-examination Mrs Warrington was asked detailed questions by Mr Greaves as to the completion of the Evidence Form. In answer to whether or not the handwriting appeared to be hers in relation to the answer to question 3(b), and questions 9 and 10, she did not agree that a different pen had been used, or that the handwriting was different. She was adamant that it was her handwriting, and she was shocked by her own handwriting. She also said that so many people used Herston Fields.

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- 3.95. Insofar as Herston itself is concerned, Mrs Warrington stated that in effect, Herston was a distinct entity and it was not part of Swanage. She stated that there were fights between Herston men and Swanage men on occasions.
- 3.96. Insofar as question 23 on the Evidence Form, Mrs Warrington was asked questions about children fishing in the stream. It was clear that children tried to fish in the stream. Her grandchildren used to take buckets over there.
- 3.97. Between 1957 and 2005 Mrs Warrington lived in London, and visited Swanage during holiday periods. Between 1996 and 2005 they lived in a flat at 60A High Street. It was a holiday flat near to the Town Hall in the centre of Swanage which they had for 10 years from 1996 to 2005, and then she moved to Kingswood Close. They used Herston Fields a lot.
- 3.98. Mrs Warrington has no dog now, the last time she had a dog was in 2008, but her daughter's dog comes over to Herston Fields. The route used was that they entered Herston Fields at the stile, stayed in the Southern Field where it was most convenient, and if animals were in the north field they would not go there. Cow pats were messy. Cattle have only appeared in the southern field during the course of the last 4 years, and Mrs Warrington stated that she would call the dogs to heel if animals in the north field when walking on the footpath. Mrs Warrington stated that she saw horses a couple of times, possibly for a couple of months, and they would have to adjust their behaviour if animals were present, and steer well clear. Mrs Warrington stated that she also saw sheep a few times in the northern field. She would have visitors from outside Swanage being family and friends.
- 3.99. Mrs Warrington stated that it is now difficult to access the fields to pick blackberries and other purposes because of the barbed wire fence. It is now not possible to go the whole length of the field because of the barbed wire. Mrs Warrington did not think that there was an electric fence in the field. Insofar as fishing was concerned, Mrs Warrington stated that she would sit down with little chairs and children would fish with bits of wood made up into rods from Woolworths.

3.100. Insofar as question 23 of the Evidence Form is concerned, Mrs Warrington stated that she saw football and cricket, and bat and ball being played in the southern field between the two stiles, and she met local children who lived nearby on Herston Fields. She stated that she often saw them down there over all the years from 1996. On one occasion she saw an organised group of Russian students going to school and use the fields for games. This was in 1997. Mrs Warrington could not recall any crops on the fields.

Summary

3.100.1. Between 1957 and 2011 Mrs Warrington has had a long standing knowledge of Herston Fields in two capacities. First as a non-resident when she used Herston Fields whilst staying in Swanage on holiday between 1957 and 2005, and secondly, from 2005 since moving to Kingswood Close. She referred to the “*safe environment*” of Herston Fields when referring to the various activities she described in her evidence, which included general relaxation and recreation. She stated Herston was a distinct entity and it was not part of Swanage. She stated that there were fights between Herston men and Swanage men on occasions.

Miss Linda McMorrow

3.101. Miss McMorrow lives at 16 Benlease Way, Herston, and made her witness statement on 17th February 2016. She states that she has known Herston Fields since 2003, and has used the same freely, without obstruction or challenge for 8 years between 2003 and 2011 for the purposes of walking and exercising her dog. She also states that members of her immediate family used Herston Fields during this time for jogging. Between 2003 and 2011 she saw Herston Fields being used by children playing, people walking their dogs, picking blackberries, jogging, playing football and walking. During this time that she has used Herston Fields the general pattern of use of the Fields has remained basically the same. Miss McMorrow also stated that she was never prevented from using Herston Fields; nor was any attempt ever made during this time by notice or fencing or by other means to prevent or discourage such use being made. In the final paragraph of her witness statement Miss McMorrow makes the same closing summary as other witnesses which is that she considers that Herston Fields has

provided an important recreational amenity to the locality for many years, there being no alternative space available.

- 3.102. In her evidence-in-chief Miss McMorrow stated that she has a good view from her garden of Herston Fields, and she marked her house on the plan when asked to do so. Her house is about one-third along Benlease Way up a steep hill, and she can see Herston Fields, and even the smoke from the train when it journeys along the railway line. She had no knowledge of any electric fencing.
- 3.103. In answer to a number of detailed questions made by junior Counsel, Miss McMorrow stated that she considered that she knew what the *locality* of Herston was as she could see it on the map, which included the whole of the Conservation Area and the Council Estate. Miss McMorrow stated that Herston was very distinctive in character and was a hotchpotch of architecture. It was a very distinct area. Miss McMorrow stated that she had connection with Herston before she moved there.
- 3.104. Miss McMorrow stated that she would gain access by going over the stile into Herston Fields and there was a half open farm gate, and she would get in that way. There was a very neglected barn and gate there. She would go over the stile and then follow the footpath, and then around the perimeter of the Southern Field into Washpond Lane. It was a well-worn path. If there were horses on the northern field, she would then keep her dog on the lead. Miss McMorrow stated that there were two routes she took. If it was dark she would do the perimeter walk several times and it was a well-worn path along the same route. She would take her dog and a ball. A longer walk would take her over the stile to Herston Halt. Miss McMorrow stated that there was a tendency for horses to be put out in the Spring on the Fields, but not all the year round. She did not think this occurred in the Southern Field. She stated that she saw cattle very rarely. The introduction of crops was fairly recent, about the time of the consultation, and in her belief Miss McMorrow stated that she thought that it was an attempt to make the fields look as though they were being used because of the objections. Miss McMorrow stated that there were lots of dog walkers and no hay crop in the field. She had a big Spaniel which used to run for the ball in the Southern Field. Dog walking took place from March 2005 until November 2010 when her dog died. Miss McMorrow about the time of the consultation when the fields were cut for hay and baled. This was

towards the end of the period on one or two occasions. In general, the fields were very neglected and not farmed between 2003 to 2010 at the time of consultation.

- 3.105. Miss McMorrow stated that she saw blackberry picking on the north and south sides of the hedgerow between the northern and southern fields. She saw the same people exercising their dogs, and she assumed they lived locally, the dog walkers doing the same thing when exercising their dogs. Miss McMorrow considered Herston Fields to be open green space.
- 3.106. When asked further questions on the Evidence Form, Miss McMorrow stated that she saw others using the fields, the majority of them being dog walkers. Her son aged 18 used to play on the fields and build dens there.
- 3.107. In Miss McMorrow's view, the fields were neglected and latterly started to be cultivated. She could not believe it as she thought Herston Fields were open space and thought it as being common land because of usage. At the time of the consultation period in 2010/11 there started to be changes and crops grown. Miss McMorrow stated that she saw football being played on the land occasionally and people walking there without dogs. The footpath was not a direct route to the Purbeck Hills

Summary

- 3.107.1. Miss McMorrow has known Herston Fields since 2003, and has used the same freely, without obstruction or challenge for 8 years between 2003 and 2011 for the purposes of walking and exercising her dog. She has also seen others engaged in the various activities described in her evidence, and saw lots of dog walkers. She has a good view from her garden of Herston Fields. Miss McMorrow thought Herston Fields were open space and thought it as being common land because of usage. At the time of the consultation period in 2010/11 there started to be changes and crops grown.

Ms Lars Smits

- 3.108. Ms Smits lives at 375 High Street, Herston opposite Herston Fields. She made her witness statement on 16th February 2016. She states that she has known Herston Fields since October 1989 and she has also known Herston Fields as "*Gennis*". Ms Smits stated that she has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers for the 22-year period between 1989 and 2011. She accessed Herston Fields and public footpath by climbing over the stile into the Fields.

- 3.109. Ms Smits states that between October 1989 and 2011 she used the Herston Fields most days to walk her dogs, collect blackberries, sloes, hops and wildflowers, watch birds, feed the foxes and enjoy sketching. During that period, she has seen Herston Fields used by children playing, people drawing and painting, walking their dogs, picking blackberries, playing football, birdwatching, picnicking, kite flying and walking. During the time she has used Herston Fields she states that the general patterns of use of the fields remained basically the same. No attempt was ever made by anybody during this period of time by notice or fencing or by any other means to prevent or discourage such use being made by the local inhabitants.
- 3.110. Along with other witnesses, Ms Smits states that Herston Fields has provided an important recreational amenity to the locality for many years, there being no alternative space available. She also states that this use does not appear to have interfered or conflicted with use by the owners or occupiers of the land, and by affording the land village green status it would preserve this situation for the future.
- 3.111. In her oral evidence, Ms Smits stated that by reference to Map A she said that her house was just left of the letter “H” in the High Street, from which she had a magnificent view of Herston Fields. She is a painter and during the course of her evidence she produced in book form colour photocopies of paintings that she had made whilst on Herston Fields. She also took photographs of cattle in the Southern Field, who, in her interpretation, looked “*very poor*”. Ms Smits stated that part of the Southern Field was used as a recreation ground.
- 3.112. Ms Smits was asked a number of detailed questions about what she considered constituted Herston as a place. Her address at 375 High Street was a second home owned since 1989, her main home being in Ruislip, Middlesex. Ms Spits was shown a number of photographs by Counsel for the Scott Estate, one of which, (No.6) was the photograph of a calf. She stated that there had been no cattle since 1990/1991, although she has seen a flock of sheep this year which appeared overnight and the next day they were gone.

- 3.113. Ms Smits was asked about fencing and the use of the Fields which she stated was mainly grassland and kept short but not grazed. This started when the “*Save Herston Fields*” campaign started, and then the fields were ploughed up right to the hedge, the hedge cut back and a wire was erected. A crop was also sown, but this looked (as she stated) “*very miserable*”, but did not know what type of crop it was. Since the fields started to be used the fencing along the southern side of the Southern Field was erected and also along the side of the footpath and top side and western side. The Fields are now “*firmly fenced*” with a post and wire fence, and “*very tight wire*”.
- 3.114. During the course of cross-examination by Mr Greaves Ms Smits stated that in 1989 her house at 375 High Street was a second home, but they came down to Herston every second weekend until October 1993 when they moved into 375 High Street permanently. The photographs in evidence were all taken after she had moved into the house. Miss Smits joined a local society in Herston in 1994. Ms Smits stated that she saw the various activities which she has described taking place between 1993 and 2011, and the cattle were just there between 1990 and 1991. She stated that horses arrived after the cattle had left although there was a gap in between. Ms Smits stated that she took her three dogs for walks on Herston Fields on a daily basis, but none after 2009 when the last dog died. The other two dogs (Jack Russells) had died one year apart. On her walks she would take the footpath over the stream and then make her way round the boundary of the Southern Field to the left over the stream. Ms Smits stated that she went round and round the Southern Field, and the dogs loved the hedges. Originally there were no cattle in the Southern Field. When the cattle were there she remembered that they moved from field to field and the gates were kept open. She missed the cattle when they left.
- 3.115. Insofar as crops were concerned, it came as a bit of a shock the first time that the fields were ploughed, and very noticeable activity started about 3 years ago with the fields being ploughed and levelled. This activity angered everyone, as it destroyed the hedgerows and people can no longer walk around the perimeter. People would picnic in the fields, and she recognised people as local people who she would see on a weekly basis and she also recognised their dogs. There was a fish and chip shop at the end, and knew that local people used it. Everyone turned up on Herston Fields with dogs, about 30 of them. Ms Smits stated that the hay making was recent. She picked hops, (she lived with an Italian man) sloes, from which she made sloe gin, and she picked

blackberries. The hedges were full of blackberries and people and children came to pick them, all being local people. Blackberries were on the southern side of the southern hedge next to the verge, but also on the hedge between the Southern and Northern Fields. Ms Smits stated that she also saw foxes and badgers. She stated that all the activities in effect took place in the Southern Field, but also there was activity in the Northern Field, but not on a “*social basis*”. She also stated that she saw people playing golf shots, and kite flying.

Summary

3.115.1. Ms Smits states that she has known Herston Fields since October 1989 and she has also known Herston Fields as “*Gennis*”. Ms Smits stated that in 1989 her house at 375 High Street was a second home (her main home being in Ruislip), but they came down to Herston every second weekend until October 1993 when they moved into 375 High Street permanently. The photographs in evidence were all taken after she had moved into the house in 1993. Her house is just left of the letter “*H*” in the High Street, from which she had a magnificent view of Herston Fields. She is a painter and during the course of her evidence she produced in book form colour photocopies of paintings that she had made whilst on Herston Fields. She also took photographs of cattle in the Southern Field, who, in her interpretation, looked “*very poor*”. Ms Smits stated that part of the Southern Field was used as a recreation ground. Ms Smits stated that she has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers for the 22-year period between 1989 and 2011. She also has seen the various activities undertaken by others on Herston Fields, as she described.

The Applicants’ Witnesses who did not give evidence

3.116. There were eight persons on the Applicants’ list of witnesses who provided witness statements, but did not give oral evidence for one reason or another. At least two of the witnesses could not attend the Public Inquiry through reasons of age, infirmity or illness, or a combination of the same.

3.117. The witnesses who did not give oral evidence are the following:

- (1) Mrs Patricia Andrews
- (2) Mr RSB (Ray) Aplin
- (3) Ms Charlotte Dowling
- (4) Mrs Jo Duncan
- (5) Miss Brenda Enticknapp
- (6) Mr Michael Lyons
- (7) Mr Frederick Riley
- (8) Mrs Betty Stephenson

At least 4 of those persons attended at various stages during the course of the Public Inquiry, but it proved impossible to find appropriate times when they could have given their evidence, despite best endeavours to try and do so. Health and personal reasons then intervened in the cases of Mr Aplin and Mrs Stephenson. Mr Riley could not attend the Public Inquiry in any event owing to ill-health.

3.118. I made a ruling at the conclusion of the oral evidence adduced by the Applicants that I would not interpose any of these witnesses who could make themselves available during the case presented by the Scott Estate. This meant that those who had attended the hearing but were not available at a specific time in order to give their evidence were therefore unable to do so. As their evidence was not tested in cross-examination it would therefore be inappropriate to give such weight to their evidence as accorded to the witnesses who did attend and were cross-examined. However, for the purposes of this Report I do take into account the contents of their witness statements as part of the overall evidence in the case. I now refer to the evidence of each of these witnesses in turn.

Mrs Patricia Andrews

3.119. Mrs Andrews lives at 6 Steer Road, Herston and made her witness statement on 16th February 2016. She states that she has known Herston Fields or Genis since 1937, her birth year. She states that she has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers for the 67 years between 1942 and 2011.

Between those years she used Herston Fields for walking, fresh air and blackberrying, and her immediate family also used Herston Fields during this time for playing and picnicking. Mrs Andrews further states that between those years she has seen Herston Fields used by children playing and people playing team games, rounders, football and cricket. She has seen people fishing in the stream, walking their dogs, picking blackberries, birdwatching, picnicking, kite flying and walking.

- 3.120. During the time she used Herston Fields the general pattern of use of the fields remained basically the same and she was never prevented from using them, nor was any attempt ever made by notice or fencing to prevent or discourage such use being made of Herston Fields by the local inhabitants. Mrs Andrews summarises her witness statement by saying (as have other witnesses) that Herston Fields has provided an important recreation amenity to the locality for many years, there being no alternative space available.

Mr Ray Aplin

- 3.121. Mr Aplin lives at 3 Hendrie Close, Swanage. He made his witness statement on 7th February 2016. He says he has known Herston Fields since 1940, and also has known them as "*First and Second Genis*". His witness statement contains similar statements to that of Mrs Andrews, in that he says that he has used Herston Fields freely, without obstruction or challenge for the 71 years between 1940 and 2011. He says that he accessed the fields and public footpath by climbing the stile into the fields and through gateways often left open in Washpond Lane. Between 1940 and 2011 he used Herston Fields for walking and exercising dogs with his parents in the 1940s, and with his own dog in recent years. He states that his immediate family have also used Herston Fields during this time for walking and exercising dogs and that his daughter, son and their friends played in Herston Fields during the 1970s often with cattle grazing nearby. Mr Aplin also states that between 1940 and 2011 he has seen people increasingly use the footpath across Herston Fields and the fields themselves for exercising dogs and children's' play activities. He has also seen people picking blackberries, having picnics, flying kites and playing ball games and relaxing in the sun on Herston Fields. Mr Aplin also states that community activities have been held on Herston Field and include a regular annual fair during the late 1940s and early 1950s and the occasional circus during those years.

3.122. During the time Mr Aplin used Herston Fields he states that the general pattern of use of the fields remained basically the same. He understood that the Encombe Estate owned the land and that it was occupied by Knitson Farm at the present time. Mr Aplin also states that he and members of his family have never been prevented from using Herston Fields, and no attempt was ever made by notice or fencing or by any other means to prevent or discourage such use being made of Herston Fields by the local inhabitants. In essence Herston Fields has provided an important recreational amenity to the locality for many years, there being no alternative space available nearby.

Ms Charlotte Dowling

3.123. Ms Dowling lives at 1 Ancaster Road, Herston and she made her statement on 16th February 2016. She has known Herston Fields since 1997 and has used the Fields freely without obstruction or challenge for the 14 years between 1997 and 2011. She states that she has used Herston Fields daily for jogging, walking and recreation, and her immediate family has also used Herston Fields for playing and exercise. Ms Dowling also states that between 1997 and 2011 she has seen the local community use Herston Fields for seasonal activities such as blackberry and elderflower picking, and she has seen children playing on the fields and people using Herston Fields for drawing and painting, dog walking, kite flying and walking.

3.124. Ms Dowling states that she knew the Scott Estates owned the land, but did not know the identity of the occupier of the land. During the time she has used the Fields the general pattern of use has remained the same. She has never been prevented from using the fields and no attempt has ever been made to prevent or discourage use being made of the fields by the local inhabitants. In summary she considers that Herston Fields has provided an important recreational amenity and she, her family and others have frequently used the area for recreation, there being no alternative space available.

Ms Jo Duncan

3.125. Ms Duncan lives at 5 Cauldron Meadows, Swanage and formerly lived at 4 Ash Close, Swanage. She made his witness statement on 11th February 2016. Ms Duncan is a relative newcomer to the area in that she has only known Herston Fields since 2006. During those 5 years she states that she has used Herston Fields freely without obstruction or challenge and has used the same 2 or 3 times a week for dog walking.

Her immediate family also use Herston Fields for walking and playing ball games. Ms Duncan has also seen Herston Fields being used for community activities including dog training, team games such as football and cricket, and bonfire parties. She has seen children using Herston Fields for playing games and people using the fields for dog walking, playing, picking blackberries, birdwatching, picnicking, walking and bicycle riding. During the time Ms Duncan has used Herston Fields the general pattern of use has remained the same, and she did not know who owned or occupied the land but she was never prevented from using Herston Fields. There was no attempt to prevent or discourage such use being made of Herston Fields by the local inhabitants. Again, Ms Duncan reiterates the point made in every witness statement that Herston Fields has provided an important recreational amenity to the locality, there being no alternative space available.

Ms Brenda Enticknap

- 3.126. Ms Enticknap has lived at 373 High Street, Herston since 1996. She has also heard of Herston Fields being referred to as “*Genna*” or “*Genesis*” fields. She states that she has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers for the 15 years between 1996 and 2011 and she has accessed the fields and public footpath by climbing the stile into the fields. Between 1996 and 2011 she has used Herston Fields frequently for recreational purposes, such as walking and blackberrying. Ms Enticknap also states that her immediate family have used Herston Fields during this time for walking, blackberrying, kite flying and dog walking and as a place for her grandchildren to play. She also states that she is aware that the local Girl Guides and Brownies have used Herston Fields for outdoor activities. Ms Enticknap states that between 1996 and 2011 she has seen Herston Fields used by children playing and people using the fields for drawing and painting, dog walking, picking blackberries, birdwatching, picnicking, kite flying, playing football and cricket and walking. She has never been prevented from using Herston Fields, and they have provided an important recreational amenity to the locality for many years, there being no other space available.

Mr Michael Lyons

- 3.127. Mr Michael Lyons lives at “Aurora”, High Street, Herston and made his witness statement on 17th February 2016. He states in his witness statement that he has known Herston Fields since 1978, and that for the 22 years between then and 2011 he has used Herston Fields freely, without obstruction or challenge by the landowners or occupiers and has accessed the fields and public footpath by climbing the stile into the fields. His use was mostly for dog walking between 1978 and about 2000, and he states that his immediate family has also used Herston Fields for walking. Between 1978 and 2011 he has seen Herston Fields used by children playing, people drawing and painting, walking dogs, picking blackberries, birdwatching, picnicking, kite flying, walking and train spotting. He has also seen Herston Fields used for hang-gliders landing, and once saw the Air Ambulance use the fields for a landing. During the time he has used Herston Fields the general pattern of use has remained basically the same, but he believes that the volume of use by members of the public has increased. He states that he was never prevented from using Herston Fields, and no attempt was ever made by notice or fencing or by any other means to prevent or discourage such use being made by local inhabitants.
- 3.128. In summary, Mr Lyons also states as have all the other witnesses that Herston Fields has provided an important recreational amenity to the locality for many years, and that he, his family and others have frequently used the area for recreation, there being no alternative space available. Such use does not appear to have conflicted with use by the owners or occupiers of the land.

Mr Frederick Riley

- 3.129. Mr Riley lives at 363 High Street, Herston, and has known Herston Fields since 1926. He also is aware that the fields are also known as “Ginnis”. Mr Riley states that he has used Herston Fields freely, without obstruction or challenge for the 80 years between 1931 and 2011. He says that he accessed the fields and public footpath by climbing the stile into the Fields. The use he made of Herston Fields between those years was daily for walking and playing there as a child, and his immediate family have also used Herston Fields during this time for walking and playing. During the 1950s to 1960s Herston Fields were used for circuses, fairs and bonfire nights.

- 3.130. Between 1926 and 2011 Mr Riley states that he has seen Herston Fields used by children playing, and people drawing and painting, dog walking, picking blackberries, birdwatching, picnicking, kite flying, walking and bicycling. He has also seen community activities taking place on Herston Fields including team games, rounders, football and cricket, village fetes and bonfire parties. During the time that he has used Herston Fields the general pattern of use has remained basically the same, and he has never been prevented from using Herston Fields. He knew the fields to be owned by the Encombe Estate, but did not know who occupied the land. No attempt was ever made during this time by notice or fencing or by other means to prevent or discourage such use by the local inhabitants.
- 3.131. In summary, he repeats what the other witnesses have said in that Herston Fields has provided an important recreational amenity to the locality for many years which he, his family and others have frequently used for recreation, there being no alternative space available. Such use does not appear to have interfered or conflicted with the use by the owners or occupiers of the land.

Mrs Betty Stephenson

- 3.132. Mrs Stephenson lives at April Cottage, 7 Globe Close, Herston and has lived there since 1967. She made her witness statement on 17th February 2017. Mrs Stephenson states that she has used Herston Fields freely, without obstruction or challenge for the 30 years between 1981 and 2011, and she has accessed the Fields and public footpath by climbing the stile into the fields.
- 3.133. Between 1981 and 2011 she has used Herston Fields daily to keep fit, enjoy wildlife and scenery and walk the dog. She has also picked blackberries, played ball games, and had picnics on Herston Fields. She has also walked across Herston Fields to watch the trains. Mrs Stephenson also states that her visiting family used Herston Fields during this time for walking, playing ball games, having picnics and admiring the scenery.
- 3.134. Mrs Stephenson also states that between 1981 and 2011 she has seen Herston Fields used by children playing, people drawing and painting, dog walking, picking blackberries, birdwatching, having picnics, kite flying, walking and train watching. She has also seen it used for team games such as rounders, football and cricket. During

the time she has used Herston Fields the general pattern of use of the fields has remained basically the same. No-one has ever during this period by notice or fencing or by other means tried to prevent or discourage such use being made of the fields by the local inhabitants.

- 3.135. In summary, again, Mrs Stephenson makes similar statements to those made by the other witnesses to the effect that Herston Fields has provided an important recreational amenity to the *locality* for many years, there being no alternative space available.

