

In the Matter of
an Application to Register
Warneford Meadow, Oxford,
as a New Town Green

REPORT
of Mr. VIVIAN CHAPMAN Q.C.
15th. October 2008

Oxfordshire County Council

Chief Executive's Office

Legal Services

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EXECUTIVE SUMMARY

<p>The Report concludes that the applicant has established that Warneford Meadow (including the orchard) is land on which for not less than 20 years a significant number of the inhabitants of the Hill Top Road neighbourhood within the locality of the City of Oxford have indulged in lawful sports and pastimes as of right and continued to do so at the date of the application. The Report recommends that the registration authority should register the Meadow (including the orchard) as a new green.</p>

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1. The town green application

[1] Warneford Meadow is an attractive expanse of unmaintained meadowland in the south-eastern suburbs of Oxford. The Meadow is about 20 acres in area. It slopes gently from west to east down to a stream called Boundary Brook. The Meadow is crossed by a number of footpaths, some being public footpaths and others being informal paths. There is a small overgrown orchard on the northern side of the Meadow.

[2] The surroundings of Warneford Meadow are as follows:

- East of Boundary Brook, there is the densely built up complex of the Churchill Hospital.
- South of the Meadow, there is the Southfield Golf Course.
- West of the Meadow there is an area of long-established residential housing stretching down quite steeply from Hill Top Road to the Cowley Road. Some of the gardens of houses on the east side of Hill Top Road back onto the Meadow.
- North of the Meadow is more varied. At the north eastern end is the Warneford Hospital set in large grounds. At the western end of these grounds there is a Teaching Nursing Home built in about 1999. To the east of the Teaching Nursing Home there is a northerly dog-leg of the Meadow bounded to the north by Roosevelt Drive, which is an access road to the Churchill Hospital. Roosevelt Drive was built in about 1980. To the north of Roosevelt Drive, there is the Little Oxford housing estate, built in about 1991. Further north, there is the Gypsy Lane campus of Oxford Brookes University set in the midst of residential suburbs.

[3] Warneford Meadow is owned by the Secretary of State for Health (“SoS”). The SoS has plans to build on the Meadow. These plans are opposed by many local people who wish to preserve the Meadow as an unspoilt recreational resource.

[4] On 19th December 2006, Mr. Paul Deluce, a local resident, applied¹ to Oxfordshire County Council (“OCC”) under s. 13 of the Commons Registration Act 1965 (“CRA 1965”) to register Warneford Meadow as a new town green. OCC is the relevant commons registration authority. The application form was in the prescribed Form CR30. The form (so far as material) provided as follows:

- Part 1 gave Mr. Deluce’s name and address. He lives in the Southfield Park Flats, which are in the residential area to the west of the Meadow.
- Part 3 described the application land as Warneford Meadow as shown edged red on an attached plan. The locality of the Meadow was said to be the parishes of (a) All Saints, Highfield, (b) Holy Trinity, Headington Quarry, (c) St. Clement’s, and (d) St. Mary and St. John. During the course of the public inquiry, the applicant sought (without any opposition from the objectors) to amend the description of the locality to read “The Divinity Road neighbourhood (as defined by the green edging on Map 2A) within the ecclesiastical parish of Cowley St. John and the ecclesiastical parish of

¹ R1

Headington Quarry, and at all material times within the locality of the City of Oxford”.

- Part 4 stated that the Meadow became a green on 19th December 2006
- Part 5 stated that the Meadow became a green because “the land has been used for not less than 20 years by a significant number of the inhabitants of the locality/neighbourhood for lawful sports and pastimes as of right and this use continues”
- Part 6 stated that the SoS was believed to be landowner
- Part 8 listed the evidence submitted in support of the application
- Part 9 (other facts relating to the application which ought to be drawn to the attention of the registration authority) referred to applications for outline planning permission to develop the Meadow.

The application form was accompanied by a statutory declaration² in prescribed form made by Mr. Deluce and also dated 19th December 2006.

[5] The application was considered by OCC to be duly made and, in accordance with the relevant regulations, the application was publicised, inviting objections.

There were six objectors:

- The SoS
- Oxfordshire and Buckinghamshire Mental Health Partnership NHS Trust
- South Central Strategic Health Authority
- Oxford Radcliffe Hospitals NHS Trust
- Mr. Christopher J Whitmey
- Mrs. Rosie Booth.

[6] The following objection statements were served:

- The first four objectors served a joint objection statement³ dated 7th June 2007. The objection statement objected to the application on numerous grounds. These objectors are interested in developing the Meadow.
- Mr. Whitmey served an objection statement⁴ dated 7th June 2007. He lives in Herefordshire and has no personal involvement with the Meadow. He objected “as a resident of the United Kingdom and a tax-payer entitled to avail himself of the National Health Service”. The objection statement put forward a number of legal arguments against the validity of the application. Mr. Whitmey, although not a lawyer, has considerable experience in this area of the law, having taken part in at least one previous public inquiry into an application to register a new green and having been the claimant in *R (Whitmey) v Commons Commissioners*⁵.
- Mrs. Booth served a letter dated 16th June 2007⁶ by way of objection statement. She adopted the arguments in Mr. Whitmey’s objection statement.

[7] I was appointed by OCC as an independent inspector to hold a public inquiry into the application and, afterwards, to write a Report setting out my recommendation

² R4

³ B3

⁴ Y1

⁵ [2005] 1 QB 282.

⁶ Y6

as to whether OCC should accept or reject the application. I gave written Directions on 20th July 2007 as to the conduct of the public inquiry.

[8] The public inquiry took place in Oxford over 15 days in October 2007, January 2008 and May 2008. The applicant was represented by Miss Ross Crail of counsel instructed by Public Law Solicitors. The first four objectors were represented by Mr Philip Petchey of counsel instructed by Clarkslegal LLP. Mr. Whitmey represented himself and Mrs. Booth. I held a lengthy accompanied site view and I also visited Warneford Meadow on several occasions unaccompanied. The public inquiry was extremely hard-fought, although remaining constructive and good-humoured. A wealth of oral and written evidence was submitted to the public inquiry. Very detailed oral and written submissions were made by both counsel and by Mr. Whitmey.

[9] After conclusion of the public inquiry, Mr. Whitmey requested permission to serve additional written submissions. I gave directions permitting such submissions by 13th June 2008 and giving the other parties until 23rd June 2008 to comment in writing upon them. Mr. Whitmey duly served further submissions. No other party commented on them.

[10] After Mr. Whitmey's additional submissions were served, judgment was delivered in the case of *R (Lewis) v Redcar & Cleveland BC & anor*⁷. The applicant's solicitors requested an opportunity to make further written submissions on this case. I gave further directions allowing further written submissions on the new case by 14th August 2008 with permission to serve written comments on any such submissions by 1st September 2008. This rather extended time scale was dictated by summer holiday commitments.

[11] I would like to express my gratitude to both counsel, to their respective instructing solicitors and to Mr. Whitmey for the considerable assistance which they all gave me throughout the public inquiry (and in their written submissions afterwards). I would also like to pay tribute to Mr Richard Goodlad and Mr. David Brown of OCC who, with exemplary efficiency, made all the practical arrangements for the public inquiry and gave me excellent administrative support throughout.

[12] Before turning to review the evidence, I think that it would be useful if I were to summarise my understanding of the law and procedure relating to the registration of new greens under the CRA 1965.

2. New greens: the law and procedure

[13] The CRA 1965 provides for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31st July 1970 for the registration of existing greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be...a town or village green unless it is so registered". Section 13 of the Act provides for the amendment of that register where any land becomes a town or village green after the end of the original registration

⁷ [2008] EWHC 1813

period. The expression “town or village green” is defined by s 22(1) of the Act. It is a three limbed definition, comprising

- statutory greens (i.e. greens created by statute),
- customary greens (i.e. greens based on immemorial use) and
- prescriptive greens (i.e. greens based on 20 years’ use).

It is the third limb of the definition, i.e. the definition of prescriptive greens, which is relevant in this case. This definition has been altered twice, first, by the Countryside and Rights of Way Act 2000 (“CRoW 2000”) and second, by the Commons Act 2006 (“CA 2006”).

[14] Until 30th January 2001, the first definition of a prescriptive green was:

“land...on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than twenty years”.

[15] As from 30th January 2001, this definition was replaced, pursuant to s 98 of CRoW 2000, by the following second definition:

“...land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.”

No regulations have been made to implement para. (b) of the second definition and it now seems unlikely that any such regulations will ever be made.