Visual evidence

- 3.136. As stated above, the visual evidence took a number of forms. Part of day 6 of the Public Inquiry was set aside for the study of a large number of photographs produced by witnesses, together with video evidence.

- 3.137. As a general impression generated from the still photographic evidence there would appear to have been much activity on Herston Fields, albeit it that much of it was generated during and after the period from about June 2010. From the perspective of the Scott Estate this activity was, in effect, manufactured in order to demonstrate wide activity in support of the Application, and for the benefit of the Registration Authority, and more particularly as evidence for this subsequent Public Inquiry. For their part, the position of the Applicants is that it is acknowledged that activity may have increased over recent years until unrestricted user was prevented from about 2011, but that this merely demonstrated the exercise by the citizens of Herston of their rights over Herston Fields as a Town or Village Green over many decades. In this Report I take these competing interpretations into account.

- 3.138. In support of her evidence Ms Richards produced a video of her daughter engaged in a school cross-country running when she was 9 years old, and probably recorded in about 1989. Her daughter attended the Middle School, Herston, which lies in the background of the video film. Such activities can fall within the concept of lawful sports and pastimes as they fall within the category of organised sports.

SECTION 4

4. EVIDENCE FOR THE SCOTT ESTATE

4.1. There are two strands to the Objectors' evidence. First some twelve witnesses gave oral evidence to the Public Inquiry, and were cross-examined by Mr Jensen for the Applicants. Secondly, in addition to the oral evidence given by those witnesses the evidence bundle produced by the Objectors contained a number of witness statements whose makers were not called. In one instance the witness (Mr David Eldon Scott) sadly died last year. As with similar evidence provided by the Applicants, as these witnesses were not available for cross-examination, their evidence cannot be given the same weight as the other "live" witnesses.

Oral evidence

4.2. Twelve witness statements were lodged on behalf of the Scott Estate in opposition to the Application. Of these twelve witness statements, ten witnesses were called to oral evidence, and were cross-examined by Mr Jensen. I permitted each witness to read out his or her witness statement in chief, on a request being made by Leading Counsel so to do. This did not occur in the case of the Applicants' witnesses where each witness was asked by Mr Jensen to elucidate points in chief by reference to in his or her respective witness statement, but the statement itself was not read out *verbatim*.

4.3. I shall consider this evidence in the order in which the witnesses were called to give such evidence.

Mr David Dicker

4.4. Mr Dicker is a dairy farmer who lives at Coombe Farm, which is about one mile from Swanage. He made his witness statement of 20th November 2014. He states that he was born in 1963 and has been local to the Swanage area since he was 4 years old. He was a former tenant of Herston Fields from 25th March 2005 until 2013 which he rented from DCC, who in turn leased it from the Scott Estate. Prior to that

from 29th September 2002 until 2005 Herston Fields, together with other parcels of land, were let to Alan and Jane Helfer, who are local farmers.¹³¹

- 4.5. Mr Dicker recalls that when Mr Helfer took over Herston Fields as a sub-tenant, at some stage he ploughed the Southern Field. It was in poor condition. Mr Dicker remembered that haylage was grown but mainly the fields were used to graze his dairy herd. Mr Helfer then in turn sub-let Herston Fields to Vic and Kath Lawrence for them to graze horses. This appears to have been in about 2004, and they seemed to have remained there until 2013. That arrangement was apparently without the knowledge or consent of DCC, and was undoubtedly in breach of covenant, and as a consequence illegal.
- 4.6. Mr Dicker states that prior to Mr Helfer renting Herston Fields, they had been sub-let to Mr Gerald Tatchell who apparently had been in occupation of Herston Fields for at least 30 years. Mr Dicker's recollection is that when Mr Tatchell occupied Herston Fields whilst Mr Dicker was growing up in the area, he remembered that the fields were used for grazing and for hay. He could not recall seeing any games played on the fields whilst he was growing up and normally there were cattle on all three fields, as he stated. He also stated that it was likely that Mr Tatchell kept a strong line "*in terms of making sure people stayed on the public footpath, as that was the type of man he was*".
- 4.7. Insofar as the sub-tenancy to Vic and Kath Lawrence were concerned, Mr Dicker sub-let Herston Fields to them from about 2005. In effect their sub-tenancy appears to have carried over after Mr Helfer's departure. Mr Dicker stated that he was aware that Mr and Mrs Lawrence used all three fields to graze horses, and the horses remained on the fields day and night all the year round.

¹³¹ Some discrepancies arose with regard to the dates of the lettings and sub-lettings of Herston Fields. Mr Tatchell occupied Herston Fields from 5th January 1962 pursuant to a sub-letting from DCC. He died in October 2000, and his widow died in 2002. Mr Helfer was granted a new sub-tenancy by DCC on 29th September 2002 on an annual Farm Business Tenancy of two areas of farmland, referred to as Site A and Site B. Site A is Herston Fields. Mr Dicker's sub-tenancy commenced after the expiry of that granted to Mr Helfer.

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- 4.8. Mr Dicker stated that he had never used Herston Fields to graze his own dairy herd as it would be impractical to do so. However, he continued to rent Herston Fields from DCC as it formed part of a larger parcel of land for which he claimed a Single Farm Payment for the entirety of his sub-tenancy, and the fields were included as permanent pasture. This arrangement may well have been in breach of the terms of the rules relating to the Single Farm Payment scheme.
- 4.9. Mr Dicker also stated that he was aware that Herston Fields, mainly the Southern Field, were used by local people to walk their dogs, and that they did not tend to stay on the public footpath, but walk around the edge of the fields. Mr Dicker stated that Mr Lawrence had told him that he had had trouble with trying to keep dog walkers on the footpath. Mr Dicker went on to state that he had seen people walking on the fields and using the public footpath, he could not recall seeing anyone playing games on the fields. Mr Dicker also stated that Mr Lawrence was always moaning about the use of the fields, and that people were arrogant. He agreed that he could only see the fields from when passing by.
- 4.10. He was also aware that Mr Lawrence grew silage/haylage on the fields during the spring of most years to provide feed for the horses.
- 4.11. In Spring 2011 Mr Dicker stated that he started to plough the Southern Field to see whether a crop would take. The field was ploughed all the way until the edge of the public footpath, which was not ploughed and could still be used. He sowed a crop called Tritikale which was like a corn crop, but which he had never grown before, and it did not take very well. Once the field had been ploughed, and the crop was growing, it would not have been easy for anyone to walk over the field other than on the footpath, as ploughed land is very rough under foot. Mr Dicker stated that there was some noticeable trampling from the gate off Washpond Lane on the west side of the field to the public footpath. The Tritikale crop did not take well, and so it was decided to return the Southern Field back to grass in the autumn of 2011. The field was ploughed again, and slots were cut into the soil with seeds being dropped into the slots.

- 4.12. Mr Lawrence as the sub-tenant of Herston Fields then fertilised the Southern Field and allowed the grass to grow to produce a haylage crop for his horses. Mr Dicker stated that the grass grew to about 2.5 feet tall which would have made it difficult for anyone to walk over the field other than along the footpath. Mr Lawrence then took a haylage crop in the summer of 2012, and after that the field was grazed by Mr Lawrence's horses.
- 4.13. Mr Dicker stated that throughout he sub-let Herston Fields to Vic and Kath Lawrence during his tenancy from DCC. He stated that he has never taken any steps to put up any signs or restrict access to the fields. However, Mr Dicker said that Mr and Mrs Helfer had taken a more active approach to people using the fields by telling them to stay on the footpath, and it was in his nature to do so - "*to lay the law down*", as he put it.
- 4.14. Mr Dicker stated that on one occasion he was aware that Mr Lawrence put up signs near to the footpath in 2011 to warn people he intended to spray the fields with weed killer, but he did not know what those signs stated. Mr Dicker stated that he did have a word on one occasion with Mr Lawrence about maintaining the boundaries to stop people being able to get into Herston Fields other than at the access points for the public footpath in line with his obligations under his tenancy with DCC. He was aware that Mr Lawrence erected a gate and temporary steel fence on Washpond Lane, where the southern and northern fields meet.
- 4.15. In November 2013 DCC surrendered Lease to the Scott Estate, since when Mr Dicker no longer has any occupation rights over Herston Fields.
- 4.16. In cross-examination Mr Dicker attempted to describe what appears to have been a somewhat complicated relationship between himself, Mr Helfer, Mr and Mrs Lawrence, and DCC, the circumstances of which are quite opaque. Mr Helfer originally came on the scene on 29th September 2001 in relation to Sites A and B (Site A being Herston Fields), and remained on the scene until 2005. Mr Dicker in effect took over from Mr Helfer in March 2005 as DCC's sub-tenant, but it appears that Mr Dicker then let Mr Helfer remain in occupation, alongside Mr and Mrs Lawrence. As Mr Dicker stated in answer to questions from Mr Jensen, he had

originally been asked to take on Herston Fields, and the attraction was access to the larger Single Farm Payment. However, subsequently he wished to get out of any involvement with Herston Fields as there was no value to him and it was becoming a hassle. He let Mr and Mrs Lawrence remain in occupation of Herston Fields, and the rent payments made by them were “re-directed” to him. Mr Dicker stated that he gave no-one permission to use the fields, nor did he tell anyone to get off Herston Fields. Mr Dicker stated that he had no involvement in Herston Fields at all

- 4.17. Insofar as the ploughing of the Southern Field in Spring 2011 is concerned, Mr Dicker stated that he was asked to do this by Savills (the Agents for the Scott Estate), and they paid all his expenses. The purpose was to grow maze, but the land was too wet for this crop. He also stated that he was asked by Savills to plough right up to the hedges, but he decided not to plough to the east side of the footpath, this being his decision. The reason for this he stated was obvious i.e. “*to make the Southern Field look more farmed than it was*”. He also said that he was aware that Savills were acting independently for the head landlord, i.e. the Scott Estate, and he did not have to comply. Mr Dicker also stated that he was aware of the possibility that Herston Fields would be used as a gypsy site.

Summary

- 4.17.1. Mr Dicker illegally sub-let Herston Fields throughout his sub-tenancy to Mr and Mrs Lawrence for grazing horses having, in effect, taken over the sub-tenancy granted by Mr Helfer to them. Herston Fields formed part of a larger parcel of land for which he claimed a Single Farm Payment, and Herston Fields were included as permanent pasture within the scheme. This is likely to have been in breach of the rules regulating the scheme. Mr Dicker was aware that Herston Fields, mainly the Southern Field, were used by local people to walk their dogs, and that they did not tend to stay on the public footpath, but walk around the edge of the fields. Mr Lawrence had told him that he had had trouble with trying to keep dog walkers on the footpath. Mr Dicker also stated that Mr Lawrence was always moaning about the use of the fields by the public, and that people were arrogant. On one occasion Mr Dicker said that he had a word with Mr Lawrence about maintaining

the boundaries to stop people being able to get into Herston Fields, other than at the access points for the public footpath in line with his obligations under his tenancy with DCC, of which he was clearly aware. He said that Mr and Mrs Helfer took a more active approach. In Spring 2011 he was asked by Savills, agents for the Scott Estate to “*to make the Southern Field look more farmed than it was*”.

Mr Alan Helfer

- 4.18. Mr Helfer lives at Knitson Farm, Corfe Castle where he is a dairy farmer with his wife Jane. He made his witness statement on 28th November 2014. In his (corrected) witness statement Mr Helfer states that he rented Herston Fields as a sub-tenant from DCC from September 2002 (Site A) and was let with other land (referred to as Site B) from 29th September 2002 on a three-year annual Farm Business Tenancy with the possibility of having a three-year extension thereafter. Mr Helfer explains in paragraph 3 of his witness statement that soon after the commencement of this tenancy DCC wanted to change its terms which would have resulted in him losing some of his Milk Quota. A somewhat complicated arrangement was then apparently entered into whereby Mr Helfer remained in occupation of the other land (Site B) but sub-let Herston Fields to Vic and Kath Lawrence for horse grazing in 2004. There is some confusion in relation to the exact arrangements in that in paragraph 3 of his witness statement Mr Helfer states that he did not want to sign up to the new tenancy and thereafter DCC let Herston Fields to Mr Dicker who then sub-let Herston Fields to Mr Helfer, along with other parcels of land. This analysis, however, does not appear to be correct when regard is had to the evidence given other witnesses.
- 4.19. Whatever may be the correct interpretation of the position relating to the various tenures at that time, by all accounts Mr Helfer’s occupation of Herston Fields appears to have been somewhat tenuous between 2004 and 25th March 2005 when Mr Dicker asked him to vacate Herston Fields on the grant of Mr Dicker’s sub-tenancy by DCC. . It is apparent that DCC had no knowledge of this/these arrangements.

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- 4.20. Mr Helfer states at paragraph 4 of his witness statement that when he took possession of Herston Fields in 2002 the fields were unusable as a result of Mr Tatchell's previous use. Mr Tatchell had apparently kept beef cattle on all three fields all the year around which meant that the Fields were in a very poor condition. Attached to Mr Helfer's witness statement are a number of photographs which demonstrate the poor husbandry of Herston Fields.
- 4.21. Mr Helfer states that at that time in his view it would have been very difficult for local people to use Herston Fields for any kind of recreational activity, or to walk along the public footpath, given that the land was so uneven and the fields were overrun with weeds. He stated that in order to be able to use the fields for grazing he set about a process of re-seeding which involved killing off the weeds, ploughing the fields and then sowing new grass seed. He said this whole process had been completed by Spring 2002. This date must be incorrect in that his sub-tenancy did not commence until September 2002. Mr Helfer stated that he would graze his dairy herd on all three fields from March until October, and the fields were empty during the Winter months. Mr Helfer stated that there was no sign of any major walking in the fields in 2002.
- 4.22. In his witness statement Mr Helfer also said that during the time he was in occupation of Herston Fields he experienced a great deal of trouble from local people who used the footpath to walk their dogs. Prior to re-seeding he said that the footpath was not well used, and people avoided it. After he ploughed the fields he made sure that the footpath was marked, and he wanted to make sure that the dog walkers stayed on the footpath. He stated that people then tended to use the footpath more regularly. However, as more people started to use the footpath to walk their dogs some of them began to deviate from the route of the public footpath particularly in the Southern Field. In order to ensure that the local people did not gain access to the Southern Field through the gates up Washpond Lane, he used barbed wire to keep the gates shut, although the wire used to get cut, so he stated. He also stated that once the footpath was used more regularly by dog walkers there was more litter including aluminium cans. Mr Helfer stated that he had never put up any signs to ask people to keep or stay on the footpath, as in his view these would have been vandalised and removed.

- 4.23. Mr Helfer also stated that local people were aware that they did not have permission to use Herston Fields other than the public footpath as a result of steps taken by his wife, Jane. At the time she was a Governor at Swanage Middle School, located next to Herston Fields. In about 2005 she had found out that some children from the school had started to use a gap in the fence to access the fields from the school. An announcement was made by her during assembly that children should not go onto the fields other than on the footpath. Mr Helfer states that as a result whenever his wife or he went down to the Fields anybody who was there would scatter as soon as they saw us. Mr Helfer then stated that after a few years he sub-let Herston Fields to Mr Lawrence for him to graze his horses. Subsequently Mr Lawrence rented the fields from Mr Dicker.
- 4.24. Mr Helfer in his oral evidence stated that initially the footpath was not used very much, but since the idea of the green developed everything, as he put it, “*gone mad*”. He stated that he also used electric fences to control the livestock, but agreed that it was impossible to see the electric fences from the footpath. He said that he experienced a great deal of trouble with people coming onto Herston Fields using dogs. Walkers knew that they had to stick to the footpath.
- 4.25. In cross-examination Mr Helfer stated that it was only those people in Herston who knew the footpath route, and the footpath used not to go anywhere. There were very few walkers. He had known Herston Fields for 50 years, and when Mr Tatchell was there the land was a “*sea of mud*” and was in general dereliction, but being used. Its poor condition meant that it was totally unsuitable as a “*green area*”, and it was obvious that it was in poor condition for farmland. He said that the cattle passed through from the Southern Field to the Northern Field. Mr Helfer also stated that he would challenge people whenever he saw them.

Summary

- 4.25.1. During the (short) time he was in occupation of Herston Fields Mr Helfer said that he experienced a great deal of trouble from local people who used the footpath to walk their dogs. The public generally had used Washpond lane. Since the idea of the TVG came to the fore

he said that “*everything had gone mad*”. Prior to re-seeding he said that the footpath was not well used, and people avoided it. After he ploughed the fields he made sure that the footpath was marked, and he wanted to make sure that the dog walkers stayed on the footpath. People then tended to use the footpath more regularly. However, as more people started to use the footpath to walk their dogs some of them began to deviate from the route of the public footpath particularly in the Southern Field. However, Mr Helfer’s connection with Herston Fields seems to have been somewhat tenuous throughout his sub-tenancy, as from an early stage he sub-let Herston Fields to Mr and Mrs Lawrence, but he, and his wife were aware that the fields were used by locals for walking with dogs.

Mr Henry Scott

- 4.26. Mr Henry Scott made his statement on 15th September 2014, and is the manager for the day to day running of the Scott Estate, including, but not limited to all relationships with the tenants, agents, workforce and suppliers. He is also a beneficiary of the Trust which owns the Scott Estate. In his witness statement he states that he has been the manager of the estate for the past 5 years (i.e. from 2009), and prior to that he was involved in a non-executive way as beneficiary of the Trust which owns the Estate.
- 4.27. Mr Scott states that he spent much of his childhood in Purbeck as he was at boarding school there, and he can remember playing rugby matches against Swanage Middle School adjoining Herston Fields. Whilst growing up he would regularly go past the Fields to go into Swanage. Since about 1998 he would go past Herston Fields at least twice a day in the car. For as long as he can remember there has always been farming going on at Herston Fields, and they were always either planted or grazed. He has seen cows and sometimes horses in the fields, and he recalls that sometimes the Fields were divided with wire fencing for strip grazing, and sometimes the whole area was used as “*one parcel*”. Mr Scott stated that he has never seen the fields ever used for any type of recreation. However, he has often seen people using the footpath, and sometimes has used the footpath himself to cut through to the railway

line. As far as he can remember there has always been a clear well-trodden path along the public footpath route which people follow. He has noticed that if there are livestock in the fields most people put their dogs on the lead.

- 4.28. Mr Scott has not heard any reports of animals being harassed since he has been involved with the management of the estate i.e. from about 2009. He therefore has had to assume most people remain on the marked footpath and keep their pets under control when crossing the fields on the footpath. However, within the last 10 years he has become aware of the new path which has been trodden in around the edge of the Southern Field. In his oral evidence he stated that up to 2011 he had visited Herston Fields on about half a dozen occasions.
- 4.29. Mr Scott states that as with all the Estate's parcels of land, he has always taken a keen look at Herston Fields when passing. He says that had he seen anybody trespassing then he would have asked them to cease, but he has never seen anyone using the Fields for recreation such as playing football, flying kites or having picnics. He has seen and he does see people using the public footpath. He also states that since the large increase of holidaymakers in the Purbeck area, and since the surrender of the Head Lease from DCC in November 2013, signs have been erected at both ends of the public footpath reminding people to keep to it, and that this is private land.
- 4.30. Mr Scott states that as far as he is aware DCC has never had to intervene on behalf of the sub-tenants - nor has the Scott Estate. As far as he is aware there have been no issues arising from open public access onto Herston Fields, and no reports have been made to him about such access or issues arising.
- 4.31. Mr Scott states that the first time he heard claims of open public access onto Herston Fields was in 2010/2011 when he heard rumours that a TGV application was being made. He thought that he had been told this by the agents, Savills. This seemed to have been generated by a report in 2008 referring to Herston Fields as a possible site as a gypsy site in the area, or for housing development under SLHLA. No planning application has been lodged, as far as Mr Scott is aware.

- 4.32. Mr Scott also stated that where there is open public access he would expect there to be some written communication from the tenants, or a request for reduction in rent, but there have been no such reports made to him that indicate that the farming and the fields has been hindered by people taking it upon themselves to use the fields themselves as they saw fit. He concludes that the footpath across Herston Fields had been used properly by people as there would have been evidence to suggest that the normal farming activities were ever encroached upon.
- 4.33. In his cross-examination Mr Scott stated that landowners were invited to put land forward for development under the SLHLA scheme, and 30 landowners were approached in relation to a possible traveller site. There is a Purbeck Council consultation document on the website entitled "*Purbeck for You*". Mr Scott stated that he knew the name of the farmers, and had known Mr Dicker all his life, but he had met him for the first time that day at the Public Inquiry. A similar situation related to Mr Helfer who he had seen before, but had shaken his hand for the first time that day. Mr Scott stated that he observed the Fields as he passed them frequently since 1998 whilst driving past. He also stated that he has walked across Herston Fields during the last 10 years with his children, and before then had not seen kite flying or ball games. He said he had a detailed knowledge of Herston Fields since about 2011.

Summary

- 4.33.1. Whilst growing up Mr Scott would regularly go past Herston Fields to go into Swanage. Since about 1998 he would go past Herston Fields at least twice a day in the car whilst driving past. He stated that he has walked across Herston Fields during the last 10 years with his children. There has always been farming going on at Herston Fields He has never seen the fields ever used for any type of recreation. However, he has often seen people using the footpath, and sometimes has used the footpath himself to cut through to the railway line. As far as he can remember there has always been a clear well-trodden path along the public footpath route which people follow, and if there are livestock in the fields most people put their dogs on the lead. He has always taken a keen look at Herston Fields when passing. He says that had he seen

anybody trespassing then he would have asked them to cease, but he has never seen anyone using the Fields for recreation such as playing football, flying kites or having picnics. He has seen and he does see people using the public footpath. As far as he is aware DCC has never had to intervene on behalf of the sub-tenants - nor has the Scott Estate, and there have been no issues arising from open public access onto Herston Fields, and no reports have been made to him about such access or issues arising. The sub-tenants have not sought a reduction in rent.

Mr Roger BB Sewell

- 4.34. Mr Sewell is the Principal Estates Manager for Dorset Property for whom he has worked since 1992 when he joined DCC as an Assistant Land Agent. He became the Principal Land Agent in 1997. He remained in that role until 2008. Mr Sewell's role includes managing the Rural Practice Team and General Practice Team and overseeing the strategic management of DCC's property portfolio. In the role of Principal Land Agent, he was responsible for managing the land owned and leased in the County Farm Estate within Dorset Property. Mr Sewell states that Herston Fields and other parcels of land within its County Farm Estate were held and managed by DCC in its capacity as Smallholdings Authority under the Agriculture Act 1947, and subsequently the Agriculture Act 1970. The County Farm Estate comprised six farms leased from the Scott Estate.
- 4.35. In paragraph 4 of his witness statement by reference to the records held by DCC Mr Sewell refers to the three sub-lettings granted over Herston Fields since 1962. During his early years from 1992 as an Assistant Land Agent part of his job was to visit the various parcels of land comprising the County Farm Estate to ensure, amongst other things that the land was being used in accordance with the terms of the tenancies granted to the farm tenants. He remembered that Herston Farm, which included Herston Fields, was not being cultivated by Mr Tatchell to its full potential. He recalled that Mr Tatchell ran a beef herd and the cattle were out-wintered because he did not have a suitable barn. Some fields were poached and rutted as a

consequence. It was poor husbandry and an unacceptable amount of weed growth, poor pastures, non-maintained hedges.

4.36. Mr Sewell refers to a meeting note made in August 1998 in which it is stated that Herston Fields was in poor condition. This is the only recorded visit made by him to Herston Fields. He states that he had inspected the land and noted that the hedgerows were unmaintained and grown out. At the time they were considering serving a Notice to Remedy on Mr Tatchell. The records of DCC also demonstrate that Mr Sewell's predecessor, a Mr Gannon, was also concerned about the condition of Herston Fields in the 1980s. Exhibited to the statement, and to which Mr Sewell referred during the course of his evidence, is a document entitled draft Notice to remedy breach of the tenancy agreement contained in a schedule of defects requiring remedial works as at 24th October 1985. This sets out that the boundaries including hedges and fences had not been maintained and the land was not being farmed in accordance with the rules of good husbandry. This followed inspections which had taken place in October and November 1984. It is unclear whether the Notice was ever served.