[16] Section 15 of the CA 2006 was brought into force on 6th April 2007 and contains the following provision for the registration of new prescriptive greens:

“Registration of greens

(1) *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.*

(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),*

(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)*

However, by para 4 of the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, an application made before 6th April 2007 to register a new green continues to be governed by the pre CA 2006 law.

[17] The main legal issues concerning prescriptive greens that have been decided by the courts are as follows:

What is a Town or Village Green?

[18] A town or village green is land which is subject to the right of local people to enjoy general recreational activities on it. There is no legal requirement that it should consist mainly of grass, be situated in or in reasonable proximity to a town or village, or be suitable for use by local inhabitants for traditional recreational activities⁸. Greens which were not registered by 31st July 1970 ceased in law to be town or village greens and, so long as they remain unregistered, local people have no recreational rights over them⁹.

What is the Effect of Registration?

[19] The effect of registration can be summarised as follows.

- The fact that land is registered as a green is conclusive evidence that it was a green as at the date of registration¹⁰.
- Land becomes a new green only when it is registered as such¹¹.
- Registration as a new green confers general recreational rights over the green on the inhabitants of the relevant locality or neighbourhood¹²
- Registration as a new green subjects the land to the protective provisions of s. 12 of the Inclosure Act 1857 (“IA 1857”) and s. 29 of the Commons Act 1876 (“CA 1876”), which in practice preclude development of greens¹³

Which definition applies?

⁸ *Oxfordshire County Council v Oxford City Council & anor* [2006] 2 AC 674 *per* Lord Hoffmann at paras 3-16, & 37-39, Lord Rodger at para 115 & Lord Walker at paras 124-128 (Lord Scott dissenting at paras 71-83)

⁹ *Oxfordshire per* Lord Hoffmann at para. 18.

¹⁰ CRA 1965 s. 10

¹¹ *Oxfordshire per* Lord Hoffmann at para 43, Lord Scott at para 110, & Lord Rodger at para 116 (Lady Hale dissenting at para 142 in relation to original definition)

¹² *Oxfordshire*

¹³ *Oxfordshire*

[20] In the case of any application to register a new green made after 30th January 2001, and before s. 15 of the CA 2006 came into force, only the second definition applies¹⁴. This, therefore, is the relevant definition in the present case.

What is the meaning of the second definition?

[21] The meaning of the second definition has also been extensively considered by the courts.

Land...

...on which for not less than 20 years...

[22] The 20 year period must be the 20 years immediately before the s. 13 application¹⁵.

...a significant number...

[23] “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers¹⁶.

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

[24] A “locality” cannot be created by drawing a line on a map¹⁷. A “locality” must be some division of the county known to the law, such as a borough, parish or manor¹⁸. An ecclesiastical parish can be a “locality”¹⁹. It will be seen that the courts have adopted a very narrow construction of “locality” which catches out many lay applicants for registration of new greens. The House of Lords in the *Oxfordshire* case recognised and upheld the narrowness of this definition of “locality”. Lord Hoffmann said that it had been decided in the *Sunningwell* case that the narrowness of the definition was qualified only by the fact that it was sufficient if the recreational users of the green came “predominantly” from the relevant locality²⁰. However, I think that it must be borne in mind that that this qualification was applied on consideration of the first, and narrower, definition of a prescriptive green in the *Sunningwell* case. Under the second definition, the test is not whether the users come predominantly from the relevant locality or neighbourhood, but whether a significant number of the users come from such locality or neighbourhood.

¹⁴ *Oxfordshire per* Lord Hoffmann at para 43, Lord Scott at para 110, Lord Rodger at paras 117-123 & Lord Walker at para 124. Lady Hale dissented at para 147.

¹⁵ *Oxfordshire per* Lord Hoffmann at para s 41-42 & 60, Lord Rodger at para 114 & Lord Walker at para 124. Lady Hale dissented at para 147.

¹⁶ *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

¹⁷ *R (Cheltenham Builders Ltd) v South Glos, DC* [2004] 1 EGLR 85 at paras 41-48

¹⁸ *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-e, *Cheltenham Builders* at paras 72-84 and see *R (Laing Homes Ltd) v Buckinghamshire CC* [2004] P&CR 573 at para. 133

¹⁹ *Laing Homes*

²⁰ *Oxfordshire per* Lord Hoffmann at para. 25 applying the ruling of the House of Lords in *R v Oxfordshire County Council ex. p. Sunningwell Parish Council*[2000] 1 AC 335.

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

[25] A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood²¹. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness²². A neighbourhood need not lie wholly within a single locality²³. In the *Oxfordshire* case²⁴, Lord Hoffmann pointed out the “*deliberate imprecision*” of the expression.

...have indulged in lawful sports and pastimes...

[26] The words “lawful sports and pastimes” form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play²⁵. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way²⁶.

...as of right...

[27] In my view, the cases disclose three threads in the requirement that recreational use of the application land must be “as of right”:

- use of land “as of right” must be use which is without force, stealth or permission (“*nec vi nec clam nec precario*”) and does not turn on the subjective beliefs of users²⁷.
- Use of land “as of right” must be use as a trespasser and not use “by right”, i.e. pursuant to a legal right²⁸.
- Use of land “as of right” must have the appearance to the landowner of the exercise of a legal right.

[28] As to the first thread:

- “Force” does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates, if it involves ignoring notices prohibiting entry, or if it is contentious or under protest²⁹.
- Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner
- “Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be granted impliedly (as opposed to expressly), but permission cannot be implied from inaction or acts of encouragement by the landowner³⁰. The effect of permissive signs to preclude continuing user as of right will, in the case of post 6th April 2007 applications, be affected by CA 2006 s. 15(7)(b).

²¹ *McAlpine*

²² *Cheltenham Builders* at para 85

²³ *Oxfordshire per* Lord Hoffmann at para 27 disapproving *Cheltenham Builders* at para. 88 para. 27

²⁵ *Sunningwell* at pp 356F-357E

²⁶ *Oxfordshire* [2004] Ch 253 at paras 96-105

²⁷ *Sunningwell*

²⁸ *R (Beresford) v Sunderland CC* [2004] 1 AC 889 at paras 3, 9 & 30

²⁹ *Newnham v Willison* (1987) 56 P&CR 8

³⁰ *Beresford*

- In the *Sunningwell* case, the House of Lords said that use “as of right” has to be use which is without force, stealth or permission. However, I think that it would be wrong to treat *Sunningwell* as if it had amended the statute to substitute “*without force, stealth or permission*” for the words “*as of right*”. In *Sunningwell*, the House was considering the issue whether, in addition to the requirement that user must be *nec vi nec clam nec precario*, users had to have a subjective belief that they were exercising the right claimed. In rejecting the requirement for such subjective belief, the House emphasised the objective nature of user “as of right”.

[29] As to the second thread, if user is pursuant to a legal right, e.g. under a statutory right of public recreation, it is “by right” rather than “as of right”. This point was fully discussed by the House of Lords in the *Beresford* case, and it illustrates the fact that “as of right” does not just mean “without force, stealth or permission”. User as of right must also be trespassory.

[30] As to the third thread, there are hints in the speeches of Lord Hoffmann in the *Sunningwell* and *Oxfordshire* cases (a) that qualifying recreational user must have the appearance to the landowner of the exercise of a legal right and (b) that this appearance may be affected by the interaction between the use of the land made by the landowner and by local people. Lord Hoffmann rejected the view expressed in the *Laing Homes* and *Humphries*³¹ cases that land could not acquire town or village green status if the landowner was using the land for purposes that would be unlawful under IA 1857 s. 12 or CA 1876 s. 29 if the land were a green. In cases where the land is subject to low level use by the landowner, there may be no conflict between the use of the land by the landowner and the recreational use of the land by local people. There must be give and take between the landowner and local recreational users. However, if recreational use by local people materially defers to the use by the landowner, the recreational use may not be “as of right” because it does not have the appearance to the landowner of the exercise of a legal right³².

[31] I therefore conclude that user “as of right” means user which is:

- not forcible, secret or permissive (“*nec vi nec clam nec precario*”).
- trespassory and not pursuant to a legal right, i.e. “as of right” as opposed to “by right”,
- has the appearance to the landowner of the exercise of a legal right

...and continue to do so.

[32] It was decided by the House of Lords in the *Oxfordshire* case that the relevant user must continue down to the date of the application: user need not continue down to the date of registration³³.