4.37. Mr Sewell also states that he would have visited each farm on the County Farm Estate every three years for the purposes of rent reviews. The rent reviews which he undertook in relation to Herston Fields were in 1995 and 1998. Specific reference is made to the rent review of the land sub-let to Mr Tatchell which included Herston Fields, this taking place on 11th September 1998. Mr Sewell stated that in order to undertake such an exercise he would have walked the fields as it was his policy to spend time with the farmer and to look around the holding. As is normal in such circumstances, had Mr Tatchell had any concerns to raise with regard to the land which were affecting his farming, he would try to negotiate a lower rent. Such an issue could have been the question of open access by the public onto the fields. Mr Sewell stated that he could not recall any such issues being raised and had this been the position then he thought he would remember that there was something that would be a significant problem upon which action was required.

- 4.38. Mr Sewell went on in paragraph 8 of his witness statement to state that there was concern about the state of Herston Fields prior to Mr Tatchell's death. At the end of the tenancy DCC had to decide whether to pursue Mr Tatchell for dilapidations. A dilapidations report was prepared in January 2002 showing the condition as at 4th September 2001, and a draft copy of that report is in evidence attached to Mr Sewell's witness statement. A number of photographs are contained within the report relating to Herston Fields to which Mr Sewell's attention was drawn during the course of his evidence. He said that he chose not serve the report as it was not productive to do so. Reference is made in Mr Sewell's witness statement as to the condition of the three fields comprising Herston Fields.
- 4.39. Mr Sewell states that in his view Herston Fields in 2001 were not suitable for village green activities such as playing football or cricket as the ground would have been too uneven and overgrown. At the end of Mr Tatchell's sub-tenancy an invitation went out to local farmers to tender for the land, including Herston Fields. Mr Helfer did so tender and set out the works he would do such as weed control and the requirement to roll the fields heavily.
- 4.40. Finally, Mr Sewell states in paragraph 11 that he has no memory of seeing anyone using the fields for picnics, kite flying, games or recreation. He has driven past Herston Fields on many weekends going to Swanage, and he has also visited Swanage on many occasions in his role as Principal Estates Manager, and continues to do so. There are no records contained in the files of DCC of any of these visits. Mr Sewell states that had he seen anything unusual in the use of Herston Fields he said it would have registered with him, and he would have made an assessment as to whether anything needed to be done. This is particularly so in the case where the land is leased by the County Council as there are obligations relating to trespass. He also states that he has no recollection, and there are no records in the County Council's files, of any of the farm tenants raising any issues or concerns about the public's use of Herston Fields, or open access by the public to the fields. Nor was any mention made when negotiating rent with the Scott Estate.
- 4.41. In his oral evidence Mr Sewell stated that the policy of DCC was to let to existing tenants. Insofar as paragraph 6 of his witness statement is concerned, cattle were in

all three fields, but there was considerable damage to the land in that there was poaching and potholes in all three fields. As he stated this was an example of bad husbandry and damaged the land and damaged the grazing for the spring cycle. It was not easy to walk across the land as the cattle had damaged it quite considerably. There was a long history of neglect by Mr Tatchell. The land was in such poor condition that there was a rent free period, otherwise there would have been a large dilapidations claim.

4.42. Mr Sewell stated that there were six farms let by the Scott Estate to DCC forming part of his responsibilities as Principal Estates Manager. Mr Sewell stated that he would not have come specifically to Herston Fields, except during the course of rent reviews. However, Mr Sewell stated that he did believe that he was about a “*fair bit*”. He had always known that the land was poorly looked after from about 1998. Mr Sewell could not recall any conversations about any limitation on the public using Herston Fields in order to try to reduce the rent. This would have been a bargaining position on the part of the tenant. If such an issue had been raised Mr Sewell stated that he would have tried to prevent it, but he had no memory of any issue being raised with regard to open access to Herston Fields, but he had no note on the subject. He had no recollection of it ever being raised. Mr Sewell was then taken through a number of photographs in his evidence in chief which are exhibited to his witness statement. He stated that Herston Fields were not suitable for village green activities, and he repeated the point that he had no memory of any public use of the land.

4.43. In cross-examination Mr Sewell said it was not unusual to have open access to fields near urban areas, but the tendency was try to maintain control. He had no memory of any public access. Mr Tatchell died on 10th October 2000 and the appropriate Case G Notice to Quit dated 29th September 2001 was served giving a year’s notice. This expired on 29th September 2002. Mr Tatchell’s widow would have been technically responsible, but there was a 20-month hiatus when no-one was in practical control. His widow was unlikely to deal with the farm, and the assumption was that she was elderly. Mr Sewell was shown some of the photographs exhibited to his witness statement, and it was suggested that people could walk across the fields

when reference is made to photograph No.50. Mr Sewell stated that it was not brought to his attention that people were walking across Herston Fields.

4.44. As to Mr Tatchell's character, Mr Sewell stated that he was an older man and farmed in a traditional way, and he did not farm Herston Fields in accordance with good agricultural practice. He "*kept himself to himself*", and "*had his own life*".

4.45. Insofar as paragraph 11 of his witness statement was concerned where Mr Sewell stated that he had driven past the fields on many weekends, and he accepted that he only saw the fields from a car. He said that the policy was to visit the land once per year, and the Northern Field he visited more frequently. He also said that such visits would be made on weekday business hours. However, any such policy has not been recorded, nor have any of the visits said to have been made by Mr Sewell been recorded. As to the position of Mr Helfer, he was on a three-year tenancy with an annual renewal. Under the Agricultural Tenancies Act 1995 a longer period than 3 years could not be offered to a tenant. Mr Sewell stated that he was not aware that there was any sub-letting, and if there was it was contrary to the Lease. He has no memory of knowing anything about sub-lettings, nor could he remember horses in the fields.

Summary

4.45.1. During his early years as an Assistant Land Agent from 1992 part of Mr Sewell's job was to visit the various parcels of land comprising the County Farm Estate to ensure, amongst other things that the land was being used in accordance with the terms of the tenancies granted to the farm tenants. His overall involvement with the County Farm Estate was from 1997 to 2008, but there appears to have been quite limited day-to-day involvement on his part. Mr Sewell makes reference to the only three recorded visits made to Herston Fields, namely the two made by Mr Gannon in October and November 1984, and the only visit made by Mr Sewell made in August 1998. He remembered that Herston Farm including Herston Fields was not being cultivated by Mr Tatchell to its full potential. He would not have come specifically to Herston Fields, except during the course of rent reviews every 3 years. When the inspection took place in August 1998 he says that he would have

walked over Herston Fields as it was his policy to spend time with the farmer and look around the holding. This related to the September 1998 rent review. He would not have come specifically to Herston Fields except during the course of rent reviews.

4.45.2. He had always known that the land was poorly looked after from about 1998, and concern had been expressed about Mr Tatchell by Mr Sewell's predecessor, Mr Gannon, in the 1980s. This had led to a draft notice to remedy being produced in October 1985. Mr Sewell could not recall any conversations about any limitation on the public using Herston Fields in order to try to reduce the rent. This would have been a bargaining position on the part of the tenant. If such an issue had been raised Mr Sewell stated that he would have tried to prevent it, but he had no memory of any issue being raised with regard to open access to Herston Fields, but he had no note on the subject.

4.45.3. Mr Sewell had driven past the fields on many weekends going to Swanage, and he accepted that he only saw the fields from a car. The policy was to visit the land once per year, and the Northern Field he visited more frequently. Such visits would be made on weekday business hours. However, he did believe that he was about a "fair bit". No records exist of any of these visits, except for the one made by him in 1998, and the two made by Mr Gannon in 1984. Mr Sewell had no memory of any public access, or knowing anything about sub-lettings, nor could he remember horses in the fields.

Mr Benjamin James Lancaster

4.46. Mr Lancaster is a Senior Land Agent in the Rural Practice Team of DCC's Dorset Property and he has worked in this capacity since 2002. His witness statement is dated 14th November 2014. In paragraph 1 of his witness statement he describes his

role which included managing the agricultural estate owned and leased by DCC known as the County Farm Estate in its capacity as Smallholdings Authority, pursuant to the provisions of the Agricultural Act 1947, and subsequently the Agricultural Act 1970. His responsibilities for land management included Herston Fields which he managed from 2002 until DCC surrendered its interest in the land in November 2013. When the term of the Lease expired in April 1998 DCC continued as a tenant from year to year under the provisions contained in the Agricultural Holdings Act 1986.

- 4.47. As a Senior Land Agent part of his responsibilities is to visit the various parcels of land within the County Farm Estates to ensure (amongst other matters) that the land is used in accordance with the tenancy granted to the farm tenants. Typically, he said that his visits occurred on weekdays during business hours. His paper diaries record visits to Herston Fields on three dates, namely 5th August 2003, 2nd August 2004 and 21st October 2013. On the first occasions as he was relatively new in post he took the opportunity to make an inspection of the land at that time. He cannot recall the purpose of the 2004 visit, but the 2013 visit was to ensure that vacant possession had been delivered by the tenant prior to surrender of the land to the Scott Estate. Mr Lancaster also records in paragraph 4 of his witness statement nine further dates when he drove past Herston Fields, but did not walk the Fields. He stated that there may have been other dates as well but those are not recorded.
- 4.48. On the three visits when he walked the land, Mr Lancaster states that he would have walked all over the fields to inspect them, and would not have remained on the public footpath. He recalls that on his first visit the land was in poor condition, and was being used as permanent pasture. When Mr Helfer took a sub-lease of Herston Fields in 2002 following the death of Mr Tatchell on 10th October 2000, his recollection was that the condition of the land had improved. Between 2002 and 2004 Mr Helfer used the fields for grazing his dairy cows and also for growing fodder crops, such as haylage/silage. Mr Lancaster states that he can recall seeing cut grass on Herston Fields waiting to be turned/baled during Mr Helfer's sub-tenancy.

- 4.49. Following the termination of Mr Helfer's tenancy in 2004, Mr Dicker's sub-tenancy commenced on 25th March 2005. Mr Lancaster states that he made drive-by inspections, and the land was always in pasture. However, the condition of Herston Fields did not improve any further during the sub-tenancy of Mr Dicker. Mr Lancaster stated that until the Autumn of 2013 he was unaware that Herston Fields were being sub-let by Mr Dicker, such sub-letting not having the consent of DCC.
- 4.50. On the occasions (there were 9 recorded) when Mr Lancaster did drive past Herston Fields, he stated that he would have a quick look, but did not recall seeing anyone on Herston Fields during any of his visits and observations. He stated that had he seen members of the public using the land other than the public footpath "... *this would have registered with me and I would have made a note (either on paper or a mental note when driving) to take action*". He would have been concerned if he saw anyone playing football or games, kite flying or having a picnic on the fields as he was aware of the implications that can arise in such use. Mr Lancaster stated that he would have contacted the tenant once he was back in the office, but he did not recall doing this, and he has no file notes to recall having taken such a step. Further, none of the tenants ever raised any concerns with him about the use of Herston Fields by the public for recreation.
- 4.51. In cross-examination he acknowledged that the drive-by "*visits*" only enabled him to see the Southern Field from the High Street, and there could have been people there but it was, in effect, a momentary snap-shot when driving past. He did not see cows in Herston Fields.

Summary

- 4.51.1. Mr Lancaster's paper diaries record visits to Herston Fields on three dates in August 2003, August 2004 and October 2013, and with a gap of nine years between August 2004 and October 2013. He also made nine drive-by visits, which only gave a fleeting glimpse of Herston Fields. Thus there were twelve visits in all between August 2003 and October 2013. Typically, he said that his visits occurred on weekdays during business hours. He did not recall seeing anyone on Herston Fields during any of his visits and observations. He would have been concerned if he saw anyone playing football or games, kite flying or

having a picnic on the fields as he was aware of the implications that can arise in such use, and he would have contacted the tenant once he was back in the office, but he did not recall doing this, and he has no file notes to recall having taken such a step. Further, none of the tenants ever raised any concerns with him about the use of Herston Fields by the public for recreation.

Mr David Pardoe

- 4.52. Mr Pardoe is a member of the Royal Institute of Chartered Surveyors and currently works for Humberts. Prior to his employment with Humberts he was a land agent employed by Savills between September 1996 and June 2011. In that capacity he was the Assistant Agent for the Scott Estate from September 1997 until 2000, and from then 2000 until 2011 he was the Principal Agent. His witness statement is dated 27th November 2014.
- 4.53. In paragraph 3 of his witness statement Mr Pardoe states that the Scott Estate had no day-to-day involvement in the management of the land leased to DCC unless an issue required the head landlord's involvement. He only had contact with DCC's sub-tenants. The Estate also had no responsibility for Herston Fields when regard is had to the terms of the Lease. He said that it was DCC's responsibility to sort out any issues to do with Herston Fields.
- 4.54. As a consequence of proposals being made for the surrender of the Lease, in 2004 he, together with colleagues from Savills, inspected all the land leased to DCC in the Scott Estates' portfolio, which included Herston Fields, in order to evaluate the land's value from a planning perspective. He recalls that when they visited Herston Fields that the Southern Field had just been cut for silage. He also recalls seeing stock grazing on the Northern and Eastern Fields, but could not recall precisely whether they were cattle or sheep. There was no apparent use of the fields by the public other than the use of the public footpath where a trodden path was clearly visible. He did not recall anyone on Herston Fields on this visit which would have been made during working hours.

- 4.55. Other than the 2004 inspection, Mr Pardoe stated that he rarely visited Herston Fields directly, but did drive past regularly both along the High Street and Washpond Lane. He stated that as time went on it became apparent that another circular path around the Southern Field was being created by use. He could not recall the nature of the realisation, or when, but it may have been on a drive-by, and he had very limited memory on the subject. Mr Pardoe states that he did not recall this trampled path being evident on the 2004 inspection, and could not recall when,
- 4.56. By about 2009/2010 he became aware that local public were taking an interest in Herston Fields, and that there was a “*Save Herston Fields*” campaign. Prior to that he was unaware of there being any issues reported to him about public access onto Herston Fields either from DCC or the sub-tenants.
- 4.57. In paragraph 8 of his witness statement Mr Pardoe states that he had discussions in 2010 with the farmers to whom Herston Fields had been sub-let from 2002 onwards. He said that the sub-tenants had started to have issues of people being on the fields, and that they had done their best to keep people out by putting up fences and often had to ask people to get off the fields unless they were using the public footpath. He also recalled a specific conversation with Mrs Helfer who had tried to stop people at the end of the school day taking a short cut across Herston Fields. However, none of these concerns was apparently relayed to either Mr Sewell or Mr Lancaster prior to the surrender of the Lease by DCC to the Scott Estate. In the final paragraph of his witness statement Mr Pardoe says that the sub-tenants gave witness statements to him (and apparently also to Mr Hill) about their concerns over Herston Fields. None of these concerns seemed to have been relayed either to Mr Sewell or to Mr Lancaster, nor were the witness statements produced during the course of the evidence during the Public Inquiry.
- 4.58. In cross-examination Mr Pardoe stated that his instinct was in relation to paragraph 5 of his witness statement that the animals on site were cattle, but he could not be more specific than that, and “*could not put a finger on it*”. There were few landlord’s obligations contained in the Lease. Mr Pardoe agreed that he would not be involved in relation to day to day aspects, but if there were major capital items such as erection of farm buildings then he would get involved. He agreed that they were sub-tenants

of DCC, and not tenants of the Scott Estate. The High Street was elevated which enabled him to have a view of the Southern Field. Mr Pardoe stated that he could not recall asking Mr Dicker to plough the Fields, and to pay him money for so doing. He stated that he had many conversations with various people but could not remember this one. Some doubt was raised by Mr Jensen as to exactly how much Mr Pardoe could see of the “trodden path” around the perimeter of the Southern Field from the car when driving past along the High Street. Mr Pardoe stated that he was not aware of any gypsy/traveller proposal, nor of any proposed housing development.

Summary

4.58.1. From September 1997 until 2011 Mr Pardoe worked for Savills who were retained by the Scott Estate. During that time the only apparent direct visit he made to Herston Fields was that which occurred on the 2004 inspection. He stated that he rarely visited Herston Fields directly, but did drive past regularly both along the High Street and Washpond Lane. He stated that as time went on it became apparent to him that another circular path around the Southern Field was being created by use. He could not recall the nature of the realisation, or when, but it may have been on a drive-by. He said that the sub-tenants had started to have issues of people being on the fields, and that they had done their best to keep people out by putting up fences and often had to ask people to get off the fields unless they were using the public footpath. He also recalled a specific conversation with Mrs Helfer who had tried to stop people at the end of the school day taking a short cut across Herston Fields. However, none of these concerns was apparently relayed to either Mr Sewell or Mr Lancaster of DCC prior to the surrender of the Lease by DCC to the Scott Estate. Apparently witness statements had been provided by the sub-tenants about their dealings with Herston Fields, but they were not produced in evidence during the Public Inquiry.

Mr David Jonathan Hill

- 4.59. Mr Hill is a member of the Royal College of Chartered Surveyors and was employed by Savills the Land Agent acting on behalf of the Scott Estate. He left Savills in 2015 and since has been an adviser to the Country Landowners Association. He made his witness statement on the 24th November 2014.
- 4.60. He describes having joined Savills in 2003 after training, and from 2006 to 2011 he was an Assistant Land Agent to the Scott Estate, and became the Principal Land Agent in 2011. From 2003 to 2004 he worked two days a week in the Scott Estate Office in Kingston over-seeing the management of the Scott Estate as a whole. He describes that the Scott Estate had little involvement in the management of the six farms leased to DCC as it had its own team of land agents. It was not necessary to interact with DCC other than for rent reviews and repairs.
- 4.61. In paragraph 6 of his witness statement, Mr Hill stated that in 2003/2004 he was based in Purbeck for 2 days per week. At this stage he would drive around the whole of the Scott Estate including the land leased to DCC, every couple of weeks. He stated that whenever he saw Herston Fields on these drive-bys he would only ever see people using the public footpath, such as to walk dogs. He stated that he never saw anyone using Herston Fields for any sports or games or other recreational activities.
- 4.62. In his oral evidence relating to the contents of paragraph 6 of his witness statement Mr Hill stated that he could see the Southern Field, the Northern Field and a bit of the Eastern Field from the High Street on his drive-bys. Mr Helfer used the land for grazing cattle, and there was an electric fence present.
- 4.63. In paragraph 7 Mr Hill describes how when he became involved with the Scott Estate in 2003 he was aware that the sub-tenant of DCC was Mr Helfer. He says that at this time the condition of the land at Herston Fields was not too bad although the hedges were “tatty”. From 2004 to 2005 the fields were sub-let to Mr Dicker, and in his view since 2005 the condition of the land got worse from an agricultural perspective as it was grazed by horses. The hedges were also poorly maintained and

spread quite considerably and for the most part were impenetrable. The current tenant Mr Derek Smith has taken steps to improve the condition of the fields.

- 4.64. Exhibited to Mr Hill's witness statement were a number of photographs which he was shown during the course of his examination in chief, which were taken probably around 2014.
- 4.65. In paragraph 9 of his witness statement, Mr Hill refers to the visit which was made in 2004 with Mr Pardoe together with valuers from Savills when they carried out a valuation exercise over all the land held by DCC which included Herston Fields, in order to establish market value for management purposes. He states that he recalls that there were cattle on Herston Fields and the fields were bounded by electric fencing. Mr Hill also produced a number of further photographs which were taken when they undertook this valuation exercise in 2004. He saw cattle in the fields and an electric fence and no sign of trampling around the Fields. There were cattle on the Southern Field, and the gates were left open between the Southern and the Northern Fields. He says that he saw electric fencing in the Southern Field, and stated that photograph No.2 in Exhibit DJH3 indicated such fencing.
- 4.66. In paragraph 10 of his witness statement Mr Hill states that from 2006 onwards when he became the Assistant Land Agent to the Scott Estate, and at the date of his statement, he said that he routinely drove around the whole of the Scott Estate every couple of months. He said that this involved driving past the whole estate or alternatively walking across any public footpath. Insofar as Herston Fields is concerned, he thought that he went around about once per month. On these visits he found nothing untoward, but acknowledged that on the drive-bys this would only take a matter of moments.
- 4.67. In paragraph 11 of his witness statement, Mr Hill stated that his first recollection of concerns about open public access on Herston Fields arose in about 2009/2010 when various options were proposed by Purbeck District Council. Herston Fields were perceived as being a potential development opportunity for houses, doctor's surgery, and a community centre. Mr Hill exhibits an article published in the Daily Echo detailing the "Save Herston Fields" campaign, the edition being dated 24th July 2010. Reference is made to about 120 people attending a meeting in Herston Hall, and the

fact that 900 people had already signed a petition demanding that Herston Fields be left alone, and that hundreds more had joined an online “*Save Our Herston Fields*” Forum on Facebook. In fact, the petition bore 450 signatures.

- 4.68. Mr Hill also referred to the fact that in 2011 Herston Fields were also identified as a suitable site for gypsy or traveller use. Since then, he stated, the Scott Estate has taken more of an interest in Herston Fields, and had taken statements from previous tenant farmers and other local people. In these statements these people have apparently stated that there has not been public access to Herston Fields beyond that which is permitted along the public footpath. Those statements have never been produced in evidence by the Scott Estate, and did not form part of the evidence at the Public Inquiry.
- 4.69. Mr Hill states in paragraph 12 of his witness statement that the Southern Field was ploughed in 2011 and was sown with a crop of Triticale and Lupin to see if the land was suitable for arable farming. Those further photographs were produced as Exhibit “DJH5” which were taken on 1st November 2013, to which reference was made during the course of Mr Hill’s evidence. These photographs are not relevant as they were all taken in 2013 and indicate ploughing of the land.
- 4.70. Mr Hill also stated during the course of his examination-in-chief that he considered that more and more people were using the fields for recreational activities.
- 4.71. Insofar as the ploughing of the fields in 2011, Mr Hill stated that this was a deliberate act to deter persons using the fields, to plough up to the hedgerows. He was not aware that the fields had been ploughed before. The intention was to stop people from walking on the fields. There was very small scale evidence of the trampling of crops.
- 4.72. Mr Hill also referred to a number of aerial photographs exhibited as “DJH6”, and Google Earth screen shots from 2002 to 2014. The aerial photographs are from 1947, 1972, 1997, 2002, 2005 and 2009. The description of these various photographs are set out in paragraph 14 of Mr Hill’s witness statement. A number of features were examined during the course of his oral evidence such as cattle treads and cattle paths,

and more recently what is said to be a path around the perimeter of the Southern Field which was not visible in previous photographs.

4.73. In the last paragraph of Mr Hill's witness statement, he acknowledged that until recently there had been no signs on Herston Fields to say that the land is private. He stated that up until November 1913 the fields were let to DCC so the Scott Estate had no responsibility or managerial control of the land. He stated that there was also never any need to put up signs because no issues were communicated concerning open public access. However, this appears to be at variance with the various statements Mr Hill made with regard to the sub-tenants apparently producing written statements to him and Mr Pardoe expressing their concerns as to the use of Herston Fields by members of the public. Recently such signs have been erected on Herston Fields in the light of the Application and as Mr Hill put it "*the encouragement*" to local people to use Herston Fields for recreational activities.

4.74. In cross-examination Mr Hill stated that he could see across to the Southern Field, even though (according to Mr Jensen) it would only take 15 seconds at 25mph to have any view of the Southern Field. Insofar as Mr Dicker being told to plough the fields, it was put to Mr Hill that a Mr Matthew Tawl told Mr Dicker to do this and his expenses would be paid. He was also told what crops to grow. Mr Hill also stated there was no visible sign of people walking on the Northern Field.

Summary

4.74.1. After training in 2003 until 2015 Mr Hill was employed by Savills and was assigned to work for the Scott Estate, initially for two days a week in 2003/2004 in the Estate Office in Kingston over-seeing the management of the Scott Estate as a whole. He describes that the Scott Estate had little involvement in the management of the six farms leased to DCC as it had its own team of land agents. It was not necessary to interact with DCC other than for rent reviews and repairs. At the initial stage he had little involvement with Herston Fields in that he would drive around the whole of the Scott Estate including the land leased to DCC, every couple of weeks. He stated that whenever he saw Herston Fields on these drive-bys he was able to see the Southern Field, the

Northern Field and a bit of the Eastern Field from the High Street on his drive-bys, and would only ever see people using the public footpath, such as to walk dogs. He stated that he never saw anyone using Herston Fields for any sports or games or other recreational activities. Insofar as Herston Fields is concerned, he thought that he went around about once per month. On these visits he found nothing untoward, but acknowledged that on the drive-bys this would only take a matter of moments.