Human Rights

³¹ *Humphreys v Rochdale MBC* (2004) unreported

³² *R (Lewis) v Redcar & Cleveland BC & anor* [2008] EWHC 1813 Admin

³³ *Oxfordshire*: Lord Hoffmann at para 44, Lord Rodger at para 114, Lord Walker at para 124 & Lady Hale at para 143. Lord Scott, at para 109, would have allowed recreational use to cease shortly before the date of the application provided that the application was made reasonably promptly after interruption.

[33] The majority view of the House of Lords in the *Oxfordshire* case was that the creation of a new green by prescription under the CRA 1965 did not infringe the landowner's human rights under art. 1 of the 1st Protocol to the ECHR.

Procedure

[34] Procedure on applications to register new greens under the CRA 1965 is governed by The Commons Registration (New Land) Regulations 1969. These regulations have proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications.

Who can apply?

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

Application.

[36] Application is made by submitting to the registration authority a completed application form in Form 30. The form asks a series of questions which are very hard in practice to answer.

- Part 3 asks for the "locality" of the application land. Few people completing the form are aware of the narrow technical meaning given by the courts to "locality".
- Part 4 asks the applicant to state on what date the land became a green. This question is now hard to answer in the light of the House of Lords' ruling that land does not become a new green until it is registered. Probably the correct answer is the date of the application.
- Part 5 asks how the land became a green. This question is now also hard to answer in the light of the House of Lords' ruling that land does not become a new green until it is registered. Probably it means: how did the land become land which qualifies for registration as a new green?

The House of Lords in the *Oxfordshire* case has emphasised that the procedure is intended to be simple and informal and that applications are not to be defeated by technical objections to the form of applications provided that the applications are handled in a way which is fair to all parties³⁴. The form has been replaced and improved in relation to post 6th April 2007 applications.

Accompanying documents.

[37] Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 4 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he

³⁴ Lord Hoffmann at paras 60-62, Lord Scott at para 110, Lord Walker at para 124 & Lady Hale at para 144.

has the right to production. In many cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence.

[38] The applicant is only required to produce evidence to support the application if the registration authority reasonably requires him to produce it under reg. 3(7)(d)(ii).

Preliminary consideration.

[39] After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(7). The registration authority can reject the application as not “duly made” at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- where Form 30 has not been duly completed in some material respect,
- where the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or
- where the supporting documents disprove the validity of the application

Publicity.

[40] If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(4) to publicise the application:

- by notifying the landowner and other people interested in the application land
- by publishing notices in the local area, and
- by erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors.

[41] Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement.

[42] Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has a discretion to admit late objection statements.

Determination of application.

[43] The most striking feature of the 1969 Regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The Commons Commissioners have no jurisdiction to deal with disputed applications to register new greens: *R (Whitmey) v Commons Commissioners*³⁵. The regulations seem to assume that the registration authority can determine disputed applications to register new

³⁵ [2005] 1 QB 282.

greens on paper. A practice has grown up, repeatedly approved by the courts, most recently by the House of Lords in the *Oxfordshire* case, whereby the registration authority appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. In some cases, procedural fairness will make an oral hearing not merely an option but a necessity³⁶. In the *Whitney* case, it was held that the procedure by non statutory public inquiry did not infringe art. 6 of the ECHR because any decision of the registration authority is subject to review by the courts.

Procedural issues.

[44] A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”³⁷. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 30.** The House of Lords has held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness³⁸.

3. Legal submissions of Mr. Whitney

[45] It is convenient at this point to deal with the general legal submissions made by Mr. Whitney. He also made detailed submissions on the facts of this case which I have taken into account when applying the law to the facts. However, Mr. Whitney made general submissions about the law relating to new greens which I need to address. His submissions were very detailed and supported by reference to much authority. However, it appears to me that his submissions can be resolved into two main propositions:

- Land cannot be registered as a new green unless it is a customary green which failed to be registered before 31st. July 1970, and
- Sports and pastimes are not “lawful” if trespassory.

[46] I reject the first submission. In my judgment, there is no warrant for importing such a requirement into the definition of a prescriptive green under CRA 1965 s. 22(1) (as amended). I see no reason why the words of the definition should not be read as having the effect that land can become registrable as a new green after 20

³⁶ *Oxfordshire per Lord Hoffmann* at para 29 approving Sullivan J in *Cheltenham Builders*

³⁷ *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

³⁸ Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

years' qualifying use, irrespective of its previous status. If Mr. Whitmey's submission were right, the decisions of the House of Lords in *Sunningwell*, *Beresford* and *Oxfordshire* would all have been wrong since none of these cases concerned land which was historically a customary green.

[47] I also reject the second submission. In my judgment, the word "lawful" does not mean that tortious user is excluded from qualification. Indeed, as the House of Lords made clear in *Beresford*, all prescription is based on trespassory user. In my view, the adjective "lawful" is intended to exclude sports and pastimes which are criminal offences such as bear-baiting, cock-fighting or bull-fighting.

4. The historical documents

[48] A very large number of historical documents, including letters, maps and photographs, were produced to the public inquiry. The authenticity of these documents was not in dispute. A number of other historical facts were not in dispute. These documents and facts provide a vital background to the oral and other written evidence given to the public inquiry. I therefore propose to review the more important of these documents and facts before turning to consider the oral and other written evidence placed before the public inquiry. It is convenient to consider the historical documents in chronological order.

1830

[49] A map³⁹ of 1830 shows that Warneford Meadow was then part of the open countryside to the south east of Oxford. A number of the features shown on the map remain, at least in name, today:

- "The Asylum" was the Radcliffe Asylum founded in the 1820 and renamed the Warneford Asylum in 1843⁴⁰. This is the basis of the present Warneford Hospital
- "Southfield Farm" is the site of the Southfield Park Flats, where the applicant lives.
- "St. Bartholomew" was the Hospital of St. Bartholomew⁴¹, founded in 1126 by Henry I for the care of lepers. The hospital and its chapel were given by Edward III to Oriel College in 1329. The hospital (now Bartlemas Farm) and chapel still remain in a tiny picturesque hamlet called Bartlemas, approached by an unnamed road from the east side of the Cowley Road.
- Boundary Brook can be seen running from the north of the map, passing the Asylum on its eastern side and running into Cowley Marsh.

What is now Warneford Meadow lies between the Asylum, Southfield Farm and Boundary Brook.

1876

³⁹ R210

⁴⁰ R197

⁴¹ R195

[50] An OS map⁴² of 1876 shows:

- the Warneford Asylum set in spacious grounds
- part of the St. Bartholomew lands
- Southfield Farm
- A track running east from Southfield Farm, turning south down another track (roughly in the position of the present Hill Top Road), turning east along the line of what is now Public Footpath 80 (“FP80”) , and crossing Boundary Brook to reach Warren Cottages (which were demolished in 1986).

Warneford Meadow lies in part of the area between the Asylum, Boundary Brook, FP80 and the Hill Top Road track.

1899

[51] An OS map⁴³ of 1899 shows:

- Warneford Asylum expanded by incorporating further grounds on its southern side,
- Southfield Farm and the track joining that farm with Warren Cottages (the Hill Top Road track having disappeared)
- OS enclosures 46 and 48 lying to the east and south of Warneford Asylum.

Warneford Meadow comprises the southern part of OS46 and the north eastern part of OS48.

1900

[52] An OS map⁴⁴ of 1900 shows a wider area. The map shows that, by 1900, development was creeping up the hill eastwards from the Cowley Road between the workhouse and St. Bartholomew’s Hospital and Chapel, comprising what are now the western end of Divinity Road, Bartlemas Road, the western end of Southfield Road and Warneford Road. However, there was still a large area (marked Southfield Estate 1902 on the map) between this development and the Warneford Asylum which remained undeveloped. Divinity Walk ran along the northern side of this land.

[53] In 1900, the Warneford Asylum purchased from Magdalen College 13 acres of land to the east of the asylum extending to Boundary Brook⁴⁵. According to the Warneford Archives⁴⁶ the land was at the time let as allotments and was purchased for £3,000 to prevent the land falling into the hands of a speculative builder. I infer that the land purchased was enclosure OS 46 on the 1899 OS map⁴⁷. The southern part of that land forms part of the land now known as Warneford Meadow and subject to the present application.

1902

⁴² R210
⁴³ R215
⁴⁴ R211
⁴⁵ R197
⁴⁶ R208
⁴⁷ R215

[54] In 1902, the Southfield Estate (as shown on the 1900 OS map⁴⁸) was sold by the Faulkner family to the Industrial and Provident Land and Building Society⁴⁹ and was then laid out in lots for residential development.

1918

[55] In 1918, a portion of land amounting to 18 acres was purchased by the Warneford Asylum from Mr Faulkner to protect the amenity of the Asylum⁵⁰. This purchase was of the rest of what is now Warneford Meadow.

1921

[56] An OS map⁵¹ of 1921 shows that the Southfield Estate had largely been developed by that date, although there were still a few empty lots in Hill Top Road. The acreage of OS 48 was given as 17.928 acres, which corresponds roughly with the 18 acres purchased by the Warneford Asylum in 1918. The Warneford Asylum had been renamed the Warneford Mental Hospital.

1927/29

[57] An aerial photograph⁵² variously dated 1927 or 1929 gives an excellent overview of the position on the ground in the late 1920s:

- In the foreground was the junction of Hill Top Road and Southfield Road
- East of Hill Top Road was the Warneford Mental Hospital with formal gardens to its west, playing fields to the east and south and kitchen gardens/nurseries to the south east
- At the south east corner of the Warneford grounds were the hospital farm buildings, now replaced by the Teaching Nursing Home built in about 1999.
- To the south and east of the Warneford grounds were fields in agricultural use. The northern part is now the Little Oxford estate. The rest is Warneford Meadow.
- In the north eastern distance, the Grays Road/Valentia Road estate was being built on the far side of Old Road and Gipsy Lane.

1945

[58] An aerial photograph⁵³ of 1945 shows:

- The nurses' home built on the land between the Warneford Mental Hospital and Boundary Brook
- A rectangular section of the Meadow taken over for horticultural use
- The rest of the Meadow still apparently in agricultural use
- The prefabricated buildings of the new Churchill Hospital east of Boundary Brook on land annexed by the Ministry of Defence in 1940 and leased to the US army in 1942⁵⁴.

⁴⁸ R211
⁴⁹ R196
⁵⁰ R208 & 460
⁵¹ R216
⁵² R9 & R221
⁵³ R222

1948

[59] With the creation of the NHS, the Warneford Mental Hospital and its remaining grounds (including the Meadow) were nationalised and, in 1948, vested in the Minister of Health⁵⁵.

1956

[60] An OS map⁵⁶ of 1956 shows:

- The wartime horticultural enclosures on the Meadow still in place
- Two new enclosures west of the wartime enclosures, one of which is marked as an orchard
- Southfield Farm still in being with the footpath leading to Warren Cottages
- The Meadow divided by a roughly north-south fence, vestiges of which still remain today.

Early 1960s

[61] For many years, Warneford Hospital had run a hospital farm used *inter alia* for the rehabilitation of patients. It had a dairy herd which grazed the Meadow. In the early 1960s, the government required hospital farms to be closed. The dairy herd was managed by an outside contractor for the rest of the 1960s⁵⁷.

1969-70

[62] In about 1969-70 a rugby pitch was mowed on the Meadow, but it proved too rough and games were transferred to the formal playing fields of the hospital⁵⁸.

1971

[63] In 1971 the SoS (as successor to the Minister of Health) sold and conveyed some land at the south west corner of the Meadow to the Spastics Society for the construction of a home originally called Chiltern House but subsequently renamed Jack Howarth House. In the same year, the SoS granted a 99 year lease to the Spastics Society of a roughly square piece of land to the north of Chiltern House⁵⁹. The land subject to the Lease is shown edged blue on the plan to the SoS's registered title⁶⁰.

1981

[64] An aerial photograph⁶¹ of 1981 shows:

⁵⁴ R198
⁵⁵ R11 & R198
⁵⁶ R217
⁵⁷ R199
⁵⁸ R201
⁵⁹ R198, 207 & 460
⁶⁰ R461
⁶¹ R223

- Chiltern House at the south west corner of the Meadow with the leased square of land to its north
- The orchard area shown on the 1956 OS map⁶²
- A new orchard area to the east of the old orchard area
- The new road called Roosevelt Drive starting opposite Gypsy Lane, running south between the Warneford Hospital and the nurses' home and then striking eastwards across the former open meadowland towards the Churchill Hospital.
- The Meadow appears to be long grass with beaten tracks running along the western, southern and eastern sides and a similar track running diagonally across the centre towards the new orchard.

It seems that, by 1981, the Meadow had taken broadly its present shape and its present state of vegetation.

1986

[65] There was produced an internal memorandum⁶³ dated 7th April 1986 of the Oxford Regional Health Authority (“ORHA”) from Mr. Tankard, the District Works and Estates Manager to Dr. Christopher Paine, the District General Manager. It seems that a Mr. Thomas was claiming the right to walk over Warneford Meadow towards Hill Top Road. He may be the Mr. Thomas whose evidence form I mention below. The gist of the memorandum was that there was only one public footpath across Warneford Meadow (FP80) but that people were exercising their dogs and were wearing many paths over the Meadow. This was spoiling the hay crop. Also, there was a danger that public rights of way might be acquired over land which the authority proposed to sell in the near future. It was intended to prohibit public access.

[66] The SoS produced a letter⁶⁴ dated 3rd July 1986 from Dr. Christopher Paine to Councillor Mrs. M Godden. The letter is important for two reasons:

- First, it confirms that Warren Cottages were demolished in April 1986
- Second, it appears from the letter that the health authority had erected notices prohibiting the exercising of animals on hospital land at the Warneford and Churchill Hospitals. It does not appear from the letter how many notices there were or precisely when or where the notices were erected. Later evidence⁶⁵ suggests that the notices were erected in 1985. However, it does seem clear from the letter that the notices were prompted by the fact that the authority had had to reduce the fee that it charged to a farmer for taking the hay crop from the Meadow because of dog fouling of the hay. It therefore seems clear (a) that the Meadow (other than the orchard areas) was being mown for hay until at least 1986 and (b) that extensive use was being made of the Meadow for dog walking by 1985.

[67] The relevant 20 year user period for the purposes of Mr. Deluce's application started on 19th. December 1986.

1987

⁶² R217
⁶³ B683
⁶⁴ B31
⁶⁵ B34

[68] The SoS produced three aerial photographs⁶⁶ of 28th October 1987. They show:

- The two orchards to the south of the Warneford Hospital site
- The nurses' home still standing east of Roosevelt Drive
- The Meadow consisting of long grass with several beaten tracks, including tracks along each boundary and a diagonal track leading from beside Chiltern House to (and into) the eastern orchard. The photograph suggests that the public were walking a variety of routes over the Meadow in 1987. The length and colour of the grass suggests that the Meadow had not been mown for hay in 1987.

1988

[69] Photographs⁶⁷ from 1988 show:

- the Boundary Brook edge of the Meadow. It appears to be a winter photograph. The grass is fairly short and a well-worn track can be seen running parallel with Boundary Brook.
- Two ladies with a child walking along a well-worn path from Hill Top Road to the Meadow over the land leased to the Spastics Society.

The photographs suggest that the public was walking over the Meadow to a significant extent in 1988.

[70] On 21st November 1988, Mr. RY Pomfret of the Campaign for the Protection of Rural England ("CPRE") applied to OCC for a modification order under s. 53(2) of the Wildlife and Countryside Act 1981 to add certain footpaths over the Meadows to the definitive map⁶⁸.

[71] It seems that the ORHA were already alert to the danger that further public footpaths might be established over NHS land. It appears from an internal memorandum⁶⁹ dated 22nd November 1988 that the ORHA had identified a number of unofficial footpaths over Churchill/Warneford Land and were considering the erection of notices at each end of such paths, such notices to be worded as the ORHA's legal advisors (Messrs. Clarks of Reading) should advise.

[72] On 24th. November 1988, Mr. Gowing of the ORHA wrote⁷⁰ to Messrs. Clarks to say that the estates department were concerned at the number of unofficial footpaths criss-crossing the land at Warneford and Churchill Hospitals. The letter enclosed a plan showing the principal unofficial paths and said that it was proposed to erect statutory signs at the points marked "X" on the plan bearing words to indicate that there was no public right of way. Messrs. Clarks were asked to advise on the wording of the signs. There is no copy of the accompanying plan but it seems likely that it was similar to plan JNB3A⁷¹ produced by Mr. Banbury.

⁶⁶ B26-28 & 160-162

⁶⁷ R92A-C

⁶⁸ B509

⁶⁹ B686

⁷⁰ B990

⁷¹ B986A

[73] Messrs. Clarks advised the ORHA by letter⁷² dated 28th December 1988. They advised (a) that a modification application had been made by the CPRE and (b) that the appropriate wording for the proposed signs would be “No Public Right of Way”. They did not refer to the possibility of registration as a new green under the CRA 1965.