- 4.74.2. Mr Hill only ever seems to have undertaken one inspection of Herston Fields. This was in 2004 with Mr Pardoe together with valuers from Savills when they carried out a valuation exercise over all the land held by DCC which included Herston Fields. Mr Hill also produced a number of further photographs which were taken when they undertook this valuation exercise in 2004. Reliance was also placed upon a number of aerial photographs taken over a number of years, which at best can only be a snapshot of the time when they were taken. He said that concerns about open public access on Herston Fields first arose in about 2009/2010 when various options were proposed by Purbeck District Council. Herston Fields were perceived as being a potential development opportunity for houses, doctor's surgery, a community centre, or a gypsy site.

Mr Alan John Smith

- 4.75. Mr Smith made his witness statement on 6th February 2016. He is a retired farmer and was born in April 1934 at Prospect Farm, which was a tenant farm leased from DCC, the Head Landlord being the Scott Estate. Mr Smith describes Herston Fields as being known to him as First Genniss, being the Southern Field, Second Genniss being the Northern Field, and Brimbalong being the Eastern Field. The Eastern Field was rented by his grandfather, and then his father, from DCC. He explains in paragraph 5 of his witness statement that in 1954 DCC re-adjusted the holding so that the Eastern Field then became included as one of the three fields comprising the Herston Fields holding.

- 4.76. In paragraph 5 Mr Smith states that all three fields comprising Herston Fields were then let to Mr Tatchell from 1954. Mr Smith stated that when Mr Tatchell first started farming everything was in good order, but towards the end as he got older and unwell the condition of the farm was not so good, and the boundaries were not always kept well.
- 4.77. In paragraph 9 Mr Smith stated that he remembered that Mr Charles Tatchell and his son Gerald Tatchell used to allow the annual fun fair and circus to use the bottom section of First Gennis (the Southern Field) however this stopped after the road widening of the High Street took place in the late 1950s/ early 1960s. After the road was widened the fun fair moved to fields on the other side of the school to the west of Herston Fields. Neither Mr Charles Tatchell nor Mr Gerald Tatchell stood for any nonsense and would not let any of the local kids get out onto the Fields.
- 4.78. In paragraph 9 of his witness statement Mr Smith makes reference to Mr Tatchell's cattleman was a Mr Tom Batterick, who worked for Mr Tatchell for at least 40 years. Mr Smith stated that Mr Batterick made sure people stayed on the footpath. Mr Smith also stated in the 1960s, and possibly 1970s "*I do remember seeing kids kicking a ball around Herston Fields on the odd occasions*". Mr Tatchell always had a bull, possibly more than one running with the cattle at all times, and the bulls would have been loose on Herston Fields. He said that he suspected that this deterred people from being on the fields other than walking on the footpath.
- 4.79. After Mr and Mrs Tatchell died in 2000 and 2002 respectively, Mr Smith stated that he recalled Mr and Mrs Helfer leased Herston Fields for a few years. He recalled that Mr Helfer ploughed the Southern Field (first Geniss) soon after he took over the fields and re-seeded it. He said that he could also remember him having cattle on the fields. After Mr and Mrs Helfer left he believed that Mr Dicker became the tenant of the fields and he recalled him ploughing the Southern Field and growing a crop in the late 2000s. Mr Smith also recalled there being horses in the field in 2004, 2005, and 2006. He stated that since 2002 local people have had more freedom to use Herston Fields as "*there is not someone down there all the time like Mr Tatchell and Tom Batterick were.*" Mr Smith stated that he had seen people walking on the footpath and walking around the edge of the Southern Field, but he had never seen

any kind of organised recreational activities, such as football or cricket games involving two proper teams on Herston Fields. However, he stated that he has seen kids kicking a football around, but this was in the 1960s/1970s, and certainly not within the last 30 to 35 years.

- 4.80. In cross-examination he stated that he never understood the “*set-up*” with Mr Helfer, and “*didn’t know how he got there*”.

Summary

4.80.1. Mr Smith stated that neither Mr Charles Tatchell nor Mr Gerald Tatchell stood for any nonsense and would not let any of the local kids get out onto Herston Fields, but also said that in the 1960s, and possibly 1970s he remembered seeing kids kicking a ball around Herston Fields on the odd occasions. He also said that since 2002 local people have had more freedom to use Herston Fields as “*there is not someone down there all the time like Mr Tatchell and Tom Batterick were.*”

Mrs Elizabeth Jean Smith

- 4.81. Mrs Smith lives at 2 Hendrie Close, Swanage, and made her witness statement on 10th October 2014. She describes herself as a retired secretary/quarry office manager/farmer’s wife, and she has lived and worked in the Swanage area all her life.
- 4.82. In paragraph 3 Mrs Smith states that in 1948 (when she was 9 years old) her family moved to Langton Matravers, and from 1950 to 1955 she attended Swanage Grammar School. As the family lived 3 miles outside Swanage a coach would pick her up every day to take her to the Grammar School. This would pass along the High Street into Swanage which meant that she passed Herston Fields twice a day every school day. This was before the road was widened at Herston Cross and the large verge created. Until the road was widened the Southern Field at Herston Fields was bounded by a stone wall which ran right alongside the road. Exhibited to her witness statement is a bundle containing copies of old photographs of Herston Fields. During the course of her oral evidence Mrs Smith was asked to identify these photographs.

- 4.83. Mrs Smith stated that she always remembered there being cows on Herston Fields when she would pass on the coach between 1950 and 1955, and from the coach she had a good view of the Southern Field together with the Northern Field behind it. However, she could not see the Eastern Field. In paragraph 4 of her witness statement she asserts that photograph No.4 was taken in 1902 probably from the Southern Field, and this shows cows in the fields even then. This was an unchallenged. Photograph No.5 is an aerial photograph from about 1935 where the Southern Field is shown on the bottom left-hand corner which she says shows livestock in the field.
- 4.84. Mrs Smith also recalls the time when Herston Fields were let to Mr Tatchell, and she remembers him having cattle in the fields. She stated that Mr Tatchell “*did not stand for any nonsense from people being in the fields, and this was how he was whilst he remained fit and well which would have been up to about the late 1990s*”. Mr Batterick, his cattleman, was the same. He would always tell people to stick to the footpath. From 2002 after the death of Mr Tatchell in 2000 and his wife in 2002, Mrs Smith remembers Mr and Mrs Helfer renting fields for a few years. She says they ploughed the fields to start with, and the footpath had been ploughed up and then reinstated. She also states that she remembers Mr Dicker renting the fields after that, but he then sub-let Herston Fields for horse grazing. She has also seen haymaking in the fields over the last 10 years.
- 4.85. In paragraph 8 of her witness statement Mrs Smith states that in terms of the use of Herston Fields by the locals, she knew that her sons never went onto the fields to kick a ball about like some of their friends did, because they knew Mr Tatchell would tell them off. This would have been in the 1960s/early 1970s. Mrs Smith states that she recalls her sons telling me that their friends had been told off by Mr Tatchell for playing football on the fields. She also confirms her husband’s evidence insofar as when Mr Tatchell had bulls on the fields from the 1970s/1980s onwards. Mrs Smith also stated that since 2002 she has noticed that people were starting to walk around the Southern Field. She stated that she was concerned about dog defecation.

- 4.86. In cross-examination Mrs Smith agreed that there would be a more restricted view of the Southern Field in a car rather than in a coach. She also stated that Mr Tatchell was well known for shouting, and his character changed. Mrs Smith stated she used to visit her mother when she was still alive on a daily basis but she died 4 years ago.

Summary

- 4.86.1. Mrs Smith confirmed that Mr Tatchell did not stand for any nonsense from people being in the fields, and this was how he was whilst he remained fit and well which would have been up to about the late 1990s. Mr Batterick, his cattleman, was the same. He would always tell people to stick to the footpath. Mrs Smith said that she knew that in the 1960s/early 1970 her sons never went onto the fields to kick a ball about like some of their friends did, because they knew Mr Tatchell would tell them off. Mrs Smith also stated that she recalls her sons telling me that their friends had been told off by Mr Tatchell for playing football on the fields. Since 2002 she has noticed that people were starting to walk around the Southern Field. She stated that she was concerned about dog defecation. She agreed in answer to questions being put to her by Mr Jensen that there would be a more restricted view of the Southern Field in a car rather than in a coach.

Mr Derek William George Smith

- 4.87. Mr Derek Smith is the son of Mr and Mrs Smith, and lives at 76 Victoria Avenue, Swanage. He made his statement on 24th November 2014. He states in his witness statement that he is the current tenant of Herston Fields and has rented the land directly from the Scott Estate since October 2013. He is also the tenant of the neighbouring Prospect Farm also rented from the Scott Estate, this land being located to the north and east of Herston Fields. He states that he mainly farms at Prospect Farm, and that his family have been tenants of that farm for over three generations since the late 1870s.

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- 4.88. Mr Smith states that for the period from 1997 to 2002 he worked for Mr and Mrs Gerald Tatchell as well as farming his own land. He said that Mr and Mrs Tatchell had about 120 acres in total including Herston Fields. He stated that cattle used to graze on all three fields, but would be rotated between all the fields that Mr and Mrs Tatchell rented comprising Prospect Farm. On Herston Fields the cattle could move between all three fields as there were no gates. On Mr Tatchell's death all the cattle were sold and Mr Smith stated that he bought the majority of the cows. He said there was a degree of rutting and poaching on the fields during Mr Tatchell's time.
- 4.89. In paragraph 7 of his witness statement Mr Smith refers to documents which were exhibited to his statement (Exhibit "DWGS2"). These documents related to subsidies which Mr Smith was able to recoup, having been missed by Mr Tatchell during his time as farmer. These documents record a period from 1999 to 2002, and the highlighted entries are to Herston Fields which show that Mr and Mrs Tatchell were claiming these fields as part of their forage area for the Beef Special Premium payment together with other subsidies, subsequently replaced by the Single Farm Payment in about 2004. This therefore is a record of what the land was used for at the time.
- 4.90. In paragraph 8 of his witness statement Mr Smith stated that he lives near to Herston Fields and drives past most days down Washpond Lane. He states that after Mr Tatchell died the Fields, he believed, were let to Mr Dicker who then sub-let them to Mr Helfer. He recalls that Mr Helfer ploughed the Southern Field once and sowed a fresh layer of grass, and also that he grew a silage crop in 2003/2004. Mr Smith stated he was the sort of person who would tell people to stay on the footpath.
- 4.91. From about 2005 to Autumn 2013 the fields were grazed by horses belonging to Mr Lawrence. Mr Smith stated that he did recall the Southern Field being ploughed in 2011.
- 4.92. In paragraph 10 of his witness statement Mr Smith describes the public footpath, and stated that whilst Mr and Mrs Tatchell rented the fields the local people walking across the fields would always stay on the footpath. As he said, there seemed to be more adherence to footpath and a respect for private land at this time. He said that

he also considered that the locals were wary of cattle, as there would be 2 or 3 bulls grazing with the cows. He recalls that Mr Batterick would always shout at anyone who was not walking on the footpath. *“He farmed Herston Fields with an iron fist, and had no qualms about telling people to stick to the footpath”*.

4.93. In paragraph 11 of his witness statement Mr Smith says that local people do use Herston Fields for dog walking, and he stated that once Mr Lawrence started to use the Fields to graze his horses from 2005 onwards he noticed that people started to stray from the public footpath when walking in the fields, instead of doing a circular route around the Southern Field. This was probably because there was no longer a regular herd of cattle on the fields to deter people, and the fields were not so muddy from the cattle hooves. Mr Smith also went on to state that he has seen more use in the last 3 to 4 years i.e. up to November 2014, and there has been an increase in the number of people letting their dogs off the lead to roam the fields. He says that to some extent the locals use the fields as a *“dog toilet”*.

4.94. Mr Smith then went on to state that over the winter of 2012 and the spring of 2013 he recalled there was less walking than usual on the Southern Field. The circular path around the Southern Field became less visible probably because of the wet weather which caused boggy areas in the field at that time. In October 2013 Mr Smith says that he ploughed the Southern Field with a wheat crop which involved ploughing the field and then sowing the seed a week or so later. He purposively left the footpath unploughed and unplanted.

4.95. Mr Smith then stated that during the past few months i.e. in 2014 he travelled past Herston Fields nearly every day either once or twice or sometimes more because he worked with a person who has a yard about a mile past the Fields. He stated that there has been visible use of the public footpath in the Southern Field, and a footpath was trodden into the crop along the southern edge of that field towards the gate on its west side.

- 4.96. Insofar as the Northern Field and the Eastern Field was concerned, at the end of 2013 they were not in the best of condition. He spent some time pulling out the brambles and topping the fields before spraying fertilizer and growing haylage. Mr Smith stated that people did seem to stick to the public footpath across the Northern Field, although he said that someone had been walking around the Eastern Field as there was a path trodden down. He stated that someone had strimmed the grass down to create a footpath around the Eastern Field.
- 4.97. Finally, Mr Smith stated that throughout his involvement with Herston Fields he has never seen the fields being used by local people for anything other than walking with or without dogs. He stated that he has seen some people blackberry-picking, but this is mostly done from the verge outside the fields. He has also seen people playing football on the verge a handful of times but never in the Fields themselves. Herston Fields have always been farmed either for grazing of cattle or growing haylage/silage. Since 2013 he has on a few occasions told people to stay on or return to the footpath.
- 4.98. In cross-examination he stated that he was improving the whole of Herston Fields, he had cut the hedges back and removed foliage from the top. He had also removed scrub alongside the stream.

Summary

- 4.98.1. Mr Smith is the current tenant of Herston Fields and has rented the land directly from the Scott Estate since October 2013. He is also the tenant of the neighbouring Prospect Farm also rented from the Scott Estate, this land being located to the north and east of Herston Fields. He states that he mainly farms at Prospect Farm. From 1997 to 2002 he worked for Mr and Mrs Gerald Tatchell as well as farming his own land. He said that Mr and Mrs Tatchell had about 120 acres in total including Herston Fields. He stated that cattle used to graze on all three fields comprising Herston Fields, and the cattle could move between all three fields as there were no gates. Whilst Mr and Mrs Tatchell rented the fields the local people walking across the fields would always stay on the footpath. Mr Batterick would always shout at anyone who was not

walking on the footpath. Which he farmed with an iron fist and had no qualms about telling people to stick to the footpath. Mr Smith stated that local people do use Herston Fields for dog walking, and once Mr Lawrence started to use the Fields to graze his horses from 2005 onwards he noticed that people started to stray from the public footpath when walking in the fields, instead of doing a circular route around the Southern Field.

- 4.98.2. Throughout his involvement with Herston Fields Mr Smith has never seen the fields being used by local people for anything other than walking with or without dogs. He stated that he has seen some people blackberry-picking, but this is mostly done from the verge outside the Fields. He has also seen people playing football on the verge a handful of times but never in the Fields themselves. Herston Fields have always been farmed either for grazing of cattle or growing haylage/silage.

Witnesses for the Scott Estate who did not give evidence

Mr David Eldon Scott

- 4.99. Mr Scott made his witness statement on 12th September 2014, and has since died. In his witness statement he stated that he had never seen Herston Fields being used for anything other than farming. It was part of a dairy farm, and the most common sight was to see cows grazing, particularly in the Southern Field. Mr Scott saw people walking on the public footpath, with the odd dog running around in the Southern Field, but no games being played. He would have noticed if such activities had been going on as it would have been unusual.

Mr Rupert Owen Sebag-Montefiore

- 4.100. Mr Sebag-Montefiore is a trustee of David Eldon Scott's 1970 Settlement, together with other trusts. He was also the estate Manager between 1980 and 1985. He was not called to give evidence, presumably because his evidence is unrelated to the prescriptive period in question.

SECTION 5

5. DISCUSSION – THE FACTUAL AND LEGAL ISSUES

5.1. In this Section the order set out for the consideration of the legal principles arising under section 15(3) has been altered from that found in Section 2. However, it is first necessary to consider whether the Scott Estate has suffered any prejudice, and/or whether there has been any procedural unfairness subsequent to the Public Inquiry.

Power to amend and material prejudice and procedural unfairness

5.2. In Section 2 of the Report consideration has been directed to these issues. Having regard to the legal principles set out, in my judgment, it cannot be successfully asserted that in some way the Objector or his legal representatives have in some way been materially prejudiced, or that there has been procedural unfairness, for the following reasons:

- (1) The procedure adopted in this Public Inquiry established under the 2006 Act, and the subsequent consultation, was conducted in accordance the procedural requirements and mirrored those adopted in a planning inquiry.
- (2) No material prejudice has been occasioned to the Objector, nor has there been any procedural unfairness occasioned. The Scott Estate and its legal advisers, have had ample opportunity during the consultation period to make representations on the Inspector's draft recommendations. Indeed, the Objector has responded, as set out so in the formulation contained in the Additional Representations.
- (3) I have now considered these representations. I have made amendments or additions, to the Draft Report where it is perceived as being necessary or appropriate.
- (4) I am entitled to make a recommendation based upon the evidence and the historical considerations as to identify the *neighbourhood* of Herston in the circumstances as developed during the course of the Public Inquiry, much

of it at the instigation of Leading Counsel and Junior Counsel during lengthy cross-examination of the Applicant's witnesses.

- (5) I have made my recommendations to the Registration Authority based upon the evidence adduced and the representations made. It is entirely within the discretion of the Registration Authority to accept or reject such recommendations.

5.3. In essence, therefore, a full consultation has been undertaken on the issues identified; representations have been made; and the Inspector has come to certain conclusions in his recommendations to the Registration Authority. It is considered that in the circumstances no material prejudice or procedural unfairness has been occasioned to the Scott Estate. The Scott Estate has been given ample opportunity to comment on the historical source material documentation referred to in Section 2 provided on request, and no subsequent comment on that historical information has been forthcoming.

5.4. The next consideration to be addressed is whether Herston can be defined as a "locality" or a "neighbourhood within a locality".

Herston as an entity

5.5. Drawing together the various strands relating to the identification of the area known as Herston, and to the short historical summary set out in Section 1, I have come to the conclusion that Herston developed as a separate hamlet from Swanage. Throughout its history until probably the mid-20th Century Herston has comprised a separate identifiable entity at what is now the western fringe of Swanage. Thus, in the Inspector's judgment, until effectively swallowed up, and then incorporated into the Urban District Council, Herston historically had undoubtedly been a separate hamlet. The centre of this former separate hamlet is still identifiable today particularly in the area south of Herston Cross in the vicinity of Bell Street and other neighbouring roads. Indeed, some of these roads form part of what is now the Herston Conservation Area.

- 5.6. Accordingly, I reject the submission made by Leading Counsel for the Scott Estate that Herston itself is not a separate identifiable area or entity.
- 5.7. However, the matter does not end there as the question then arises as to whether the applicants have demonstrated, on a balance of probabilities, that they have sufficiently identified Herston as a “*locality*”, or a “*neighbourhood within a locality*”, for the purposes of the statutory provisions contained in section 15 of the 2006 Act. In this context if such an area has not been so properly identified by reference to Map A, the issue then arises as to whether that area can be identified in accordance with the statutory provisions.¹³² In essence, can Herston be defined by a set of boundaries which satisfies the statutory test?
- 5.8. The submission made by the Applicants is that although they acknowledge that Herston today is effectively a suburb of Swanage, there is sufficient evidence that it is a *neighbourhood* which retains its own identity. It is therefore sufficiently defined when regard is had to the evidence in support of the Applicants’ case.

Locality/Neighbourhood within a Locality

- 5.9. The point is taken by the Leading Counsel for the Scott Estate that during the course of the Hearing it remained unclear throughout as to whether the Applicants were relying upon the area delineated on the map marked Exhibit A¹³³ as a “*locality*” or a “*neighbourhood within a locality*”. As submitted, Mr Jensen stated that the outset of the Public Inquiry that he considered that Herston was probably a *neighbourhood*, but seemed to be reluctant to commit himself one way or the other.¹³⁴ The contention raised by the Leading Counsel is that since the Applicants have not provided evidence of any current administrative boundary, or other recognisable area known to law, which corresponds with the identified boundary of Herston, it would seem that the Applicants must rely upon Herston as a *neighbourhood*.
- 5.10. It is submitted by Leading Counsel for the Scott Estate that the evidence adduced during the course of the Inquiry conveyed confusion with regard to the precise

¹³² See Commons (Registration of Town and Village Green) (Interim Arrangements) (England) Regulations 2007 (SI2007/457, reg 3.

¹³³ KD1/11, confirmed by Mr Jensen in cross-examination.

¹³⁴ In cross-examination.

boundary of Herston Village. The evidence of Mr Quaddy has been relied upon to indicate that there are several different interpretations of the precise geographical area comprising Herston for the purposes of the Application.¹³⁵ Similar evidence adduced by a number of witnesses for the Applicants is relied upon by the Scott Estate to suggest that the eastern boundary of Herston lay at various locations between Herston Cross,¹³⁶ and Jewsons.¹³⁷ Reliance was also placed on the fact that many of the Evidence Forms produced in support of the Application gave the various addresses as “*Swanage*”.¹³⁸ By the time the Evidence Forms had been reproduced into witness statements for the purposes of the Public Inquiry that definition was changed into “*Herston*”. In some instances, a number of witnesses also mentioned in their Evidence Forms, or in their oral evidence, of having “*moved to Swanage*”.

5.11. It is also submitted by the Scott Estate that clear demarcation of the boundaries of the claimed *neighbourhood* is necessary in order to identify then local inhabitants of Herston. The user made by such local inhabitants is relevant to the determination of the Application, and who would benefit by the rights conferred by registration if the Applicants were to succeed. Further, having regard to the case-law¹³⁹, the Applicants must be able to demonstrate that Herston can be defined by a set of boundaries. They must also be able to demonstrate that Herston is a cohesive entity which is capable of meaningful description in some way sufficiently distinctive to constitute a *neighbourhood* of its own. . However, the term is to be applied in a straightforward manner, untrammelled by any pre-existing common law technicalities A ‘*neighbourhood within a locality*’ is obviously drafted with a deliberate imprecision untrammelled by any pre-existing common law technicalities the purpose of which is to make it easier for local communities to protect community recreational assets.

5.12. It is submitted by Leading Counsel that is apparent upon walking around the area claimed to be the *neighbourhood* of Herston that it does not have any unifying

¹³⁵ Quaddy in cross-examination.

¹³⁶ See Fellows in examination in-chief.

¹³⁷ McMorrow, in cross-examination.

¹³⁸ See the Closing Submissions of the Objector at e.g. paragraph 4.6, and footnote 24.

¹³⁹ See paragraphs 2.33. to 2.25, above.

characteristics. It is said to be a hotchpotch of development and roads that could hardly be more diverse in character.

- 5.13. However, it is accepted by the Scott Estate that Herston has an historic core. This comprises Herston Cross, Bell Street, Jubilee Road, and part of the High Street as identified on the 1900 Ordnance Survey map. This broadly conforms to the existing Conservation Area boundary. Mr Jensen confirmed that the Applicants were not reliant on the Conservation Area. Instead the Applicants seek to demonstrate that Herston comprises a much larger area.
- 5.14. That submission is rejected by the Scott Estate on the basis that whatever may have been historical circumstances, Herston has now been absorbed in Swanage, and no longer retains its own identity. Other evidence in support of this submission is set out in paragraph 31 of the written Closing Submissions of Leading Counsel for the Scott Estate.
- 5.15. In summary, it is contended by the Scott Estate that much of the area claimed as Herston is indistinguishable from the rest of Swanage, with which it shares many of its facilities. Whatever may have been the historical circumstances, the two areas have merged together with no clear or obvious boundary. The boundary of the claimed *neighbourhood* represents no more than an arbitrary line delineated on Map A, and is plainly insufficient to demonstrate the requisite level of pre-existing cohesiveness.
- 5.16. Having regard to the principles of law set out in Section 2, and the factual circumstances, as set out in in Section 1, under the heading “*what is Herston*” this contention is rejected. The finding made is that although Herston has now been physically absorbed into the conurbation of Swanage, there are still clear indications, in t my judgment, that Herston is an identifiable entity with a set of boundaries, albeit now lying within the Swanage conurbation. Although there was some degree of lack of consistency amongst the Applicant’s witnesses as to what constitutes Herston at the present day, it is clear that there is some considerable pride manifested on the part of the residents of Herston that there is a conceptual entity with which they identify, whether this is based on the schools, the Parish Church, and the area lying at its core, namely Herston Cross and its environs. The finding is also made

that the local populace has a considerable affection for Herston Fields which appear to have gained a significant status in local folklore as a place where sports and pastimes can be indulged. For reasons, which are obscure, each of the three fields comprising Herston Fields is identified by name by members of the community, such nomenclature having a long historical basis covering several decades.