1988-89

[74] The modification application was supported by a number of rights of way evidence forms⁷³, mostly dating from late 1988 or early 1989. The forms give evidence of long use of paths over the Meadow but do not very clearly identify the routes of the claimed footpaths. The majority of the witnesses came from the north of the Meadows. A number mention signs:

- Mrs Brock⁷⁴ mentioned signs saying “The exercising of dogs prohibited” but not when or where they were erected.
- Mr. and Mrs. Gillett⁷⁵ referred to one sign since c. 1985 saying “The exercising of animals in these grounds is strictly prohibited”. They do not say where the sign was placed. In a later evidence form⁷⁶, Mr Gillett referred to a sign erected on 27th. January 1989 reading “No public footpath” but soon removed by the public.
- Mr. Hodge⁷⁷ referred to signs to keep people out of the Warneford Orchard and grounds, but he does not say where or when these signs were erected or how long they were in place.
- Dr. Mowat⁷⁸ refers to signs saying “No dogs to be exercised” but not when or where they were erected.
- Mr. Pontin⁷⁹ said in his evidence form dated 10th February 1989 that a sign or signs saying “No public right of way” had appeared “about a month ago”. He does not say where the sign or signs were erected.
- Mrs. Rollin⁸⁰ said that she saw signs saying “No public right of way” being erected on 23rd and 24th January 1989. She does not say where they were erected
- Mr Thomas⁸¹ said that on 21st February 1986 a sign was erected on the service road reading that the exercising of animals in these grounds was henceforward prohibited. Presumably, “the service road” was Roosevelt Drive but Mr. Thomas did not say where on the road the sign was erected or which way it faced.
- Mrs. Whittaker⁸² mentioned a sign or signs with some restriction relating to the Warneford Hospital grounds and apple orchard, although she does not say when or where the signs were erected.

72 B684
73 B552-619
74 B612
75 B554
76 B556
77 B564
78 B575
79 B577
80 B587
81 B595
82 B604

1989

[75] It seems that Messrs. Clarks wrote to the CPRE on 26th. January 1989 requesting copies of the evidence submitted in support of the modification application. The CPRE replied by letter⁸³ dated 27th. January 1989. The CPRE confirmed that it had asked OCC to copy the evidence to Messrs. Clarks. The letter went on to say:

“For the record it has been pointed out to us that new signs have been erected at the entrances from Old Road, along the internal Hospital Road, and at FP80 leading into the Hospital Fields apparently stating “No Public Footpath”, and in addition a sign in Hospital Fields stating that animals are not permitted in the Hospital Fields, has been removed”

It therefore appears that the 1985 notices about exercising animals (or such as remained) had been removed in 1989 and replaced by new notices declaring that there was no public footpath, although the precise position of the old and new notices is not clear from the letter.

[76] An undated newsletter of the Social and Liberal Democrats called “Focus”⁸⁴ appears from internal evidence to date from January or February 1989. An article in this newsletter reads:

*“RHA Fails to Close Footpaths
Congratulations to walkers on the Hospital Fields who have been cheerfully ignoring the rash of “No Public Right of Way” notices which have sprung up all over our footpaths...”*

[77] It is not disputed⁸⁵ on behalf of the applicant that in 1989 a sign reading “No Public Right of Way” was erected on the diagonal path across the Meadow near its end at Hill Top Road. Nor is it disputed that the post that carried this sign is still in place as shown in a recent photograph⁸⁶.

[78] An internal memorandum⁸⁷ by Mr. John Banbury of the ORHA dated 22nd February 1989 discussed the evidence form of Mr. Thomas. Three points emerge from the memorandum:

- Unofficial paths on Warneford Meadow had been cut for an annual fun run organised by staff of Ritchie Russell House. It therefore appears that the Meadow was no longer being cut for hay annually.
- The public footpath (FP80) had been cut to facilitate public access.
- Large signs were erected in 1985 to stop people walking their animals across the grounds of the Warneford, Churchill and John Radcliffe Hospitals. One was erected where the unofficial footpath from Old Road crossed the Churchill Drive. It was constantly vandalised and disappeared in January, a

⁸³ B33

⁸⁴ B35

⁸⁵ R206

⁸⁶ B158

⁸⁷ B34

few days before the present small signs were erected. The “small signs” seems to be a reference to the “No public right of way” signs.

[79] On 31st. March 1989, Oxford City Council wrote⁸⁸ to the ORHA to complain that “no right of way” signs had been erected by the ORHA on public footpaths in the Lye Valley area. The Lye Valley is the valley through which Boundary Brook runs east of Southfield Golf Course. The letter seems to have been passed on to Mr. Banbury for his comments. He wrote his manuscript comments at the foot of the letter. He wrote that the signs had been erected to try to stop the establishment of rights of way which were not on the definitive map.

[80] On 5th. June and 31st. July 1989, the Ramblers Association made two applications⁸⁹ to OCC for modification orders to add new public footpaths *inter alia* over Warneford Meadow.

1990

[81] The ORHA instructed its solicitors, Messrs. Clarks, to draft a letter of objection to OCC in relation to the applications for modification orders. Messrs. Clarks prepared a draft letter⁹⁰ dated 30th. May 1990. It is unclear whether a letter in the form of the draft was ever sent to OCC. It is however clear from the draft letter that the stance taken by the ORHA was that the public had general recreational access to the whole of the Meadow rather than using specific routes in the nature of rights of way:

“The Health Authority has never had a policy to discourage the use of the site as open space by members of the public, but it has never intended to dedicate any particular route through or around the perimeter of the site as a public footpath...Many...use the site as a recreational area for walking of dogs, or simply to enjoy the more peaceful atmosphere of the site. Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as open space...the Authority has not objected in the past[to the use] of the site as open space by the public, but it did in 1985 take steps to prevent people walking animals across the land by the erection of signs at various points, including at the point where the hospital service road intercepts the claimed footpaths.”

I think that I am entitled to infer that the factual basis for the draft letter was drawn from instructions given to Messrs. Clarks by the ORHA.

[82] On 5th October 1990, there was a meeting attended by Mr. Banbury of ORHA and Mr. Pomfret of the CPRE and others. A manuscript minute⁹¹ was taken. It is not easy to read but it appears that the ORHA took the stance that it was prepared to allow people to wander the Meadow so long as new rights of way were not created.

88 B37A
89 B509
90 B692
91 B687

[83] On 7th. November 1990, Mr. Ching of Messrs. Clarks wrote⁹² to the ORHA with further advice. The thrust of Mr. Ching's advice was that the applications for modification orders to add new public footpaths onto the definitive map should be opposed on the basis that public use was not use for passage on defined routes but general use for recreation.

1991

[84] An aerial photograph⁹³ of 1991 shows:

- The Little Oxford estate under construction to the north of Roosevelt Drive
- The nurses' home still standing east of Roosevelt Drive
- The Warneford farmyard still in existence
- The two orchard areas, with the eastern area still showing a fairly clear pattern of trees
- The Meadow unmown and criss-crossed with numerous worn tracks

1992

[85] In 1992, there was a reorganisation of the boundaries of the local ecclesiastical parishes. Before 1992, Warneford Meadow, together with the Warneford Hospital and the Southfield Estate had been within the parish of Holy Trinity, Headington Quarry as shown on a map⁹⁴ produced on behalf of the applicant. The streets west of the Southfield Estate were within the parish of St. Mary and St. John, Cowley. In 1992, the parish of St. Mary and St. John, Cowley was renamed the parish of St. John, Cowley and extended to incorporate the Southfield Estate, the Warneford Hospital and the orchards, but not the rest of Warneford Meadow which remained within the parish of Holy Trinity, Headington Quarry. The new boundaries are shown on a plan⁹⁵ produced on behalf of the applicant.

1994

[86] Some photographs⁹⁶ were produced on behalf of the applicant showing the Meadow in 1994⁹⁷. They are Autumn pictures and show the Meadow much as it is now, with long grass and informal tracks through the grass.

1997

[87] On 2nd. December 1997 OCC made the Oxfordshire County Council (Definitive Map and Statement for Oxford City) No. 1 Modification Order 1997⁹⁸. The effect of the 1997 Order was to modify the definitive map and statement by the addition of a number of new footpaths. So far as relevant to Warneford Meadow, the new paths were as follows:

⁹² B689

⁹³ R224

⁹⁴ R212

⁹⁵ B521

⁹⁶ R92D

⁹⁷ It is possible that they really date from 1997: see R92B where one of the 1994 photographs reappears as a 1997 photograph.