- 5.17. Accordingly, in my judgment, Herston does exist as a separate cohesive, identifiable, entity, capable of being defined by a set of boundaries.
- 5.18. That being so, there then arises for consideration whether the area of land identified by the thick black line on Plan A constitutes a “locality” or a “neighbourhood within a locality”. I appreciate the point made by Leading Counsel that the lines drawn on Plan A are arbitrary, particularly insofar as the eastern boundary is concerned. Also, the point is made whether the demarcation of the boundary is sufficient for the purposes of identifying the “neighbourhood” claimed by the local populace of Herston
- 5.19. The finding is made that in principle that the broad area identified by the Applicants is capable of being defined as a “neighbourhood” for the purposes of Section 15 of the 2006 Act in that it “has a sufficient degree of (pre-existing) cohesiveness, being a community, or portion of a town considered in reference to the character or circumstances of its inhabitants.” This finding is also made based upon the evidence that Swanage is “locality” within the meaning of section 15 of the 2006 Act, being a clearly defined administrative unit. For the purposes of this Report, therefore, Herston is a “neighbourhood within a locality”.
- 5.20. Consideration then is required to identify the precise boundaries of the *neighbourhood*, whether it is based upon the school catchment area, the boundaries of the Parish of St Mark, the Conservation Area or the Neighbourhood Watch area, or some other interpretation. The principle of identifying a *neighbourhood* is a matter of discretion for the Registration Authority. In effect the discretion is quite wide, although it is accepted that it is not any area which an applicant for registration chooses to delineate upon a plan.

- 5.21. In my preliminary judgment, the area currently delineated on Plan A as the *neighbourhood* is to an extent defective. For that reason, it was recommended that a consultation exercise should be undertaken, and that attention should be directed towards re-identifying the area, particularly on its eastern boundary, to make it less “*arbitrary*”, as asserted by Counsel. This exercise could be achieved by identifying the boundary lines by reference to physical features and existing, and historic, boundaries. In my judgment this delineation should reflect, more or less, the lines drawn on Plan A.¹⁴⁰
- 5.22. The evidence adduced during the course of the Public Inquiry has demonstrated that the area constituting the “*neighbourhood*” of Herston, as I provisionally identified, is in fact only marginally different from the area sought to be identified by the Applicant by reference to Plan A. As the Applicant in his subsequent representations made following the consultation has stated,¹⁴¹ the overall effect of the changes sought to be made to the delineation of the *neighbourhood* of Herston are *de minimis* in that have included two roads and some additional housing to that originally claimed by the Applicant.
- 5.23. On consideration of all the evidence, and following the consultation exercise, I therefore recommend that the former fields lying next to Newton Farm and Newton Manor and identified as parcel numbers 206, 207, 210, 216 and 211 on the OS map, can be historically perceived as lying within close proximity to, and within the community of, Herston. It is considered to be an entirely justified exercise to come to such conclusions based upon the evidence, particularly by reference to historic Ordnance Survey mapping.
- 5.24. Thus, only minor shortcomings have been identified in the concept of the “*neighbourhood*” as sought by the Applicant. Based upon the oral evidence and the historical research made available to both parties, I have sought to modify the boundaries of the *neighbourhood* of Herston in order to arrive at the conclusion that I can recommend for consideration by the Registration Authority.

¹⁴¹ See Appendix 5.

5.25. For the purposes of this Report I reiterate the point that in principle I am satisfied that the area identified as Herston as a *neighbourhood* for the purposes of section 15 of the 2006 Act, conforms, more or less, with the identified boundaries on Plan A.

5.26. If I am wrong in my interpretation that Herston, as I have identified, is a *neighbourhood within a locality*, then in the alternative, based on the evidence set out above, I am satisfied that Herston is itself can be perceived as a *locality*. It is clear that Herston was a parish in its own right before being absorbed into Swanage. Following the decision in *Leeds Group PLC v Leeds City Council*¹⁴² an area which was an administrative area does not cease to be a *locality* under section 15 of the 2006 Act because it subsequently loses that administrative status.

Significant number of inhabitants

5.27. A “*significant number of the inhabitants*” means a number sufficient (i.e. not *de minimis*) to indicate that the land is in general use by the community for informal recreation, and clearly to be of such an amount and manner as would reasonably be regarded as the assertion of a public right.

5.28. In my judgment having regard to the breadth of the evidence adduced by the Applicants, as summarised in each case, and as represented in the Bar and Pie Charts contained in Annex 2 to this Report, on a balance of probabilities the Applicants have demonstrated that a sufficient number of inhabitants of Herston have openly used Herston Fields for informal recreational activities. Some twenty witnesses gave oral evidence of such usage for varying periods. Another seven witnesses supplied witness statements but were unable for one reason or another to give evidence during the Public Inquiry. 92 Evidence Forms also were supplied and form part of the evidence in the case. All of these set out claims made by the makers as to each person’s use of Herston Fields for informal recreational activities over substantial and less substantial periods of time.

¹⁴² [2010] EWHC 810 (Ch).

- 5.29. Leading Counsel for the Scott Estates stressed that the nature of the collection of the evidence in the case gave cause for concern, in particular the circumstances surrounding the creation and completion of the Evidence Forms were stressed.¹⁴³ It is said by Leading Counsel that the activity was all part of a sustained campaign from around 2010 to encourage people to use, and to prevent any development of, Herston Fields. In this context many of the Applicants' witnesses were cross-examined at some length by both Leading Counsel, and Junior Counsel, as to the motivations of such persons, and attention was also directed to the manner in which the Evidence Forms came to be created and completed, which was said to be somewhat opaque. In some cases it would appear that the original writing on the Evidence Forms had been subsequently changed. In other cases it was difficult to take the information on the Evidence Forms at face value. It appears that there were circumstances where, for instance, where there was a lack of precision in some of the information provided on the Evidence Forms. During the course of oral examination a few witnesses contradicted the information apparently provided by them when completing the Evidence Forms, or stated that they had lived in Herston, when in fact there were periods of absence, and so forth.
- 5.30. Photographic evidence was also adduced during the course of the Inquiry which appeared to demonstrate that the campaign to save Herston Fields commenced in early October 2010 when there was a day of action seeking to prevent Herston Fields from being developed for housing purposes. It is said by the Scott Estate that it was from about this period of time that activities which had undoubtedly occurred over previous years, and possibly previous decades had substantially increased.
- 5.31. Leading Counsel for the Scott Estate on a number of occasions stressed what in effect she considered to be manufactured evidence on the part of the Applicants in relation to the Evidence Forms. Attempts were made to discredit the evidence adduced by the witnesses during the Public Hearing on the basis that in some cases parts of such Forms there seemed to be different handwriting, and in a different coloured ink. The fact that a template had been created upon which answers from questionnaires had

¹⁴³ See Counsels' Closing Submissions at paragraphs 2.4 to 2.8.

been extracted was criticised as being a “cavalier approach to the preparation of documentary evidence [which] also appears to have infected the evidence questionnaires....” It is also said that group meetings may have inadvertently affected and influenced the recollection of others who were present, and provided the opportunity for witnesses to rehearse their evidence..

- 5.32. However I consider that residents of Herston should not be criticised for these actions when they have considered Herston Fields to be of considerable value to the community, and, as one witness put it, the Fields are perceived as a community asset. Indeed, at one stage of the proceedings Leading Counsel was reminded that this Public Hearing was not a criminal trial, and she was not addressing a jury. It must also be borne in mind that these Evidence Forms, and the subsequent witness statements filed on behalf of the Applicants, were made by lay-persons who were doing their best to promote their interests directed to saving Herston Fields in the matter, in what has been described above as a single-purpose interest group. Further it must be remembered that these Evidence Forms and the subsequent witness statements filed on behalf of the Applicants, were not the subject (so it would seem) of any legal input or vetting, The Evidence Forms and witness statements provided a structure for their evidence, and without such a structure the orderly conduct of the Public Hearing would have been considerable more difficult to achieve.
- 5.33. Accordingly, although I appreciate and accept that there were some discrepancies between the oral and written evidence adduced by the Applicants, as identified by Counsel, on balance I find that these did not affect the overall picture which the Applicants sought to paint, which I find to credible and persuasive.
- 5.34. In this context I have also found that the local populace has a considerable affection for Herston Fields which appear to have gained a significant status in local folklore as a place where recreational activities can be indulged. However, for reasons which are obscure, the identity of each of the three Fields is identified by name by members of the community, such nomenclature having a long historical basis covering several decades.

- 5.35. However, in my judgment, none of the points raised by the Scott Estate must be allowed to detract from the essential feature of the case that a broad approach should be adopted in consideration of the evidence both prior to and during the statutory period of prescription until April 2010. I find that such evidence reveals a general pattern of use of Herston Fields which demonstrates that over a substantial period of time, and probably since the 1940s/1950s, that a significant number of persons have used Herston Fields for recreational activities.
- 5.36. Further, in the main, the evidence reveals that the persons who made such use of Herston Fields for such informal recreational activities were local inhabitants, together with others from a wider area including Swanage, and possibly some holiday makers. However, having regard to the evidence, I find that the majority of such persons were local inhabitants of Herston.
- 5.37. I appreciate that the point has been made by the Scott Estate that many of the Applicants' witnesses were unable to identify other persons using Herston Fields, either because they were too far away or because they did not know them. However, in a community comprising probably about 1000 dwellings, or so, it would not be unusual for persons themselves engaged in lawful sports and activities not to be able to identify other persons who live in the area. The important factor is that people were seen by others when using Herston Fields at the same time engaged in the activities to which reference has been made above. In some case witness were able to identify other persons using Herston Fields as being local.
- 5.38. I find based upon the evidence that there has been sufficiency of such user that which cannot be described as trivial or sporadic. Such activities were sufficient to carry the outward appearance of user as of right. I also find that the Applicants have demonstrated sufficiency of user over Herston Fields in order for it, in principle, to have been, or should have been, apparent to the landowner that TVG rights were being asserted. The quality of user and how it appeared to the landowner at the time is of importance. However it is also of importance is to view how the user should have appeared to the landowner who, having the means of knowledge at his disposal, had then been diligent in the exercise of his rights as freehold owner.

- 5.39. I should also state that a number of aerial photographs were adduced during the course of the Public Inquiry, and various questions were asked of the witnesses as to Mr Hill was also asked about to a number of aerial photographs exhibited as “DJH6”, and Google Earth screen shots from 2002 to 2014. The aerial photographs are from 1947, 1972, 1997, 6th April 2002, 16th July 2005, and 27th September 2009. The description of these various photographs are set out in paragraph 14 of Mr Hill’s witness statement. A number of features were examined during the course of his oral evidence such as cattle treads and cattle paths, and more recently what is said to be a path around the perimeter of the Southern Field which (so it was said) was not visible in previous photographs.
- 5.40. The Scott Estate placed a high degree of reliance upon these aerial photographs. However, as stated in paragraph 4.72, above, at best can only be a snapshot of the time when they were taken. I do not consider that these aerial photographs and screen shots are particularly helpful in seeking to assess the degree of use, or otherwise, of Herston Fields at the times they were taken. Aerial photographs, and Google screen-shots are notoriously unreliable as a basis for seeking to indicate a feature, and are open to various interpretations, as they during the Public Inquiry. I therefore do not find such evidence reliable.
- 5.41. Insofar as the use of the public footpath is concerned, traversing Herston Fields provides a lawful basis for members of the public to access and use Herston Fields. I accept that this provides a means of access at the “*pinch points*”, and the evidence in the Inquiry reveals that almost every witness who gave evidence described entering and exiting Herston Fields via one or other of the stiles at the northern and southern ends which leads directly to the public footpath traversing the land. However, I reject the submission made that persons thereafter accessing Herston Fields would remain on the public footpath rather than deviate from it in order to spread out over Herston Fields themselves in order to engage in recreational activities. I find that, until restricted from about 2010, such user by the inhabitants of Herston over the decades was not confined to the public footpath, or to the perimeter of the Fields, but was more wide-ranging over all three Fields, in particular over the Southern Field.

5.42. Thus, although it has been submitted on behalf of the Scott Estate that the whole of the three Fields comprising Herston Fields have not consistently been indulged by the local inhabitants for such activities, I reject that submission. In my judgment, until restrained from so doing in April 2011, the totality of the evidence reveals that members of the public have used the broader acreage of Herston Fields in order to engage in such recreational activities, but dependant on the nature of the activity involved.

5.43. The exceptions to this would have occurred when such activities over Herston Fields were constrained at times by physical limitations and impediments, such as ploughing or crops, or where the Fields were occupied by cattle, and/or horses. Also the nature of the activity would necessarily restrict use, such as berry-picking, which would be specific to certain hedgerow areas around the perimeter of the Fields. However, over the decades the evidence reveals that such farming usage was sporadic, particularly in the later years of the sub-tenancy granted to Mr Tatchell.

Lawful sports and pastimes for the statutory prescriptive period
5.44. There then arises for consideration whether the recreational activities indulged in by the inhabitants of Herston constitute lawful sports and pastimes. On the balance of probabilities, in my judgment, the evidence in support of the Applicants' case provides a compelling basis to find in their favour insofar as user for lawful sports and pastimes is concerned. As to whether these rights were exercised during the relevant qualifying 20 year period of prescription, I find that here is sufficient evidence that over the decades both during the 20 year statutory prescriptive period from April 1991 to April 2011, and prior thereto, people consistently made use of the whole of Herston Fields for such lawful pursuits and pastimes.

5.45. The pursuits and pastimes upon which the local inhabitants were engaged, were activities in the nature of informal recreation, such as dog-walking, playing with children, picnicking, flying kites, and the like, as documented in the Applicants' evidence, to which detailed reference has been made above, and illustrated in Annexe 2. I also find that, in general, such activities fall with the category of "lawful", when regard is had to the principles set out in Section 2, paragraphs 2.49 ff.

- 5.46. To be discounted from lawful sports and pastimes are activities such as trips to and from school, school runs across Herston Fields, school lessons conducted on Herston Fields, and persons traversing Herston Fields along the public footpath in order to gain access to Herston Halt railway station, for business or pleasure. Such activities, in the Inspector's judgment do not fall within the definition of lawful sports and pastimes. However, I find that such use was not significant in comparison with use by locals for lawful sports and pastimes.
- 5.47. It is clear that activities in the form of lawful sports and pastimes had undoubtedly increased from about 2010, but I find that this must be seen in the context of the desire on the part of the local inhabitants to retain their use of Herston Fields as part of their campaign to save the Fields.
- 5.48. In such circumstances, I consider that the burden of proof lying upon the Applicants has been discharged in that the evidence adduced demonstrates sufficiency of user by the inhabitants of Herston engaging in lawful sports and pastimes.

Indulgence as of right

- 5.49. Having regard to the principles of law set out in Section 2, the rationale behind the words "*as of right*" is acquiescence. It must be "*brought home*" to the landowner that such a right is being asserted. This is bound up with the point that the landowner must be in a position to know that such a right is being asserted, and to acquiesce in the assertion of such right, or to have the means of acquiring such knowledge. In this regard a paramount consideration is the quality of user which would justify recognition of a prescriptive right as being as of right.. How such user would appear to a reasonable observer is also of considerable importance.
- 5.50. In my judgment, the evidence reveals that a significant number inhabitants of Herston have used Herston Fields, as of right, without stealth, secrecy or force, and without the permission of the Scott Estate, for lawful sports and pastimes for the qualifying period.

5.51. This then leads onto the question of knowledge, or the means of knowledge on the part of the landowner.

Knowledge/means of knowledge

5.52. In Section 2 consideration was directed to the issue raised as to question of knowledge, or the means of knowledge, on the part of the Scott Estate. The question to be asked is whether the Scott Estate had a reasonable opportunity of becoming aware of the enjoyment indulged in by the citizens of Herston over Herston Fields, and had the Scott Estate the means of acquiring such knowledge? In essence, the question arises as to whether the Scott Estate had been diligent in the protection of its interests in the circumstances. This analysis involves consideration of the concept of user against the fee. In this regard the Scott Estate submitted that as a matter of English and Welsh common law, a prescriptive claim cannot lie against a tenant, only against the freeholder.¹⁴⁴

5.53. The first issue to be addressed is where does the burden of proof lie? It is clear having regard to the authorities that the burden of proof lies upon the Applicants. I appreciate that there is precedent for holding that in some instances, as a matter of principle, a presumption could arise whereby the burden of proof lies on the landowner. However, this presumption would only appear to lie in the “*user against the fee*” cases where the period of prescription arose prior to the grant of the tenancy over the land in question, and it is necessary for the landowner to rebut the presumption that he had knowledge of long user of e.g. a way over his land. In the present case, the grant of the tenancy pre-dates the user by or on behalf of the owner of the dominant land. Therefore, the burden of proof must lie upon the Applicants to prove the requisite user by a significant number of inhabitants as of right for the qualifying period up to April 2011. However, once having demonstrated that there is evidence in support of that proposition the evidential burden then shifts to the Scott Estate to challenge that evidence.

5.54. Then the question arises as to whether the freehold owner of the putative servient tenement could have taken steps to prevent such user. In the case of *Williams v Sandy Lane (Chester) Ltd* it was stated that the answer is likely to turn of the terms

¹⁴⁴ *Quaere*, whether this principle applies in the case of statutory prescription under s.15 of the 2006 Act.

of the tenancy. In the present case Scott Estate undoubtedly had the power to pursue breaches of covenant on the part of DCC for acts of trespass committed by others over Herston Fields,¹⁴⁵ but as the freeholder out of possession it had no ability to seek to pursue any action in trespass and/or nuisance itself against unlawful occupiers.

- 5.55. This then gives rise to the question of knowledge, or the means of knowledge, and diligence, on the part of the Scott Estate. The Scott Estate submits that it was not until about the early 2000s that it had any reason to know that anything untoward was occurring on Herston Fields, and that it was neither in a position to control, or acquiesce in, the claimed user over the servient land during the period prior to that point in time.
- 5.56. The witnesses for the Scott Estate, namely Mr Sewell, Mr Pardoe, Mr Hill, and Mr Scott, had no direct role, as such, in the conduct of the management of Herston Fields until the surrender of the Lease in November 2013. DCC were the tenants throughout, and based upon the terms of the covenants contained in the lease were legally responsible for the management of Herston Fields until surrender. DCC could lawfully sub-let, and invoke the covenants in the Lease against any breaches of covenant by the sub-tenants. In principle, DCC could seek action in trespass against illegal occupiers and users of Herston Fields.
- 5.57. However, the evidence reveals that persons acting on behalf of the Scott Estate did take on some responsibility for Herston Fields. This took the form of occasional but intermittent visits, and “drive-by” views made by Mr Pardoe, Mr Hill, and Mr Scott,¹⁴⁶ The evidence adduced by the Scott Estate reveals that any use of Herston Fields that had been identified by such witnesses was not considered to raise any concerns, until the second decade of the prescriptive period. It is submitted by the Scott Estate that the witnesses for the Scott Estate did not recall any of the tenant farmers of Dorset County Council raising public access as a concern when negotiating rents.

¹⁴⁵ See clause 4(q) of the Lease.

¹⁴⁶ For an analysis of these visits, see the Witness Activity Bar Chart in Annex 3.

- 5.58. However, it is also apparent that the legal (and illegal) sub-tenants were aware of use of Herston Fields. In the case of Mr Dicker his knowledge of Herston Fields goes back several decades, although he did not become a sub-tenant until March 2005. He made reference to the Tatchell sub-tenancy, and the fact that Mr Tatchell was aware of the use of Herston Fields by members of the public straying from the public footpath, which he sought to prevent. During the Lawrence era it was apparent that Herston Fields were being used regularly by people who did not keep to the public footpath. It was also apparent during the Helfer period from 2002 a great deal of trouble was experienced by him from people using Herston Fields who did not necessarily keep to the footpath until he started to try and control use.
- 5.59. The evidence of the Estate Officers for DCC demonstrated that Mr Sewell and Mr Lancaster had peripheral involvement with Herston Fields.¹⁴⁷ Mr Sewell's direct involvement as the Principal Officer over the whole of the County Farm Estate commenced in 1997. He stated that he would not come specifically to Herston Fields except during the course of rent reviews, in particular, one in 1998. Mr Lancaster as Senior Land Agent had no involvement with Herston Fields until 2002. Thereafter his involvement was limited to the three diary entries recording visits in 2003, 2004 and 2013, apart from the odd drive-by "*visits*".
- 5.60. Insofar as Mr Tatchell until his death in the year 2000, he had been the long term sub-tenant of DCC. It is apparent from the evidence that during the latter years of his life he was not regularly engaged in good farming practices and good husbandry. Clearly, his involvement with Herston Fields became less and less. Some concern had been manifested on occasions over the years as to the lack of good husbandry on the part of Mr Tatchell, particularly in his declining years. There was little that DCC could do about this other than to embark upon a course of action to seek to remove him. The rent was being paid and no complaints were made about use of the land by members of the public, so the attention of DCC was not drawn to such use. The legal procedure seeking to remove Mr Tatchell went back as far as the 1980s, but for reasons which are unknown, the procedure was not continued.

¹⁴⁷ See the evidence of Mr Sewell and Mr Lancaster in Section 4, and see Annex 3.

- 5.61. During the course of the evidence (in particular that of Mr Alan John Smith) there was some reference to a Mr Tom Batterick who, it was said, worked as a farm-hand for Mr Tatchell for 40 years, or so. I discount references made to Mr Batterick in their entirety as, in effect, such evidence was double hearsay made by witnesses about what someone else said or did a long time ago, who was not called to give evidence, presumably because he is long dead.
- 5.62. A further curiosity in the evidence presented by the Scott Estate is that reference was made by Mr Pardoe and Mr Hill to the fact that at some stage (probably in the early 2000s - although there was a lack of clarity in this regard) the sub-tenants gave witness statements about their concerns as to the use of Herston Fields by members of the public.¹⁴⁸ Neither of these witness statements was produced in evidence, nor further reference made to them. Such evidence could have had an important bearing on the use made by members of the public of Herston Fields had it been adduced. No explanation was provided as to their non-production.
- 5.63. After DCC regained possession of Herston Fields from Mr Tatchell's widow, DCC then sub-let Herston Fields (together with Site A) to Mr Helfer and then to Mr Dicker from March 2005. It was during those periods of the further sub-lettings that the illegal sub-tenancy was created in favour of Mr and Mrs Lawrence over Herston Fields which enabled Mr Dicker to claim a Single Farm Payment, the fields being included as permanent pasture for that purpose. It could be interpreted that was not in the interests of Mr Dicker to draw the attention of DCC to the circumstances appertaining to Herston Fields insofar as any use made by members of the public were concerned.
- 5.64. In essence, in my judgment it is apparent from the evidence presented by the Scott Estate that they are unable to counter the evidence adduced by the witnesses for the Applicants as to user of Herston Fields during the earlier part of the statutory prescription period, until about the early 2000s. No direct credible evidence was adduced by the Scott Estate to challenge and rebut the Applicants' evidence. Insofar as the second decade of the prescriptive period is concerned, the Scott Estate sought

¹⁴⁸ See Pardoe at paragraph 4.57, and Hill at paragraph 4.73.

to diminish the evidence adduced by the Applicants. However, I have come to the conclusion that the evidence of the Applicants is to be preferred.

5.65. For all the reasons set out above, I have found that the Applicants have proved their case as to the use of Herston Fields by a significant number of the inhabitants of the *neighbourhood* of Herston for lawful sports and pastimes for statutory qualifying period of prescription.