⁹⁸ B84

- FP111 is shown on Plan 1⁹⁹ to the 1997 Order. It starts at point A on Old Road, east of Boundary Brook. It runs down the east side of Boundary Brook to the place where Roosevelt Drive crosses the Brook. FP111 crosses the Brook on Roosevelt Drive. It leaves Roosevelt Drive at point K and crosses the northern dogleg of The Meadow to the south eastern corner of the orchard (point J). It then runs alongside the northern edge of the grassland until it nearly reaches the back gardens of Hill Top Road (point E). It then turns south to run along the edge of the grassland to a point (point F) where FP80 enters the Meadow by Jack Howarth House.
- FP112 is also shown on Plan 1¹⁰⁰ to the 1997 Order. It runs across the northern dogleg of the Meadow from Roosevelt Drive opposite the entrance to the Little Oxford estate (point I) to the south eastern corner of the orchard (point J).
- FP113 is shown on Plan 2¹⁰¹ to the 1997 Order. It runs from Roosevelt Drive close to where it crosses Boundary Brook (point H) across the northern dogleg of the Meadow to a crossing of Boundary Brook (point M).
- FP130 is also shown on Plan 2¹⁰² to the 1997 Order. It leaves FP113 close to the crossing of Boundary Brook (point L) and runs along the western side of Boundary Brook to join FP80 (point R) close to where FP80 crosses the Brook.

1998

[88] On 3rd March 1998, Mr Crowley, Property Development Manager NHS Executive Anglia and Oxford wrote¹⁰³ to OCC objecting on behalf of the SoS to the 1997 Order, and in particular FPs 111 & 112. The letter pointed out that FP111 would run through the site of the proposed Teaching Nursing Home. Mr. Crowley wrote:

“All the footpaths shown on the plan are used for recreational purposes and do not represent a strong desire line between for example, the Southfield Golf Club house and the hospital campus, nor between different parts of the hospital campus. The exact alignment of the footpaths is consequently not critical”

The letter thus maintained the position that the Meadow was used generally for recreation and not for specific routes of passage.

[89] On 6th. March 1998, Messrs. Clarks wrote¹⁰⁴ on behalf of the Oxford Radcliffe Hospital NHS Trust to OCC objecting to the 1997 Order. The letter pointed out that their client’s estates department had erected “No Public Right of Way” signs at various points throughout the site. The letter does not specify when or where the signs were erected. The letter continued:

“Access to the site is gained from numerous points and there are a variety of routes claimed. The site is used indiscriminately by members of the public as an open

⁹⁹ B91
¹⁰⁰ B91
¹⁰¹ B92
¹⁰² B92
¹⁰³ R462
¹⁰⁴ R464

space...Our client objects to proposed footpaths on the grounds that no single right of way for the public has been established in the defined positions shown on the plan attached to the proposed Order.”

Again, the stance is that there had been general recreational use of the Meadow rather than use of defined routes for passage.

2000

[90] A public local inquiry into the 1997 Order was held in October 2000 before an inspector. There is no full transcript of the proceedings at the inquiry. However, the parties were able to produce a number of documents which largely reconstructed the material parts of the public inquiry.

[91] The case for OCC as order making authority was presented by Mr. John Hobson QC¹⁰⁵. He called:

- Mr. Andrew Smith, former senior rights of way officer with OCC, who produced a proof of evidence¹⁰⁶ summarising the case for confirmation of the 1997 Order and producing the supporting rights of way evidence forms and other documentary evidence
- Mr. GW Chesterfield who produced a proof of evidence¹⁰⁷ to the effect that he had walked all the claimed paths freely since 1962. He had seen no signs on the paths crossing the Meadow
- Mrs HSM Bradbury who produced a proof of evidence¹⁰⁸ to the effect that she had walked FPs 111, 113 and 130 freely since the 1960s without encountering any obstructions or signs.
- Mrs. A Smith who produced a proof of evidence¹⁰⁹ which did not deal with the paths over the Meadow
- Mrs JW Donohoe who produced a proof of evidence¹¹⁰ to the effect that she had walked all the claimed paths since 1976 without meeting any obstruction or sign save that about 11 or 12 years before (1988-89) the Health Authority had erected signs by Roosevelt Drive which read something like “dogs patrolling-canine security-dangerous not a public right of way” but they only lasted a little while.
- Mr. P Donohoe who produced a proof of evidence¹¹¹ to the effect that he had used FPs 111 and 113 since 1976. He mentions that the hospital erected signs but not when or where they were erected or what they said.
- Mr. D Gillett who produced a proof of evidence¹¹² to the effect that he had walked FPs 111 and 113 since at least the 1960s. The only signs he could recollect were “No Public Footpath” signs erected in about January 1989 on FP111 and quickly torn down. He does not say where the signs were positioned.

¹⁰⁵ G28 reverse

¹⁰⁶ B506

¹⁰⁷ B635

¹⁰⁸ B640

¹⁰⁹ B645

¹¹⁰ B654

¹¹¹ B659

¹¹² B663

- [92] Mr Hobson also produced written statements from:
- Mrs. J Dymond¹¹³ who gave evidence that he used all the claimed paths since the 1970s. There no signs on the paths except for a series of short-lived notices posted in about 1989.
 - Mr. D Bloch¹¹⁴ who walked FPs 111, 112 and 130 from 1972-1984. He recalled no signs or obstructions.

[93] Dr. Keith Holly appeared for the Ramblers Association. Dr. Holly produced a proof of evidence¹¹⁵. Most of it deals with the procedural history of the 1997 Order. He had used the claimed paths but not to any extent until 1991. He did not mention any relevant signs. His main complaint was that the Teaching Nursing Home had been built over the routes of FP 111 and 112.

[94] Dr. Holly produced a written statement¹¹⁶ of Mr. NJ Moon of the CPRE. Mr. Moon had surveyed the claimed paths across Warneford Meadow in July 1988. He had found no signs on any of the claimed paths.

[95] Mr. Corsellis of Messrs. Clarks appeared for the Oxford Radcliffe Hospitals NHS Trust. He called Mr John Banbury who produced a written statement¹¹⁷. Mr Banbury had since 1980 been Grounds Manager for the ORHA and then the Oxford Radcliffe NHS Trust. He had visited Warneford Meadow monthly since 1980. His evidence about the claimed routes over Warneford Meadow was as follows:

- As for FP111, metal signs reading “No Public Right of Way” were erected in early 1989 both (a) where FP111 left Roosevelt Drive and (b) where FP111 joined FP80 near Hill Top Road. The positions of the signs were shown marked B and C on a plan¹¹⁸ produced by Mr. Banbury. The signs were vandalised and replaced for a period. The Roosevelt Drive sign did not last for more than a few months before it was vandalised for the last time. The Hill Top Road sign was in position for about 3 months or so before it was removed. It was replaced on several occasions and finally the sign could not be found and was not replaced. Before 1987/88 the route of FP111 was impassable and the routes across the Meadow (if indeed people were crossing from one side to the other) varied from year to year and season to season.
- As for FP112, although members of the public may have walked across Warneford Meadow without authority for a number of years, they had never taken a set path, the path varying with the seasons and from year to year.
- As for FP113, people had followed the approximate route as it crossed the edge of Warneford Meadow. People used to pick mushrooms in this area
- As for FP130 the route was either impassable at times or varied in position

[96] Mr. Corsellis also produced a written statement¹¹⁹ of Mr. David Richens. He had been employed in the works/estates department of the Churchill Hospital since

¹¹³ B712
¹¹⁴ B737
¹¹⁵ B697
¹¹⁶ B706
¹¹⁷ B666
¹¹⁸ B680
¹¹⁹ B675

1979. He confirmed Mr Banbury's evidence about the signs on FP111 at the Hill Top Road end and where it met Roosevelt Drive although he did not say more than that the signs did not last long. He gave similar evidence about variation of the routes across Warneford Meadow.

[97] The Southfield Golf Club also appeared by solicitor at the public inquiry and called evidence and made submissions¹²⁰. However, the golf club was not concerned with the claimed paths over Warneford Meadow.

[98] On behalf of the NHS Trust, Messrs. Clarks handed in written closing submissions¹²¹. A major point made in the submissions was that the public were not walking defined routes but wandering over the land as a whole:

“...people have used the Hospital grounds for recreation. They have come onto the Hospital grounds to exercise their dogs. To the extent that people may have walked onto the Hospital grounds the routes they have taken...have been various...people were not following a defined route but were instead wandering over the Hospital grounds...”