5.66. This leads to the final point as to means of knowledge, and diligence, on the part of the Scott Estate.

5.67. In my judgment, it is apparent from the evidence of the witnesses for the Scott Estate that a detached approach to Herston Fields had been manifested by them during the first decade, or more, of the qualifying period. On the infrequent and intermittent visits (drive-by and in person) made to Herston Fields, said to be on weekdays during business hours, nothing untoward was noted, and it is said that no complaints as to user had been received. However, I find that the Scott Estate in its role as freeholder, through its representatives, should have adopted a less casual, and more focussed and diligent approach, in pursuance of the protection of its freehold interests. Had more frequent and regular visits been made particularly outside business hours, and at weekends, then it should have become apparent that wide use was being made of Herston Fields for recreational activities for a substantial period of time during the period from 1991. It would have been demonstrated that such use would have been over and above the normal use of the public footpath, and that TVG rights were being asserted over a long period of time. Reliance on drive-by analysis is never satisfactory

5.68. In this context it also seems that at some stage in the early 2000s concerns had been expressed to Mr Pardoe and Mr Hill by the sub-tenants as to user of Herston Fields. Such concerns as were manifested may have had been reduced into writing into witness statements, but none was produced in evidence during the Public Inquiry.

5.69. However, it was not until the early 2000s that the Scott Estate started taking a more focussed interest in the use of Herston Fields by the residents of Herston. This seems to have corresponded with the various proposals being canvassed for the use of

Herston Fields for development purposes, such as for a traveller site, and other potential projects referred to during the course of evidence. This led to an undoubted more recent intensification of the use of Herston Fields by the local residents for recreational activities to demonstrate their concerns over the future of Herston Fields, until their use was ultimately prevented in April 2011, except for the exercise of their rights over the public footpath.

- 5.70. Thus, in my judgment, the Scott Estate had the means at their disposal to have been made aware of the quality of the user as of right over Herston Fields by the local population of Herston in significant numbers for the statutory prescriptive period. Had the landowner been diligent then he would have become aware at an earlier stage than later on in the 2000s. The Scott Estate cannot hide behind the coat-tails of the concept of user against the fee, and avoid registration of Herston Fields as a TVG.

SECTION 6

6. CONCLUSIONS

- 6.1 Having regard to the legal principles set out above, and having analysed the considerable body of evidence adduced during the Public Inquiry, both oral and documentary, and drawing together the various evidential strands, to which detailed reference has been made above, and substituting in Issue No 7 the relevant statutory prescriptive period as being the period of 20 years until April 2011, I therefore conclude that the case has been made out for registration of Herston Fields as a TVG on the basis that there has been a significant number of the inhabitants who have indulged in lawful sports and activities for the requisite 20-year period of statutory prescription.
- 6.2 The conclusion is therefore reached that all the Issues should be answered in the affirmative.
- 6.3 That being so, the necessary Recommendations are set out in Section 7. .

SECTION 7

7. RECOMMENDATIONS

- 7.1. Following the consultation process, and for all the reasons stated above, I have found that Herston constitutes a *neighbourhood* within the *locality* of Swanage for the purposes of Section 15 of the 2006 Act. Further, he has found that a, there has been qualifying user by a significant number of the inhabitants of Herston indulging in lawful sports and pastimes for the relevant prescriptive period.
- 7.2. The Inspector has also found that the *neighbourhood* is in conformity with the set of boundaries as identified on Plan A, as modified, annexed to this Report.
- 7.3. Accordingly, in these circumstances, it is recommended that Herston Fields be registered as a town or village green, and that the *neighbourhood* of Herston be defined in accordance with Plan A, as modified.

APPENDIX 1

Issues to be decided by the Inspector

1. Whether the Applicant has identified an appropriate neighbourhood and/or locality from which the claimed user is said to derive.
2. Whether a significant number of the inhabitants of the identified neighbourhood or locality have indulged in lawful sports and pastimes on the Application Land.
3. Whether any qualifying user has been sufficient and of the appropriate character throughout the relevant period to alert the landowner to the assertion of town and village green rights.
4. Whether the identified Lawful Sports and Pastimes user has been 'as of right'.
5. Whether the identified Lawful Sports and Pastimes user continued 'as of right' throughout the relevant 20 year period without any interruptions.
6. Whether the relevant 20 year period for the determination of this application is from 17 May 1993 to 17 May 2013 when the final application was submitted to Dorset County Council, or from 1991 to 2011 when the evidence forms were collected from local residents in support of the application.
7. Whether the whole area of the Application Land has been subject to qualifying user.
8. Whether, as a matter of law, the claimed TVG rights can be established against the landowner through reliance on user undertaken when the landowner was not in possession of the land.

APPENDIX 2

Applicant's Activity Log

Activity	Dates	Para No	Name
WALKING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.33	Roberts
	1988-2011	3.37/39	Angell
	1977-2011	3.44	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	2003-2011	3.101	McMorrow
	1989-2011	3.109	Smits
	1942-2011	3.119	Andrews
	1940-2010	3.121	Aplin
	1997-2011	3.123	Dowling
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 25

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
CHILDREN PLAYING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1997-2011	3.33	Roberts
	1977-2011	3.44	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	2003-2011	3.101	McMorrow
	1942-2011	3.119	Andrews
	1940-2010	3.121	Aplin
	1997-2011	3.123	Dowling
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 20

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
TEAM GAMES/SPORT	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.33	Roberts
	1988-2011	3.37	Angell
	1977-2011	3.45	Castle
	2001-2011	3.54	Baines
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	2003-2011	3.101	McMorrow
	1989-2011	3.109	Smits
	1942-2011	3.119	Andrews
	1940-2010	3.121	Aplin
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1931-2011	3.129	Riley
1981-2011	3.132/3	Stephenson	

TOTAL = 21

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
DRAWING & PAINTING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.33	Roberts
	1988-2011	3.45	Angell
	2001-2011	3.54	Baines
	1987-2011	3.63	Richards
	1979-2011	3.70	Holland
	2005-2010	3.91	Warrington
	1989-2011	3.109	Smits
	1997-2011	3.123	Dowling
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 16

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
DOG WALKING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.34	Roberts
	1988-2011	3.37	Angell
	1977-2011	3.44	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	2003-2011	3.101	McMorrow
	1989-2011	3.109	Smits
	1940-2010	3.121	Aplin
	1997-2011	3.123	Dowling
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 24

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
FRUIT/BERRY PICKING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.33	Roberts
	1988-2011	3.37	Angell
	1977-2011	3.45	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	2003-2011	3.101	McMorrow
	1989-2011	3.109	Smits
	1942-2011	3.119	Andrews
	1940-2010	3.121	Aplin
	1997-2011	3.123	Dowling
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 25

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
NATURE WATCHING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1977-2011	3.44	Castle
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	1989-2011	3.109	Smits
	1942-2011	3.119	Andrews
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 17

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
PICNICKING	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1988-2011	3.37/39	Angell
	1977-2011	3.44	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	1989-2011	3.109	Smits
	1942-2011	3.119	Andrews
	1940-2010	3.121	Aplin
	2006-2011	3.125	Duncan
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 21

Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
KITE FLYING	1996-2011	3.14	Kowalewski
	2005-2011	3.22	Hobbs
	1957-2011	3.29	Quaddy
	1997-2011	3.33	Roberts
	1988-2011	3.37/39	Angell
	1977-2011	3.44	Castle
	2001-2011	3.54	Baines
	1987-2011	3.56	Crisp
	1998-2011	3.60	Fellows
	1987-2011	3.63	Richards
	1982-2011	3.68	Mutter
	1979-2011	3.70	Holland
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	2005-2010	3.91	Warrington
	1989-2011	3.109	Smits
	1940-2010	3.121	Aplin
	1997-2011	3.123	Dowling
	1996-2011	3.126	Enticknap
	1978-2011	3.127	Lyons
	1931-2011	3.129	Riley
	1981-2011	3.132/3	Stephenson

TOTAL = 22

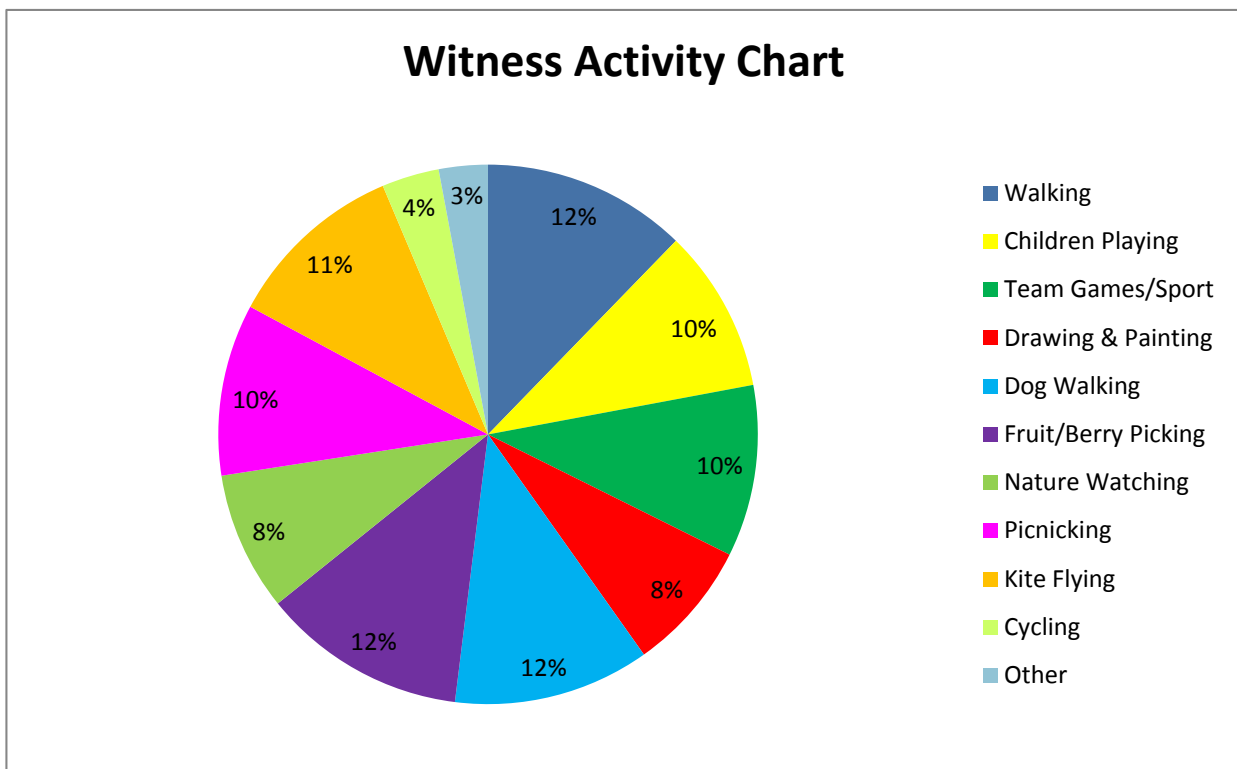
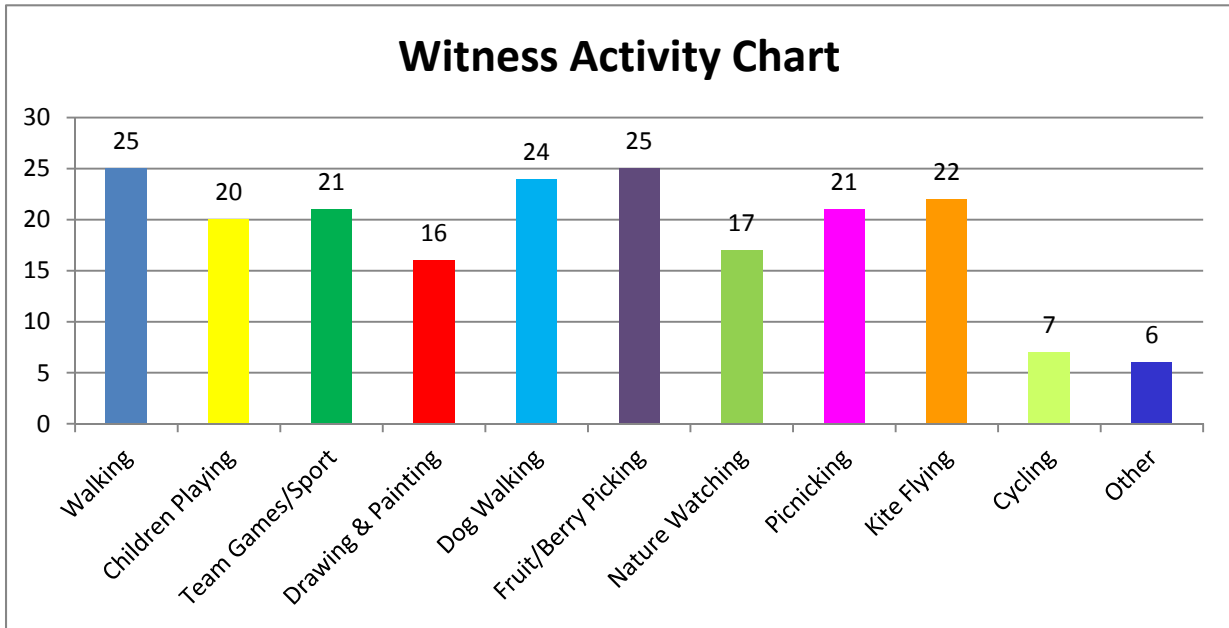
Application for the registration of a town or village green at Herston Fields, Swanage

Activity	Dates	Para No	Name
CYCLING	1996-2011	3.14	Kowalewski
	1957-2011	3.29	Quaddy
	1977-2011	3.44	Castle
	1987-2011	3.63	Richards
	2005-2010	3.91	Warrington
	2006-2011	3.124	Duncan
	1931-2011	3.129	Riley

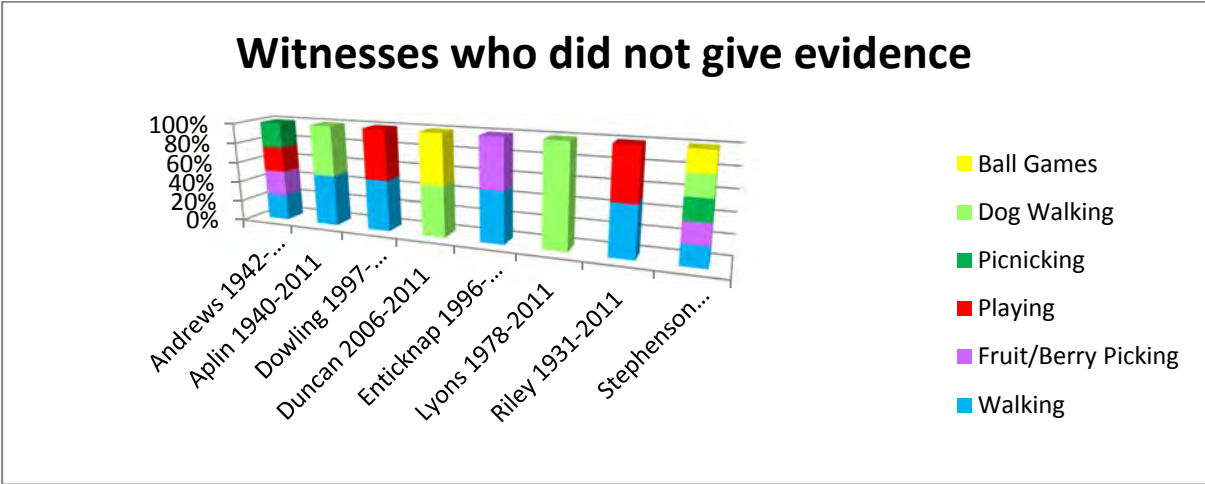
TOTAL = 7

Activity	Dates	Para No	Name
OTHER	1997-2011	3.33	Roberts
	1944-2011	3.73	Baird
	1945-2011	3.82/83	Dobson
	1940-2010	3.121	Aplin
	2006-2011	3.125	Duncan
	1931-2011	3.129	Riley

TOTAL = 6

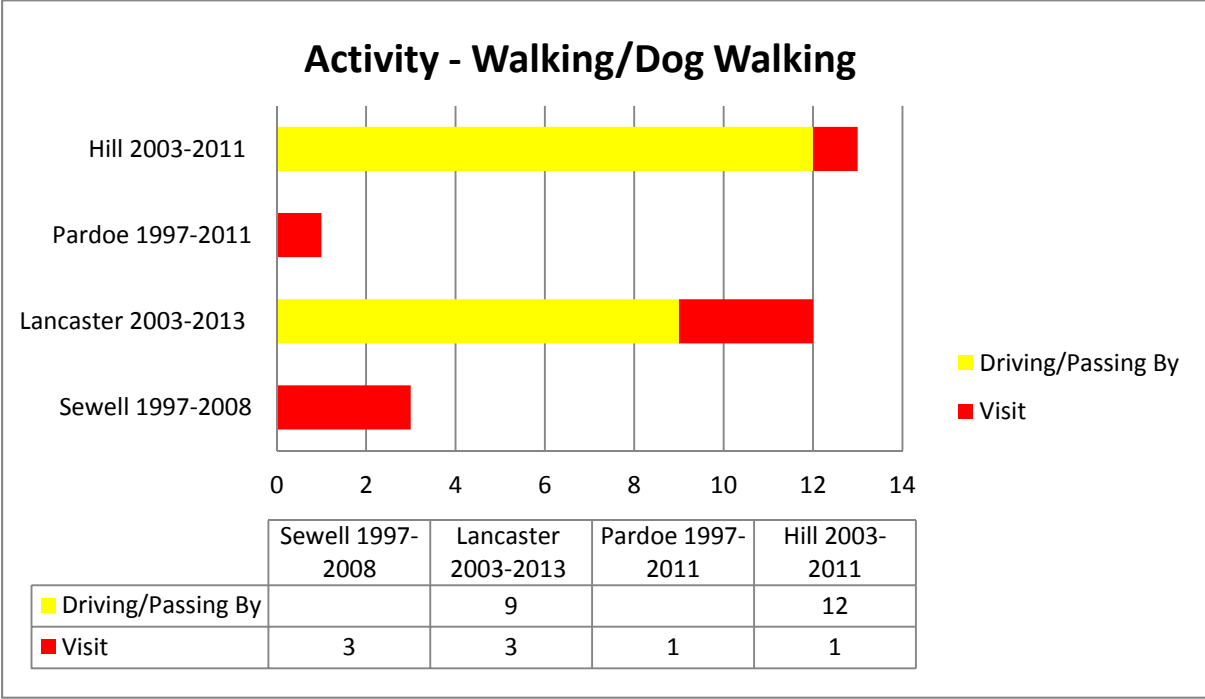


Herston Fields – Activity of Witnesses who did not give evidence



APPENDIX 3

Objector’s Activity Log



APPENDIX 4

THE INSPECTOR'S DISCUSSION NOTE

Dear Gerald and Jane,

Upon further consideration of the question of the delineation of the boundaries of the Neighbourhood of Herston, the Inspector, in his deliberations, has taken into account the historic mapping of Herston village and the surrounding area, as identified in the OS 1866 Survey, revised in 1900. In particular, it is apparent from the historic mapping that the hamlet comprising Newton Manor, and Newton Farm, and nearby buildings, together with the surrounding fields, lay in close proximity to Herston village, and can be construed as forming part of that community. The Inspector has replicated these historic boundary features onto the plan attached to this email. The Inspector has therefore come to the following conclusions:-

1. For the purpose of the delineation of the **Eastern Boundary and the eastern section of the Southern Boundary** of the proposed Neighbourhood of Herston, the Inspector is minded to recommend to the County Council as Registration Authority that Parcel Numbers 206, 207, 210, 216, and 211, as identified on the OS map, should be perceived, historically, as lying within the community of Herston.
2. In so far as the junction between the **Northern and Eastern Boundaries** is concerned, the Inspector is minded to recommend that this is delineated at the north-east corner of the rear garden of No 138 King's Road West, and the boundary line is then drawn along the eastern boundary of that property, and thereafter lies in a southerly trajectory which crosses King's Road West. The boundary line is then drawn incorporating the rear gardens of Newton Manor Close until it reaches the High Street. This conforms to the eastern boundary of Parcel Number 207. The boundary line then turns in an easterly direction along the High Street until it reaches 273 High Street. The Boundary then turns south to incorporate the garden of 273 High Street until it reaches Priests Road, thereby incorporating the gardens of the houses on the east side of South Road.
3. Similarly, in so far as the **Southern Boundary** is concerned, the western section is to be delineated along the same trajectory as currently identified but to incorporate the rear gardens of Holmes Road, Sydenham Road, Shaston Close, Sandbourne Close, Ash Close. However, thereafter, in the vicinity of a historic footpath lying on a north/south trajectory from the western side of Herston Village the boundary line on its eastern trajectory should be delineated by reference to Priest's Way, part of which is now classified as Priest's Road, which at its eastern end lies at the southern perimeter of Parcel Number 211 (now the junction of Priest's Way and Hoburne Road). The houses on the northern side of Priests Way/Priest's Road should be incorporated within the boundary.
4. **The Northern Boundary** – at the junction of the eastern boundary and Kings Road West, the boundary line should be drawn along the line formed by the Corfe Castle to Swanage Railway Line

Application for the registration of a town or village green at Herston Fields, Swanage

so as to incorporate in a westward direction the houses and gardens of Knops Road West numbered from 138. The boundary line then to continue along the line formed by the Corfe Castle to Swanage Railway until it reaches the junction with Washpond Lane at Herston Halt.

5. **The Western Boundary** – I see no justification for incorporating Swanage Middle School and its surrounding buildings and fields in the amended Plan A. Thus the junction with Washpond Lane at Herston Halt the boundary line should be drawn in a southerly trajectory to the point where it meets the High Street at the existing delineated point. The boundary then to conform to the line currently drawn to the rear of the houses and gardens in Holmes Road.

Written representations are therefore sought by the Registration Authority on whether the Registration Authority is entitled as a matter of law to accept a different neighbourhood to that set out in the application or that directly explored in evidence at the Public Inquiry. In this regard, the parties' attention is drawn to the case law on the discretion of Registration Authorities for example the opinion of Lord Hoffmann in *Oxfordshire County Council -v Oxford City Council* [2006] UKHL 25 and in particular paragraph 61 written representations by the parties must be received by the Registration Authority no later than 5pm on 30th November 2016. A plan showing the neighbourhood on a modern map base will follow on Monday.

Yours sincerely

Legal & Democratic
Services

County Hall

Colliton Park

Dorchester

Dorset

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Philip Crowther

Solicitor - Planning

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Service of Court Documents is not accepted by email

Dorset County Council



APPENDIX 5

ADDITIONAL REPRESENTATIONS

ON BEHALF OF THE OBJECTOR

RE NEIGHBOURHOOD

Introduction

1. These representations deal with the question of whether the Registration Authority is entitled as a matter of law to accept a different *neighbourhood* to that set out in the application or that directly explored in evidence at the public inquiry.
2. They are made without prejudice to any other representations which the Objector may wish to make on the rest of the inspector's report in due course.

Power to amend

3. The decision in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 provides authority for the proposition that the Registration Authority may allow amendments to the application following submission of the application. The proposed amendments in *Oxfordshire* related to the application site and the claimed period of user. The question of amending other elements of an application was not considered.
4. As Lord Hoffmann made clear in *Oxfordshire*, when considering potential amendments, the Registration Authority should be guided by the general principle of being fair to the parties. In this respect, he observed that:

*“the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.”*¹⁴⁹

5. In the present case, the proposed amendment to the *neighbourhood* boundary was not sought, or supported by, the Applicants. Instead, the proposed amendment is the product of the Inspector's own independent research, carried out following the close of the

¹⁴⁹ *Oxfordshire*, per Lord Hoffmann at [61].

inquiry,¹⁵⁰ and not tested through the evidence. This is a matter of legitimate concern to the Objector, which has already suffered prejudice insofar as the Inspector has embarked on such research, the scope of which is unknown and which has not been subject to any open scrutiny or discussion. The Objector has had no sight of the documents mentioned in the draft report and has no idea whether the Inspector has made any other researches or consulted any other, unacknowledged, documents. This is unfair.

6. In stressing that the Registration Authority is not under a duty to undertake its own investigations or reformulate the Applicant's case, doubtless Lord Hoffmann bore in mind the quasi-judicial nature of the process of determining an application to register a new green, hence his reference to fairness. It is unfair for the Registration Authority's advisor to seek to remedy a substantive defect in the Applicant's case in this way. Whilst administrative assistance might be given in the form of advising an applicant of how to put an application into a form in which it could be regarded as duly made or (possibly) advising an applicant as to the existence of an appropriate locality which then forms the subject of an amendment sought by the applicant, the nature of a *neighbourhood within a locality* is different. As the caselaw makes clear, a *neighbourhood* is something which has to be established by evidence, rather than a locality which is an entity which has already been established, usually as a result of a statutory process, e.g. a civil or ecclesiastical parish. A *neighbourhood within a locality* is meant to be an evidential expression of an underlying community reality. As such, it is not something for the Registration Authority or its Inspector to redefine. Since rights attach only to inhabitants of the specified *locality* or *neighbourhood within a Locality*, it is an important part of the statutory test, for reasons set out in the next paragraph.
7. A *neighbourhood* must be more than an area simply delineated on a plan for the purposes of the application. As the Inspector recognises,¹⁵¹ the area must also have a sufficient degree of pre-existing cohesiveness (*R (Oxfordshire and Buckinghamshire Mental Health Trust v Oxfordshire County Council* [2010] JPL 1106 per HHJ Waksman QC at [79]). The question of pre-existing cohesiveness is a matter of fact.¹⁵² However, there was no factual

¹⁵⁰ See, for example, paras. 1.25 – 1.31 of the draft report, which deal with the History of Herston Village and are relied upon in paragraphs 5.2 and 5.14 of

¹⁵¹ Para. 5.9 of the draft report.

¹⁵² See para. 5.20 of the draft report.

evidence presented at the inquiry to demonstrate that the area now proposed was a *Neighbourhood* benefitting from pre-existing cohesiveness. Indeed, it is in direct conflict with the Applicant's case, which drew the eastern boundary along Cow Lane, and concluded in closing submissions that "*there is little doubt in most resident's minds that Herston begins at the Greyseed Estate...and ends at Cow Lane (the old boundary with Newton, now Swanage)*".¹⁵³

8. The absence of factual evidence to support the new boundary cannot be cured through the provision of submissions or further evidence. Indeed, such an exercise would only compound the prejudice caused the Objector, by providing the Applicants with an opportunity to provide, retrospectively, evidence to support the new boundary. Given that the Inspector's suggested answer has already been dangled in front of the Applicants, there can now be no fair way to carry out such an exercise. It is, in short, a *fait accompli*.

Other errors in approach to the identification of the *neighbourhood*

9. In addition to the representations set out above concerning the power to amend the proposed *Neighbourhood* boundary and the prejudice that would be caused by the amendment, the Objector also has a number of freestanding observations regarding the legality of the proposed boundary and its justification.
10. Paragraph 5.19 of the draft report indicates that particular attention should be directed towards the eastern boundary of the proposed *neighbourhood*, "*so as to make it less arbitrary*" (emphasis added). That sentence includes the tacit admission that the eastern boundary to the amended *neighbourhood* remains arbitrary, even if to some lesser extent. That is, perhaps, unsurprising given the nature of its identification, which is borne out of a number of irrelevant considerations and errors of law. *A neighbourhood within a locality* must not be arbitrary. The law was amended in 2000 to prevent applications failing on the basis of legally significant but physically arbitrary boundaries contained in perhaps antiquated localities.
11. First, the approach adopted appears to conflate the tests for a *neighbourhood* and *locality* by asking the irrelevant prior question of whether Herston is an entity by reference to the historical position.¹⁵⁴ That may have been relevant to the identification of a *Locality*, but it is not relevant to the identification of a *neighbourhood*. The only question is whether there

¹⁵³ Para. 5.2.4. of the Applicant's closing submissions.

¹⁵⁴ Paras. 5.2 – 5.5 of the draft report.

is an identifiable area with a sufficient degree of pre-existing cohesiveness (*Oxfordshire Mental Health Trust*).

12. Second, having accepted that Herston has now been physically absorbed into the conurbation of Swanage and that there was a lack of consistency amongst the Applicant's witnesses as to what constitutes present day Herston, the Inspector then points to a number of irrelevant considerations which he relies upon as "*clear indications...that Herston is an identifiable entity*".¹⁵⁵ For example, it is suggested that Herston represents a "*conceptual entity*" with which its residents identify, and that "*the local populace has a considerable affection for Herston Fields which appear to have gained a significant status in local folklore as a place where sports and pastimes can be indulged*". Neither of these theoretical constructs provide any assistance in defining the boundaries of the *neighbourhood* area. Moreover, they fall foul of the same criticism which led to the rejection of one composite *neighbourhood* in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch) at [106], where HHJ Behrens said that:

"I have more difficulty with the view of the Inspector and the submission of Miss Ellis QC that there was one composite neighbourhood here, a neighbourhood of those that enjoyed the facilities. Such a construction would, to my mind, denude the word "neighbourhood" of any real meaning. It is to borrow a submission of Mrs Evans-Gordon before the Inspector an argument trying to pull itself up by its own bootstraps."

13. Third, it is clear from the "Discussion Paper"¹⁵⁶ that the genesis for the proposed *neighbourhood* boundaries is the historic boundary features as depicted on 1866 OS Map (revised in 1900). As the "Discussion Paper" indicates, the Inspector has formed an opinion on the historic boundary of Herston and then "*replicated these historic boundary features onto the [modern day] plan attached*". That is, with respect, yet a further conflation of the distinctly separate tests for identifying a *neighbourhood* or a *locality*. Historic boundary features can only be relevant to the identification of a *Neighbourhood* insofar as they remain clearly discernible in the present day. However, that is not the case, which explains why these boundaries were not pointed out or relied upon by any of the Applicants. Accordingly, the process of grafting these historic boundary features onto a present-day

¹⁵⁵ Para. 5.14 of the draft report.

¹⁵⁶ The Objector is unclear as to what this paper is. It has not been provided with a document bearing this title. It is working on the basis, for the purposes of these submissions, that it is the email of Mr Crowther dated 18 November 2016.

map is not only unsupported by the evidence, it has resulted in the creation of equally arbitrary boundaries. For example, the fact that there was once a historic footpath running along the line of Priest's Road does not explain why those living on the north of that road are deemed to fall within the Neighbourhood of Herston, but those living to the south of the same road are not. Surely, the people living to the south of that road would consider themselves to live in the same cohesive *neighbourhood* as those to the north.

14. Finally, no *locality* has been identified, within which the proposed *neighbourhood* is said to fall. Paragraph 2.13 of the draft report appears to suggest that the Neighbourhood falls within the *locality* of Herston. However, for reasons set out elsewhere in the report,¹⁵⁷ no evidence has been provided to demonstrate that Herston is an administrative area known to law.

Conclusion

15. For all the reasons set out above, the proposed amendments to the *neighbourhood* boundary are unsupported by the evidence, would cause substantial prejudice to the Objector, and have been developed through a misapplication of the law.
16. The Objector therefore invites the Registration Authority to dismiss the application on the basis of the inspector's original finding that the area currently identified on Plan A as a *neighbourhood* is defective.¹⁵⁸

¹⁵⁷ See para. 5.6.

¹⁵⁸ Per para. 5.19 of the Draft Report.

APPENDIX 6

APPLICANT'S RESPONSE TO THE "NEIGHBOURHOOD" ISSUE

Introduction

1. These representations deal with the question of whether the Registration Authority is entitled, as a matter of law, to accept a different *neighbourhood* to that set out in the application or that directly explored in evidence at the public inquiry.

Entitlement to Amend Application

2. The decision in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 appears to provide authority in principle for the Registration Authority to allow amendments to the application following submission. The proposed amendments in above case related to the actual area of the "Green" itself and the period of use claimed.
3. The authority to amend the area of the claimed *neighbourhood* was not considered in itself but the applicant would contend that the principle established in the matter of the acceptance of amended applications would equally apply in this matter, it being very similar.
4. The limitation placed on the discretion of the Registration Authority or the Inspector in accepting such amendments is one of acting in fairness to all the parties.
5. In this instance the Inspector has identified shortcomings in the *neighbourhood*, as claimed by the applicant in the original application, and has, by his own enquiries, corrected the matter by making subtle changes to the boundaries of the claimed *neighbourhood* to arrive at a conclusion that he recommends for consideration by the Registration Authority.
6. In the *Oxfordshire* case Lord Hoffman adds:

“the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.”

Whilst this clearly places no obligation on the Inspector or the Registration Authority to amend or correct the original application, the applicant does not see that this statement precludes them from doing so if it is considered reasonable to do so and does not prejudice either party.

7. The main effects of the suggested changes to the original *neighbourhood* contained in the Application are the addition of the back gardens to some properties and, on the Eastern Boundary the inclusion of two short roads and some other additional houses. The overall effect in terms of area, dwellings and inhabitants over that of the original is small and the applicant would view the overall effect of the changes as *de minimis*.
8. None of the witness statements submitted with the application were drawn from households outside that of the original *neighbourhood*, at the time they were recorded, and likewise none of the witnesses who attended the Enquiry to give evidence were drawn from outside the original *neighbourhood* at the time to which their evidence related.
9. The applicant does not see any circumstances whereby the acceptance of the amended *neighbourhood*, as proposed by the Inspector, would prejudice the Objector in any way.
10. As the conclusions of the draft report of the Inspector determine in favour of the Applicant in all other respects it would be construed as unfair indeed to dismiss the Applicant's case due to the *de minimis* changes recommended by the Inspector to the *neighbourhood* identified in the original application.
11. Based on the above the Applicant is of the opinion that the Registration Authority has the discretionary powers derived from established caselaw to accept the *de minimis* amendments to the "*neighbourhood*" as recommended by the Inspector without prejudice to either party and so should accept these and proceed to implement the conclusions of the "Draft Report".

SUPPLEMENTARY REPORT

APPENDIX 4

The Background to the Application

1. I was appointed by Dorset County Council, the Registration Authority for town and village greens in Dorset, to act as an Inspector and to hold a non-statutory Public Inquiry. This appointment related to the Application made to the Registration Authority for the registration of Herston Fields as a town or village green, and to make recommendations as to the determination of the Application.
2. For the Application Site to be eligible to be registered as a town or village green, it must have been used throughout the period of 20 years having regard to the provisions of Section 15(2) of the 2006 Act. This provides that the land in question must have been used throughout the qualifying period of prescription:
 - (1) by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
 - (2) for lawful sports and pastimes; and
 - (3) as of right.
3. In Section 2 of the Final Report I set out the legal framework to the Application, and, in particular, the relevant parts of Section 15 of the 2006 Act for the purposes of the Application. Section 15 of the 2002 Act came into force on 6th April 2007. However, Section 14 of the Growth and Infrastructure Act 2013 amended the specified relevant period contained in Section 15(3)(c) of the 2006 Act from two years to one year. The amendment to Section 15 to substitute a one year period for the two year period did not apply when the cessation occurred before 1st October 2013. As a consequence, as the cessation occurred in April 2011 when ploughing took place over all three fields constituting Herston Fields, the qualifying period of at least 20 years commenced in April 1991 and terminated in April 2011. This was accepted by Junior Counsel on behalf of the Scott Estate.¹
4. In the Final Report, I reached the following conclusions:

¹ See footnote 23 to the Final Report.

- (1) that Herston Fields as the Application Land as a whole had been used for at least 20 years prior to April 2011 by the inhabitants of Herston for lawful sports and pastimes;
 - (2) that such use had been "*as of right*" throughout the Qualifying Period.
5. Consequently, I considered that the Application Land was eligible to be registered as a town or village green, as stated in the conclusions in Section 6 of the Final Report. I therefore made the recommendation to the Registration Authority on the basis that I found that Herston constitutes a neighbourhood within the locality of Swanage for the purpose of Section 15 of the 2006 Act.

The Public Inquiry

6. The Public Inquiry lasted some eight hearing days spanning a three-week period. It was then followed by one day of oral submissions. The Applicants were represented by Mr Jensen, and the Scott Estate was represented by Leading and Junior Counsel. A considerable body of evidence was adduced both orally and in documentary form. The Applicants called some 21 witnesses (including Mr Jensen).
7. A further seven witnesses supplied witness statements for the Applicants, but were unable for one reason or another to give evidence during the Public Inquiry. Accordingly, such evidence was not tested in cross-examination, and therefore the weight attached to it could not be as high as the evidence adduced by those who attended the Public Hearing. However, I found that some value could be accorded to it. Other documentary evidence submitted by the Applicants in evidence included 92 signatures appended to the original version of Map A, and 92 Evidence Forms were. Reference was also made in the documentary evidence to a petition which contained 2,439 signatures.
8. Ten witnesses were called on behalf of the Scott Estate, and two other witness statements were served.
9. Video evidence and photographs were also relied upon by the parties.
10. I found that the evidence adduced by the Applicants was compelling in that the witnesses called to give evidence demonstrated a considerable knowledge of, and affection for, the three fields comprising Herston Fields. The affection demonstrated by the inhabitants of Herston included the provision of specific names accorded to the three

fields comprising Herston Fields, the origins of such names having been lost in historical obscurity.² I do not recall in my experience as an Inspector, or as the Chief Commons Commissioner from 2002 until December 2010,³ ever having come across similar circumstances where three individual fields had been so identified by local people in this manner. This evidence was unchallenged by the Scott Estate. Indeed, one of the witnesses for the Scott Estate also gave evidence to this effect.⁴

11. The overwhelming impression from the witnesses for the Applicants was they were truthful, and were doing their best to recall facts and events which in some cases were of some antiquity. Their evidence remained unshaken, despite at times the somewhat gruelling cross-examination to which they were subjected by the Scott Estate's legal representatives. Overall, and where the evidence conflicted, I preferred the Applicants evidence to that adduced by the Scott Estate, whose witnesses, in my judgment, could provide little basis for successfully challenging the use made by members of the public over the qualifying period.⁵ In my judgment, their involvement in Herston Fields was generally remote, and/or discontinuous, with infrequent visits being made, and/or transitory.⁶ Further, none of the witnesses for the Scott Estate lived in close proximity to Herston Fields.
12. I found that local people consistently, and without interruption, made use of the whole of Herston Fields for such lawful sports and pastimes for the qualifying period. The affection demonstrated by the inhabitants of Herston included the provision of specific names accorded to the three fields comprising Herston Fields, the origins of such names having been lost in historical obscurity.⁷

² There were variants in the spelling of the names attributed by local people to the Southern and Northern Fields, but the spelling of the name attributed to the Eastern Field was constant.

³ The abolition of the role of Commons Commissioners occurred on 1st December 2010, following the enactment of the Commons Act 2006.

⁴ Mr Smith, Senior.

⁵ Mr Dicker was aware that local people used Herston Fields, mainly the Southern Field to walk their dogs, and that they did not tend to stay on the footpath, but walk round the edges of the fields, but also walking on the fields, and using the public footpath; Mr Smith, Junior, saw people using the fields for walking dogs, and blackberry-picking.

⁶ For instance, Mr Sewell recorded three visits to Herston Fields between 1997 and 2008, only one of which was made by him in August 1998, the other two being made by Mr Gannon in October and November 1984; Mr Lancaster had a written record of only three visits made by him to Herston Fields, namely in August 2003, August 2004, and October 2013; Mar Pardoe only made one direct visit in 2004, although he said he made a number of "drive-by" views, as did Mr Hill.

⁷ There were variants in the spelling of the names attributed by local people to the Southern and Northern Fields, but the spelling of the name attributed to the Eastern Field was constant.

Summary

13. On an analysis of the Applicants' evidence in my judgment several themes can be identified:

- (1) No-one knew of the identity of the landowner;
- (2) Many of the witnesses had a long connection with Herston and Herston Fields;
- (3) Herston Fields provided an important recreational amenity for the persons living in the neighbourhood of Herston to which there was open access. There was no alternative space available;
- (4) Continuous use was made of Herston Fields;
- (5) The general pattern of the usage of Herston Fields remained basically the same throughout the qualifying period;
- (6) Each witness for the Applicants indulged in the various activities comprising lawful sports and pastimes as to which each gave evidence, and had seen others engage in the same, and in some cases such other persons were known to the witness in question;
- (7) Such activities as were indulged by each witness took place during the periods referred to in their evidence. Detailed reference was made during their evidence as to such activities in which they indulged. In some cases these activities spanned the whole of the qualifying period, and in some other cases for some part or parts of the qualifying period, without interruption save for the usual "*give and take*" that occurs when animals are present, or crops are growing, or when one or more of the fields were ploughed, in about 2001/2;
- (8) Such activities as were indulged by the witnesses depended on the nature of the activities, and the interest of each witness in promoting such activities. There was no necessary routine. Thus, dog walkers may have kept to the perimeters of the fields, whilst kite flyers and dog walkers when unleashing their dogs utilised the whole of each field for such purpose. Berry pickets were confined to the hedgerows surrounding the fields.
- (9) The general pattern of such activities occurred over all three fields comprising Herston Fields;

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- (10) No written notice was ever erected, or any letters sent to the residents of Herston, indicating that members of the public had no right to use Herston Fields;
- (11) Apart from a passing reference during the evidence of Mr Helfer, there is no direct evidence from any of the witnesses that anyone verbally, sought to restrain or to prevent use of Herston Fields, or any part thereof, by members of the public;
- (12) Each witness without exception, stated in terms that they were never prevented, nor discouraged, by anyone from using Herston Fields, or any part thereof;
- (13) There was some indirect evidence adduced by witnesses for the Scott Estate, namely:
 - (a) Mrs Helfer on one occasion in 2005 in her capacity as a school governor warning children at Swanage Middle School as mentioned by Mr Helfer and Mr Pardoe,
 - (b) Various references to the attitudes of Mr Charles Tatchell, Mr Gerald Tatchell, and his stockman, Mr Batterick during the evidence of Mr Helfer, Mr Smith, Senior, Mr Smith, Junior, and Mrs Smith. Mr Dicker referred to remarks made by Mr Lawrence.

However, I find that as such evidence was of a hearsay or double hearsay nature, little or no reliance can be placed on it.

14. It is to be expected that evidence at a Public Inquiry of this nature would show some inconsistencies, as people's memories are not perfect, and recollection is sometimes more difficult in the case of some persons rather than others. However, it is to be noted from the evidence that the themes, to which reference has been made above, demonstrate that the bulk of the Applicant's witnesses were consistent in the evidence adduced as to the state and condition of Herston Fields and their use of the same over the qualifying period. Despite the best endeavours of Counsel, the witnesses were unshaken by lengthy cross-examination.
15. In my judgment, on a balance of probabilities, the evidence adduced on behalf of the Applicants demonstrated a sufficient pattern of behaviour by the inhabitants of Herston, convincing enough to demonstrate that their evidence is to be preferred to that of the

witnesses called by the Scott Estate, and that they indulged in lawful sports and pastimes for the requisite qualifying period, as of right, over all three fields comprising Herston Fields. I also find that there was nothing untoward in the manner in which the information had been collated on the Evidence Forms sufficient to discredit any of the witnesses.

The nature of the recreational use of Herston Fields

16. As to the nature of the recreational user of the land by members of the public, I concluded that there had been abundant use of all three fields throughout the relevant period for informal recreation by the various members of the public, in the main resident in Herston. In this analysis I discounted those persons who used Herston Fields, but who were not residents of Herston. I also discounted those periods of time when such residents of Herston had moved away.
17. The nature of the recreational use of Herston Fields took the following form:
 - (1) walking with, or without, dogs;
 - (2) children playing;
 - (3) team games/sporting activities;
 - (4) drawing and painting;
 - (5) fruit/berry picking;
 - (6) nature watching;
 - (7) picnicking;
 - (8) kite flying;
 - (9) cycling.
18. I found in all that there were some ten categories of activity indulged in by members of the public over the whole of Herston Fields, such activity not being constrained merely to use of the footpath. It is clear that the principal use of the Herston Fields was for walking with, or without dogs.⁸ I found that the majority of persons entered the land via the stile at the southern end of the Southern Field and, depending on the nature of the

⁸ Appendix 2 summarises such evidence as 25 illustrations of walking, and another 20 illustrations of walking with dogs, and from between 1981 and 2011, and in some instances as far back as 1931.

activity would take a circular walk or engage in activities on the fields themselves, there being a “*give and take*” with any animals present, or husbandry that might be undertaken, at the time. This interpretation was born out by the evidence provided by the various witnesses for the Applicants.

19. I found that such activities were not necessarily constrained to using of the public right of way as was asserted by Counsel during the course of the Public Inquiry. I also found that some may well have used the public right of way to gain access to Herston Halt Station, but the great majority of users were using the whole of Herston Fields for general recreational activities, as demonstrated in the evidence as is borne out by the evidence of each witness. This accorded with the way in which people tend to use open spaces whereby people tend to walk in a circular manner around the perimeter of the open space particularly if they are walking dogs, but others will use the wider areas of open space provided in all the various types of recreational activities, such as kite flying, or picnicking, the Applicants’ evidence demonstrated, as provided in the summaries to each witness for the Applicants, and in Appendix 2. Further, each witness prefaced his or her evidence by stating that they used Herston Fields as a whole, without obstruction or challenge for the activities, and for the periods described.⁹

Ploughing of Fields

20. The assertion that the Final Report manifests contradictory findings as to the effect of various incidents of ploughing on Herston Fields is rejected on the basis that there is no inconsistency. It seems to be asserted that the 2011 ploughing, which finally interrupted use for lawful sports and pastimes, (such interruption being accepted by the parties as the relevant date for the calculation of the qualifying period), is somehow to be equated with the ploughing of one or more of the fields comprising Herston Fields in 2001/2002. I reject that comparison.
21. I have found that it was the April 2011 activities of ploughing and sowing and growing of Triticale (and possibly Lupins) which finally interrupted the use of Herston Fields made by the Applicants for lawful sports and pastimes.¹⁰ This was due to the intensity

⁹ To suggest otherwise by taking sentences out of their contextual framework, as has been done in paragraph 22 of the Further Representations ignores the overall effect of the Applicants’ witnesses as to the clear evidence of sufficient qualifying use of the whole of Herston Fields.

¹⁰ Kate and Williams’ Wedding on 29th April 2011, when Herston Fields became more difficult to use - Mrs Hobbs.

of the farming operations undertaken at that stage. The hedges were cut back, wire erected and the fields were ploughed right up to the hedges.¹¹

22. The evidence from some of the witnesses for the Applicants reveals that in 2001/2002 there was ploughing and grass seed sown on one or more of the fields comprising Herston Fields.¹² However, a few witnesses could not recall any ploughing at all in 2001/2002.¹³ This does not necessarily mean that this did not occur, but, in my judgment, clearly it was of such a nature so as not to interfere with the various activities undertaken at the time, and may have been limited to the Southern Field only.
23. It is apparent that the ploughing that did take place in 2001/2002 was uncharacteristic in the way in which the fields had been previously managed by the tenant farmers, which was, in general, poor.¹⁴ Indeed, as Mr Helfer stated in his evidence, the fields were unusable “when he took possession... and were in a very poor condition” in 2002,¹⁵ and the purpose of ploughing the fields was in order to kill-off weeds and re-seed with new grass for cattle grazing. However, it is also apparent from the Applicants’ evidence (which I find to be accurate) that such ploughing was not only of lower intensity in comparison with the 2011 activities, but also was serving a completely different purpose. It was not a predominant exercise in order to grow crops, as occurred in April 2011 in the Southern Field, but to create pasture for cattle to graze. In any event ploughing may not in any event have occurred over all three fields – the evidence is inconsistent.

¹¹ Ms Smits.

¹² There are apparent contradictions in the extent to which ploughing occurred on Herston Fields at this earlier stage. For instance, Mr Dicker stated that Mr Helfer only ploughed the Southern Field. Mr Smith, Junior, stated that it was the Southern Field that was ploughed, and only once, and a fresh layer of grass was sowed. He also stated that Mr Helfer grew a silage crop in 2003/2004, although Mr Helfer does not state this in terms. Mr Pardoe referred to the Southern Field having just been cut for silage on one of his rare visits in 2004. Mr Lancaster stated that Mr Helfer used the fields for grazing cows, and refers to seeing cut grass on Herston Fields waiting to be turned/baled on one of the two visits he made between August 2003 and August 2004.