2001

[99] The Inspector issued his Order Decision¹²² on 28th June 2001. He decided to confirm the 1997 Order with modifications. As for the claimed paths over Warneford Meadow:

- He confirmed FP111 from Roosevelt Drive southwards with the deletion of the section contiguous with the public highway of Roosevelt Drive. He thought it probable that it had been used as a field edge path for 20 years before 1988 when it was brought into question by the modification application and objection. The 1989 signs were erected after the relevant 20 year period and the evidence regarding earlier signs was “vague as to location and legend”. He accepted that any routes actually crossing the Meadow would be undefined and variable and could not give rise to a presumption of dedication. Any challenges to use after 1980 were “occasional and unspecific”.
- He confirmed FP112 from Roosevelt Drive southwards on similar reasoning save that, although it was not a field edge path, he was satisfied that a defined route existed.
- He confirmed FP113 but only from points L-M on Warneford Meadow. He was not satisfied that there was any defined route north of point L.
- He confirmed FP130 on similar reasoning to FP111

[100] It is to be noted that:

- The inspector was satisfied that there was qualifying use of the confirmed footpaths from 1968 onwards
- He was not satisfied that there were any relevant signs on the Meadow before the 1989 signs

¹²⁰ G29
¹²¹ B728
¹²² G11

- He was not satisfied that there was any other relevant challenge to use between 1968-88
- His findings were not inconsistent with there also having been general recreational use of the Meadow not confined to the confirmed footpaths.

2002

[101] Because the inspector proposed modifications to the 1997 Order, the modifications had to be advertised and any objections considered. By an Order Decision¹²³ dated 6th March 2002, a new inspector confirmed the decision of the first inspector so far as it related to Warneford Meadow.

[102] Notice of confirmation¹²⁴ was given by OCC on 15th November 2002.

[103] An aerial photograph¹²⁵ of 2002 shows the Meadow much as it is today, with rough grass crossed by a number of tracks, some major and many minor.

2004

[104] An aerial photograph thought to date from c. 2004 is much more distinct. It seems to be taken in the summer, judging by the leaves on the trees. The Meadow appears to be covered in grass, with a number of fairly clear tracks and a number of less distinct tracks crossing it.

2005

[105] In November 2005 the Oxford City Council Local Plan was adopted¹²⁶. It identified Warneford Meadow as a site for “Key Worker Housing, Medical research, Health Care Facilities, Academic Use and Student Accommodation”.

2006

[106] Between 20th and 28th. January 2006, an archaeological field evaluation was carried out by Berkshire Archaeological Services in connection with the proposed development of Warneford Meadow and a Report¹²⁷ was prepared. The evaluation was effected by excavating 31 shallow trenches on various parts of the Meadow. The total surface area excavated was about 2% of the Meadow¹²⁸. The distribution of trenches is shown by a diagram¹²⁹ and an aerial photograph¹³⁰. Warning signs¹³¹ were erected requesting the public not to enter the excavations and stating that the trenches would be backfilled as soon as possible.

123 G8
 124 B82
 125 R225
 126 B4
 127 B992
 128 B999
 129 B1023
 130 B1045
 131 B1031

[107] Some photographs¹³² of the Meadow taken by Mr. Box on 2nd May 2006 give a good impression of the Meadow in early summer at the close of the relevant 20 year period..

[108] A body known as the Oxfordshire Health Economy was formed and, in July 2006, submitted applications for outline planning permission in relation to the Meadow and other sites¹³³.

[109] There were a number of objections to the applications. For example the Highfield Residents Association (from the north of the Meadow) objected¹³⁴ on 30th August 2006 on a number of grounds, including the destruction of the last remaining natural green space in Oxford and damage to the communities of Headington.

[110] As noted above, the present application¹³⁵ was made on 19th December 2006.

2007

[111] The SoS was registered¹³⁶ at HM Land Registry as proprietor of Warneford Meadow on 8th. March 2007 under title no. ON269570. The register records that the value stated as at 8th. March 2007 was £11m. The SoS is registered proprietor of all the application land, although the present application does not extend to the land owned by the SoS and leased to the Spastics Society.

5. Evidence for applicant

[112] I now turn to consider the evidence adduced in support of the application. I will first deal with the witnesses who gave oral evidence and then turn to deal with the evidence of witnesses who did not appear at the public inquiry but submitted written statements. For convenience of reference, I will deal with witnesses in alphabetical order rather than in the order in which they gave evidence.

Mr. Alan Jay Berman

[113] Mr. Berman produced a witness statement¹³⁷ dated 17th. September 2007.

[114] Mr. Berman is an architect with his own practice in Oxford. His wife is an artist who works from home. They have two daughters. The family have lived at the top end of Southfield Road since December 1987. The two girls were then aged 4 and 6 years old. In 1988, the family acquired a dog, Sally, who lived until about 2001.

[115] From about 1988 to 1997, the family used Warneford Meadow for recreation several times a week (Mr Berman at weekends and summer evenings) except when away on holiday. They usually entered from Hill Top Road. They took the girls and the dog all over the Meadow, throwing balls for the dog, picking apples in the orchard

¹³² B151-158

¹³³ B4

¹³⁴ R68A

¹³⁵ R1

¹³⁶ R457

¹³⁷ R14

and picking blackberries in season. When the girls were older, they played by themselves or with friends in the Meadow. Mr. Berman enjoyed walking off the beaten paths through the long grass. He recognised other people on the Meadow who came from the Divinity Road neighbourhood although he could not say what proportion of users he recognised in this way. In the late 1990s he jogged around the Meadow for a period. In 1994, he strolled around the Meadow in contemplation after visiting his terminally ill mother in Sobell House Hospice. Mrs Berman walked the dog in the Meadow until the dog died. Since the dog died and the girls left home for higher education, Mr Berman has used the Meadow much less. “My involvement with the Meadow has been very scant for the last few years”.

[116] Mr. Berman’s recollection is that the grass on the Meadow was cut annually until 3 or 4 years ago. The evidence indicates that the Meadow was not cut for hay after the mid 1980s. I think that he may be referring to the following grass cutting after the mid 1980s: (a) grass cutting carried out for fire precaution purposes and (b) the cutting of FP80 and of the perimeter track for a fun run.

[117] Asked about the “No public footpath” signs in 1989, Mr Berman said that he noticed a post at the entrance to the Meadow from Hill Top Road but that there was no notice on it.

[118] Mr. Berman said that he regarded the Divinity Road neighbourhood as “a definite community of mutually supportive individuals” although he did not explain his reasons for taking this view.

[119] I accept that, over the years since 1988, Mr Berman has made a great deal of use of the Meadow with his family and dog and that this has involved a substantial amount of use away from the beaten paths. In particular, I accept that he has picked apples from the orchard. However, I got the impression that the majority of family use of the Meadow was by his wife and children, no doubt because Mr. Berman is a busy professional person with all the demands of his own practice. This may explain why he did not see the 1989 “No public right of way” sign at the Hill Top Road entrance to the Meadow, which appears to have been in place for several months in the early part of 1989.

Dr. Sietske Boeles

[120] Dr. Boeles produced an evidence questionnaire¹³⁸ dated 16th. December 2006, a written statement¹³⁹ dated 18th. September 2007 and a supplemental written statement¹⁴⁰ dated 16th. January 2008. The supplemental statement was primarily a commentary on the evidence of certain of the objectors’ witnesses.

[121] Dr. Boeles and her husband have lived in various houses in Southfield Road since 1987, with the exception of 1996-99 when she was resident in the Netherlands. They have two daughters, Anna, who was born in 1989, and Essie, who was born in 1992.

138 R26
139 R19
140 R707

[122] Dr. Boeles is a consultant old age psychiatrist. She discovered Warneford Meadow in 1987 by walking across it to psychiatric training at the Warneford Hospital. She also walked on the Meadow about once a week for pleasure. When the children were about two years old, they went to a nursery school on the Churchill Hospital site and Dr. Boeles and her husband walked or cycled through the Meadow about once a week to take or collect them from the school. On the way back, they often meandered through the Meadow looking at wildlife and picking flowers, berries and apples. In 2001, the family acquired an elkhound puppy called Pepsi. Pepsi was taken for walks on the Meadow, usually twice a day, until she died in 2007. The family walked both on and off the paths on the Meadow. As the children got older they played with friends in the Meadow. Essie jogged in the Meadow for about 2 years. In 2005, the dog had puppies, which were taken on the Meadow to be trained.

[123] Dr. Boeles has seen many other local people on the Meadow enjoying similar sorts of informal recreation, both on and off the paths.