¹³ For example, Mr Quaddy could not recall any ploughing at this time, although he recalled ploughing of the Southern Field in 2008, similarly Mrs Baird who remembered the ploughing in 2011, but could not recall any earlier ploughing. Mr Angell recalled the fields being ploughed on a couple of occasions, and crops were not regularly planted, but one could still walk around the perimeter, similarly Mrs Warrington - “ploughing from time to time”; Ms Richards – “ploughed on 3 to 4 occasions”; Ms Fellows stated in terms that she had never seen the fields being ploughed. Mrs Holland gave no evidence on this, and never seems to have been asked in cross-examination; Ms Smits stated that it came as a bit of a shock the first time the fields were ploughed, and very noticeable activity only started in about 2013 with the fields being ploughed and levelled.

¹⁴ Such examples are: Mrs Kowaleski - “never saw anyone managing the land”; Mr Angel – “generally rough pasture”; Mrs Baird - “from about 1991 the land had been left wild with weeds and dangerous ragwort”; Ms McMorrow - “fields were very neglected and not farmed between 2003 to 2010”; Mr Hill “tatty”.

¹⁵ There is some discrepancy as to the date that Mr Helfer took possession.

24. Thus, in my judgment, the two sets of activities therefore clearly were of a qualitative difference, and cannot be equated.
25. Further, no witness for the Applicants stated that their use of Herston Fields was in any way restricted by ploughing, wherever it occurred. Instead, the evidence of the Applicant's witnesses in general reveals that each person accessed Herston Fields freely and without obstruction, or challenge, for the years specified in each case, and indulged in the various activities described for the various periods in question, and also saw others doing the same.
26. Thus, paragraph 5.42 of the Final Report emphasises that the totality of the evidence reveals that members of the public have used throughout the qualifying period the broader acreage of Herston Fields in order to engage in such lawful sports and pastimes throughout. There may have been some marginal and temporary limitation for a day or so during the course the actual ploughing of one or more fields, but this, I so find, could only have been short lived, and, in my judgment, was not significant enough to constitute an interruption of such overall use. No witness commented on such ploughing has having caused any limitation on their activities.
27. In my judgment, therefore, it was not until April 2011 that the wide-ranging use of Herston Fields by the various witnesses was curtailed and thereafter use was restricted to the footpath. No witness was prevented from using Herston Fields as and when they wished to do so until April 2011. No-one was aware of electric fences. There was no challenge at all of such use, or any challenge that was made was very limited. The pattern of use revealed by the evidence was that such activities took place all over the land, not restricted by obstacles. There was, in effect, as the evidence reveals, and I so find, minimal inconvenience by such agricultural use.
28. I also find that, although there is an occasional passing reference early 2000s to rape seed, haylage/silage, the predominate land use was undoubtedly pasture,¹⁶ for grazing cattle.¹⁷ Haymaking and crops were of more recent origin, and in the last three years or so.¹⁸

¹⁶ Mr Angell.

¹⁷ Mr Helfer; Mr Crisp.

¹⁸ Ms Fellows; Ms McMorrow; Ms Smits.

29. Accordingly, I find that there was no intensive agricultural use of Herston Fields until April 2011 of sufficient scale so as to interrupt use of Herston Fields for lawful sports and pastimes. On the evidence, such activity that then did occur is to be perceived as having resulted from the awareness of the Scott Estate to the use of the fields for lawful sports and pastimes by a significant number of the inhabitants of the neighbourhood as of right, as at that stage. It was at this stage that new fencing and wiring was erected, and access to Herston Fields was thereafter confined to the public footpath.
30. In summary, the assertion made in paragraph 11 of the Further Representations that the only reasonable conclusion must be that the earlier incidents of ploughing in 2001/2002 had the same effect as the activities of 2011 and can be equated, is rejected. The important qualitative difference is that in the case of the former, ploughing was for the purpose of re-seeding the land for eventual cattle grazing, and the latter was for growing crops i.e. Triticale. The two activities cannot be equated.

The Presence of Cattle

31. Clearly, in my judgment, during the relevant qualifying period cattle were present on parts of Herston Fields, as the evidence has revealed. However, it is incorrect to assert that during much of the relevant qualifying period the whole of the three fields comprising Herston Fields were continually grazed by cattle. The evidence adduced by the Applicant's witnesses was that the use of Herston Fields for cattle and livestock was limited, and during the Helfer period only during the summer months from March until October. Prior to that cattle may have been out-wintered, causing poaching and rutting.
32. However, no evidence was adduced as the numbers of cattle present at any one time. One or two witnesses stated they had never seen any cattle in the fields. If there was livestock the animals were generally not in both fields at the same time, and depended on the time of year.¹⁹ There was always one field to use for recreational activities.²⁰ It was the Southern Field that was used mainly for grazing, and there were cows in the top and bottom fields. Cattle used to graze on all three fields, but during some periods of history would be rotated between Herston Fields belonging to other farms, such as during the Tatchell era.

¹⁹ Mr Angell.

²⁰ Mr Angell.

33. As some witnesses stated, when animals were present on the fields, for instance on the Southern Field, the inhabitants of the area kept out of their way,²¹ and also the cattle undoubtedly kept out of their way. Witnesses also stated that when the cattle were there they moved from field to field as the gates were kept open, or there were no gates.²²
34. In my judgment, what is apparent from the evidence adduced by the Applicants' witnesses is that in principle the presence of cattle did not prevent or impede, or make any real impact on, any of the recreational activities in which local people were engaged. It is clear from the evidence that such use of the fields continued even when there was livestock in the fields. This is, in my judgment, an example of what has been stated in the *Redcar* case as "*give and take*". I am therefore satisfied as to the co-existence between cattle and local people on Herston Fields.
35. It is also noteworthy that although evidence was adduced by the Scott Estate that electric fencing had been present on occasions, this was denied by all the Applicants' witnesses when cross-examined on this point. I find that the evidence led by the Scott Estate on this point to be unsatisfactory.
36. The point has been made that the beef special premium subsidies claimed for Herston Fields from 1991 to 2002 (possibly unlawfully) provide support for the contention that cattle were present, was unchallenged evidence. That may well be so. However, this is a record of what is said that Herston Fields was used for at the time on an historic retrospective basis as to part of the forage area of a much larger area of land so claimed by way of subsidy. It cannot provide evidence of how many head of cattle were actually grazing on Herston Fields at any one time, as opposed to other fields of the neighbouring farm over which the subsidy was also being claimed. As Mr Smith, Junior, stated in evidence, the cattle during the Tatchell era were rotated between Herston Fields and Prospect Farm (120 acres), so it would be impossible to make an assessment of how many cattle were present at any one time on Herston Fields, and no witness sought to do so.

²¹ Mr Angell – “not a lot of animals on the fields sometimes on the south field and if so, he kept out of their way; Mrs Baird - “traditionally Herston Fields, and the Southern Field in particular, has been treated as a public space, always respecting grazing when present”; Mrs Warrington – “if animals were in the north field they would not go there. Cow pats were messy”; Ms Smits – the cows looked “very poor”.

²² Mr Helfer; Mr Smith, Junior.

37. In summary, in my judgment, there was co-existence between cattle use as and when cattle were present, and the activities upon which the various witnesses were engaged when using Herston Fields, such activities occurring side by side with the presence of cattle as and when, on a “*give and take*” basis. Herston Fields continued to be used throughout the period for the activities described by the witnesses for the Applicants.

Area

38. It is apparent from paragraphs 5.41 and 5.42 of the Final Report that my findings were such that consideration had been directed to the registration of a smaller area of land, and whether the application should be amended, but was rejected. I have found that until restricted from April 2011 such user by the inhabitants of Herston over the qualifying period was not confined to the public footpath or to the perimeter of Herston Fields, but such activities occurred over all three fields. The submission made on behalf of the Scott Estate that not all three fields were consistently indulged by the local inhabitants for such activities is rejected. It is apparent from the evidence of some 27 witnesses for the Applicant that at various times during the qualifying period continuous use was made of all three fields comprising Herston Fields for the activities analysed in Appendices 2 and 3 to the Final Report.

39. The nature of such activities in which the local inhabitants indulged on Herston Fields depended on a number of factors:

- (1) The time of year;
- (2) the number of animals present on the fields;
- (3) the ages, interests and desires of each witness;
- (4) the type of activity in which each witness indulged.

40. Thus, in my judgment, when regard is had to the totality of the evidence, each of the three fields comprising Herston Fields were used during the qualifying period for lawful sports and pastimes by a significant number of the inhabitants as of right throughout the relevant 20 year period.

Actions by Tenants

41. In the Further Representations, challenges as to my findings were made insofar as the actions of some of the tenants of the Scott Estate.

Mr Helfer

42. Mr Helfer was the sub-tenant from DCC, together with other land, from September 2002 of Herston Fields on a three-year annual farm business tenancy. He (apparently illegally) sub-let Herston Fields to Mr and Mrs Lawrence for horse grazing in 2004. The evidence reveals that his connection with Herston Fields was somewhat tenuous between 2004 and 25th March 2005 when Mr Dicker asked him to vacate Herston Fields on the grant of Mr Dicker's sub-tenancy by DCC. At the most he appears to have a connection with Herston Fields for only two years or so.
43. As to Mr Helfer's interpretation that it would have been very difficult for local people to use Herston Fields for any kind of recreational activity, or to walk along the public footpath, his evidence is to be viewed in the light of the evidence of the Applicants as to such use that was made of the fields in question, and the public footpath, during the period of his direct involvement with Herston Fields between 2002 and 2004. I find the evidence of the witnesses for the Applicants more compelling.
44. The fact that Mr Helfer says about he was able to use the fields (or perhaps just the Southern Field) for grazing by the process of re-seeding, and subsequent grazing, does not conflict with the evidence of the witnesses for the Applicant. The fact that he ploughed one or more of the fields during this period of time accords with the evidence of some of the Applicants, but not all. Mr Helfer agrees that there was deviation from the footpath particularly by dog walkers in the Southern Field. Also he was the only witness for the Scott Estate who stated that he would challenge people whenever he saw them. Not only does this evidence directly conflict with the witnesses for the Applicants, but also it is completely non-specific. No evidence was led as to timings or numbers of occasions. I prefer the evidence of the Applicants in this regard.

Washpond Road entrance gate

45. Insofar as the gate at the southwest corner of the Southern Field is concerned, it is true that it was Mr Helfer wired it up so as to prevent any persons from gaining access from Washpond Lane at that point. It might well be that some local people had gained access to the Southern Field by this method. However, no witness for the Applicants ever stated in evidence that access was gained through this gate, and Mr Helfer did not identify anyone, as such.

46. Further, the evidence of the Applicants reveals that access to Herston Fields was regularly made through the “*pinch point*” at the stile at the southern end of the Southern Field at the point where the public footpath commenced.
47. Thus, in my judgment, the fact that the gate at Washpond Lane was secured by barbed wire is neither here nor there insofar as the access, and the use of Herston Fields were concerned for the various activities described by the witnesses for the Applicants. I therefore find that the Washpond Lane entrance does not undermine the considerations of access to and egress from Herston Fields at other points for the purposes of the residents of the neighbourhood indulging in lawful sports and pastimes.
48. It is also instructive to note that Mr Helfer never put up signs including next to the stile at the southern end of the Southern Field asking people to keep or stay on the footpath the reasons which are somewhat obscure, particularly bearing in mind that such signs could have been erected in such a way that they were vandal-proof, as has occurred more recently since 2011.

Mrs Helfer

49. Insofar as Mrs Helfer is concerned, she did not give evidence to the Public Inquiry, such information as set out in paragraph 4.23 being hearsay evidence relayed by her husband (and Mr Pardoe) as to her announcement in 2005 to the children at assembly at Swanage Middle School. In any event, it is unclear as to the purpose of such an announcement, and one interpretation it could be construed as a warning to the children at the school that it would be unsafe for them to play in Herston Fields when livestock was present. The motivation for this action was not tested in cross-examination, or in the contextual framework.
50. In summary, having regard to all these circumstances, in my judgment, Mr Helfer’s evidence can only provide a snapshot of circumstances, by a farmer who was not resident close by, who farmed other land, and whose direct involvement in Herston Fields was for only a short period of time at best two years, or so having (probably in breach of the tenancy conditions with DCC sub-let the land. The fact that the gate to Washpond Lane was barred by him does not, in my judgment undermine the evidence of the witnesses for the Applicant in relation to whether or not their use of Herston Fields can be construed as user as of right for the

requisite qualifying period. Such activities as are described by him do not conflict with the evidence of the witnesses for the Applicants, such evidence I have found to be sufficiently compelling to support the Recommendations which I have made to the Registration Authority. Further, Mrs Helfer did not give evidence, and therefore the motivation for her announcement at school is unknown, and not tested in cross-examination.

Mr Gerald Tatchell/Mr Batterick

51. During the course of the evidence that the number of references were made to Mr Gerald Tatchell (and his son) and Mr Tom Batterick, who worked for Mr Tatchell for at least 40 years as his cattle man. These references appear in the evidence of the witnesses for the Scott Estate, and refer to actions apparently taken by Mr Tatchell on occasions, and also by Mr Batterick. Mr Tatchell was apparently involved with Herston Fields from 1954 until his death in the year 2000. However, such evidence must be discounted, in my judgment, as the occasional references made as to his actions and behaviour are hearsay, or double-hearsay for the purposes of the Public Inquiry, and can carry little or no weight in evidential terms.

Use of Paths

52. In my judgment, based upon the evidence of the Applicant's witnesses, although it is clear that members of the public used the public footpath, it is also abundantly clear (as revealed by the evidence) that such use of Herston Fields for the activities described also included circular and perimeter path walks and the use of the broader acreage of Herston Fields in order to engage in such recreational activities throughout the qualifying period as normal village green uses.

Inadequate Reasons

53. As to paragraph 5.36 is concerned, insofar as the evidence that was adduced on behalf of the Applicant related to use of Herston Fields by people who are not resident inhabitants of Herston, such evidence is discounted together with evidence of periods when residents of Herston had either moved away permanently or temporarily.

Damage to Crops

54. Apart from a passing reference to rape seed being planted, and another reference to haylage/silage, there was no evidence led by the witnesses for the Scott Estate during

the Public Inquiry as to crops being planted over Herston Fields on a regular basis, or at all. At best, the evidence reveals that in 2001/2002 Herston Fields was ploughed and re-seeded for cattle grazing – no more, no less. It is therefore quite far-fetched to suggest that members of the public have in some way damaged growing crops, as no crops were grown.

Irrelevant Considerations

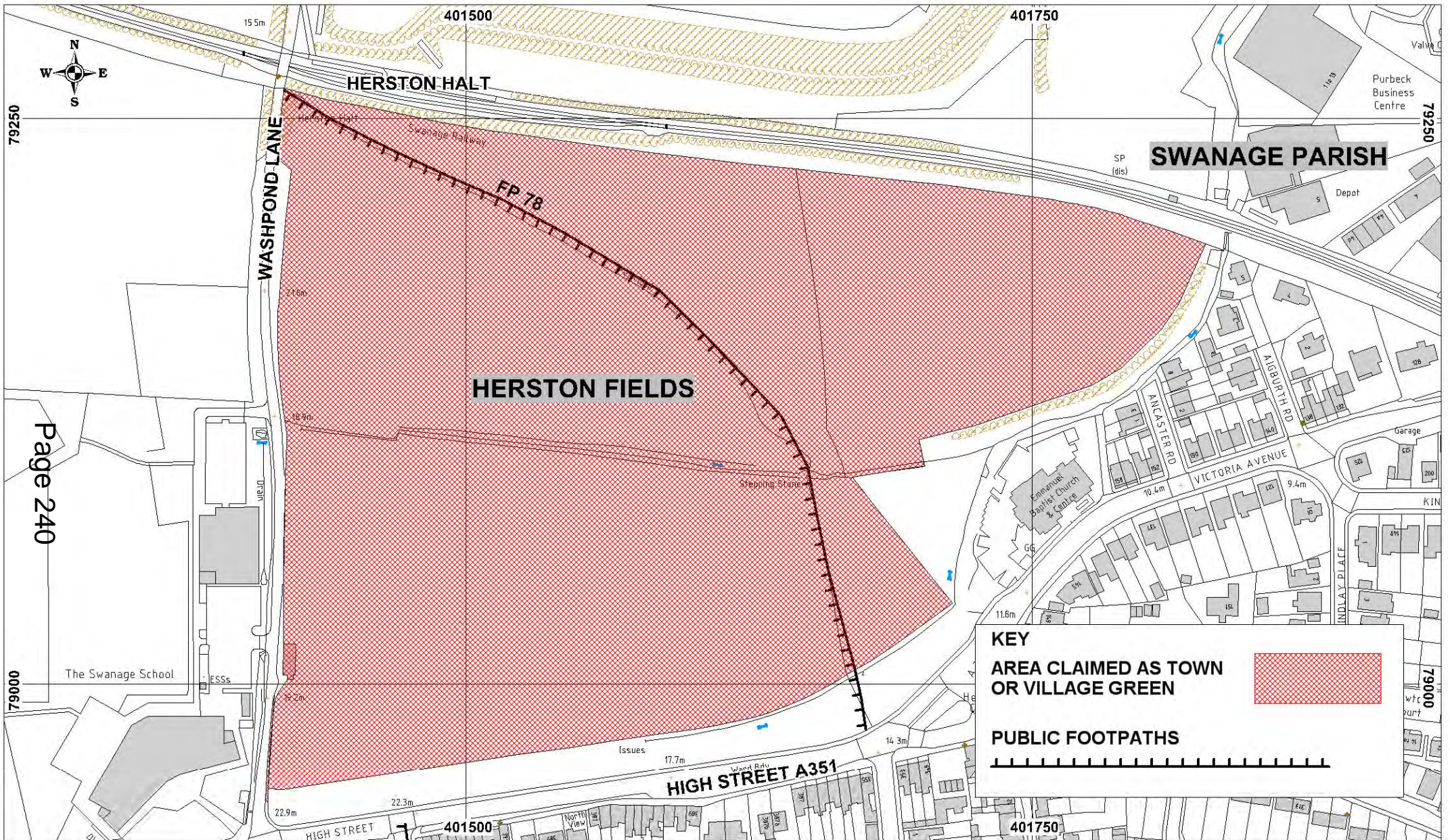
55. There was a large amount of oral and written evidence adduced during the course of the Public Inquiry which required detailed analysis. I should make it clear that the Recommendations made in the Final Report are based upon the totality of the oral and written evidence that was received. This included the evidence provided in documentary form in the Evidence Forms. In some respects some of the Evidence Forms were flawed. However, in my judgment despite such apparent flaws, in general the information collated in the Evidence Forms supports the Applicant's case, and I so find.
56. I should also add that the summaries tables i.e. the Activity Logs and Bar and Pie Charts annexed as Appendix 2 to the Final Report contain in summary form the analysis of the evidence adduced of each witness, no more no less. Such tables are included in order to assist the Registration Authority in its deliberations.

Overall Conclusion and Recommendations

57. Even though a considerable number of points have been raised by Counsel for the Scott Estate in the Further Representations, which I have considered briefly in this Supplementary Report, I remain of the view that there is overwhelming and compelling evidence demonstrating on the balance of probability that Herston Fields, as a whole, has been used for the qualifying period of 20 years by a significant number of inhabitants of Herston for lawful sports and pastimes up to April 2011, and that such user was "*as of right*". Such judgment has been based upon the considerable body of evidence both documentary, and oral, adduced during the course of the lengthy Public Inquiry.

Edward F Cousins

6th June 2017



SECTION 15, COMMONS ACT 2006

APPLICATION FOR THE REGISTRATION OF LAND AS A TOWN OR VILLAGE GREEN AT HERSTON FIELDS, SWANAGE

Application reference: VG AP 1/2013

Plan ref: 14/36/1

Date: 17/06/2015

Scale 1:2250 A4

Drawn By: AP

Cent X: 401614

Cent Y: 79115

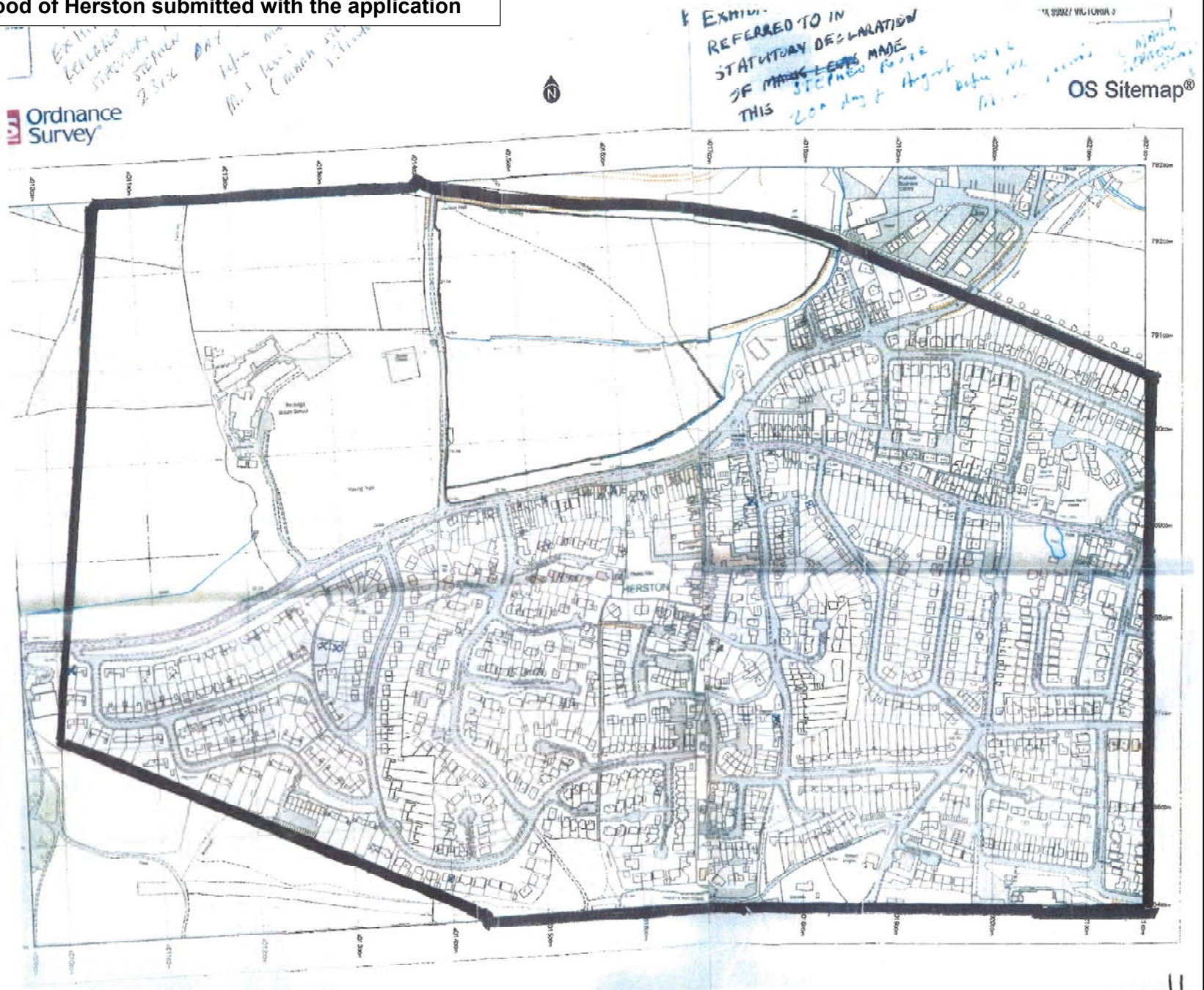
THIS MAP IS NOT DEFINITIVE AND HAS NO LEGAL STATUS

GEOGRAPHICAL INFORMATION SYSTEMS



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Plan of neighbourhood of Herston submitted with the application



Plan to show the Inspector's amended area of the neighbourhood of Herston