[124] She agreed with the Divinity Road neighbourhood as defined by Mr. Dunabin, although some of her grounds for believing in the coherence of the neighbourhood were rather vague: “We find that the large majority of residents share similar values, such as the importance of social justice, ecological and ethical living”.

[125] Dr. Boeles did not see any signs on the Meadow. However, she recalled that her mother died in late 1988 and that she went to Holland for a lengthy stay. The “No public right of way” sign at the Hill Top Road entrance to the Meadow may have come and gone during that period.

[126] Dr. Boeles produced a photograph¹⁴¹ of the Meadow in May 2007. It gives quite a good impression of the Meadow in early summer. It seems to me that it is quite clear that people could walk anywhere on the Meadow.

[127] Dr. Boeles was a very earnest and somewhat anxious witness. I accept her evidence about the use of the Meadow by herself, her family and others. On the Divinity Road neighbourhood, I got the impression that she was toeing the party line.

Mrs. Hermione Sheila Margaret Bradbury

[128] Mrs. Bradbury produced an evidence questionnaire¹⁴² dated 14th. December 2006.

[129] Mrs. Bradbury has lived in Hill Top Road since 1956 and in her present house since 1961. Her present house is about 100 yards from the Hill Top Road entrance to Warneford Meadow. She has two children born in 1962 and 1964. She walked and took the children to play on the Meadow in the 1960s and 1970s. There were cattle on the Meadow until about 1980. She recalled that the first cogent sentence that her oldest son said was about a tractor on the Meadow turning hay. After the children got older, she still walked in the Meadow, entering by the Hill Top Road entrance. Sometimes (20 years ago) she used to sit and sunbathe in the long grass. Nowadays,

¹⁴¹ R28A

¹⁴² R274

she sticks to the paths but she used to play with her children off the paths. She has seen other people on the Meadow, walking dogs, playing with children and observing wildlife.

[130] Asked about a sign prohibiting the exercising of animals she said that it “sounds right”. However, she did not have animals and so did not pay much attention to it. She did not say where the sign was situated.

[131] Mrs. Bradbury completed an evidence questionnaire¹⁴³ on 1st January 1989 in support of the application to add new paths to the definitive map. She subsequently gave evidence¹⁴⁴ to the footpath inquiry.

[132] Mrs. Bradbury remembered the “No public right of way” sign being erected near the Hill Top Road entrance in 1989. At that time, FP80 ran to the south of the sign and she took the sign to relate to the informal diagonal path that crossed the Meadow from the Hill Top Road entrance. She thought that the sign only lasted a few days and was not re-erected. In her evidence questionnaire, Mrs. Bradbury said that she used the Meadow about once a month, usually in the summer. However, in her oral evidence, she said that in 1989, when the sign was erected, she was visiting the Meadow about once a week. The frequency of her use varied over the years depending whether she was in full-time employment.

[133] The only doubt that I have about Mrs. Bradbury’s evidence was her estimate of how long the 1989 “No public right of way” sign lasted. I am not satisfied that she can remember the exact frequency of her visits to the Meadow in early 1989 in order to be able to say of her own knowledge that the sign only lasted for a few days. Otherwise, I accept her evidence.

Mrs. Christine Capon

[134] Mrs. Capon produced a written statement¹⁴⁵ dated 4th. September 2007 and a supplementary written statement¹⁴⁶ dated 17th. January 2008.

[135] Mrs. Capon lived in various addresses in Southfield Road from 1978-1989 and in Divinity Road from 1989-1994. She has lived in Hill Top Road since 1994. She has 6 children, born between 1978 and 1989. She now has a 3 year old grandson. She has had had three dogs while living in the area. She has been a frequent user of Warneford Meadow since 1978, usually entering by the Hill Top Road entrance. She has walked her dogs all over the Meadow. She has taken her children and grandchild to walk and play on the Meadow, often with friends. They flew kites on the Meadow and went to catch tadpoles in Boundary Brook. As the children grew up, they went on their own or with friends to play on the Meadow. One son was a keen photographer and took many photographs on the Meadow. She personally walks on the Meadow, looking at the wildlife, blackberrying and picking windfall apples from the orchard. All these activities were both on and off the beaten paths.

¹⁴³ B610

¹⁴⁴ B640

¹⁴⁵ R299

¹⁴⁶ R753

[136] She regularly meets friends and neighbours on the Meadow. Although a lot of people use the Meadow for access, she also meets people using the Meadow for recreation. She has seen other people walking dogs, picnicking and sunbathing on the Meadow and children playing all over the Meadow.

[137] In the week beginning 20th. January 2006, while walking her dog (Toby) on the Meadow she noticed that some shallow pits were being dug on the Meadow. Subsequently, a notice went up at the Hill Top Road entrance to say that the trenches were archaeological and asking people not to enter them. She is a school teacher and took two small groups of children to look at the pits and speak to the archaeologist working in them. Each pit was refilled after it was dug and the whole process lasted only about a week. Only a small area of the Meadow was out of use at any one time. There was no other restriction on use of the Meadow.

[138] Mrs. Capon said that she was on the Meadow during the survey of 7th. & 8th. April 2007. She did not see the surveyors but definitely went off-path.

[139] I accept the evidence of Mrs. Capon.

Mrs. Anthea Craven

[140] Mrs. Craven produced a written statement¹⁴⁷ dated 16th. January 2008.

[141] Mrs. Craven lives with her husband and children in Stapleton Road, which is in the Highfield area north of Warneford Meadow. She uses the Meadow irregularly. However, she is a member of the Highfield Residents' Association ("HRA") and was a committee member between 2006-2007. In 2006, the HRA was asked by the Friends of Warneford Meadow (a) to collect signatures for a petition opposing development on the Meadow and (b) to collect the names of Highfield residents who used the Meadow so that statements could be taken from them in support of Mr. Deluce's application to register the Meadow as a new green. A street to street survey was carried out by HRA street representatives in the Highfield area (roughly the area bounded by Old Road, Lime Walk, Headington Road, Brookside and Highfield Avenue). Not every house was surveyed. There are about 450 households in Highfield of which about 50% responded to the survey. Mrs. Craven's impression was that, although many Highfield residents were opposed to the development of the Meadow on a variety of grounds (including traffic) relatively few claimed to use the Meadow. The names of those who did were passed on to Mr. Deluce. Mrs Craven assumes that these were the 9 Highfield residents who submitted evidence questionnaires in support of Mr. Deluce's application. She suggested that the reason may be that some of the streets in Highfield, especially Lime Walk and Latimer Road had many houses which were divided into flats occupied by a transient population.

[142] I accept Mrs. Craven's evidence.

Mr. Paul Deluce

¹⁴⁷ R716

[143] Mr. Deluce is the applicant. He produced an evidence questionnaire¹⁴⁸ dated 14th. December 2006 and a witness statement¹⁴⁹ dated 14th. September 2007.

[144] Mr. Deluce has been an environmental campaigner for many years. He is a very keen bird-watcher. He came to Oxford in 1990 as a student at Oxford Brookes University (then the Oxford Polytechnic) and soon discovered Warneford Meadow as a good site for bird-watching. It was open with unrestricted public access. From 1991-1992 he lived in a student house in Gipsy Lane and visited the Meadow one or twice. He left the area in 1992. In 1998, he returned to Oxford to live in the Southfield Park Flats. He has two children. Josh is aged 15 and lives with Mr. Deluce. William is aged 6 and lives with his mother in Lechlade. Mr. Deluce regularly looks after William.

[145] Between 1998 and 2001, Mr. Deluce visited the Meadow about once a month to look at birds and other wildlife. In 2001, he was asked to carry out a bird survey on the Meadow in connection with the opposition to the Local Plan. For the next two years he visited the Meadow frequently in connection with the bird survey. He also took his children and the dog that he had at the time onto the Meadow. The children and dog ran about on and off the paths. There was a rope swing in a tree that William liked to use. Mr. Deluce enjoyed photography, writing and picnicking on the Meadow. Mr. Deluce got to know quite a few users of the Meadow, mostly from Hill Top Road. He also walked across the Meadow to Oxford Brookes University while doing a part time Master's Degree in 2006. On that course, he wrote two essays about the Meadow.

[146] Mr. Deluce first heard about town greens from the publicity concerning the Trap Grounds case in North Oxford. He met Catherine Robinson, who recommended an application for registration of the Meadow as a new green. After the NHS submitted outline planning applications to develop the Meadow, the Friends of Warneford Meadow was formed to fight the applications. He attended the inaugural meeting and expressed an interest in applying to register the Meadow as a new green. There was much support for the idea. With the help of a couple of others, Mr. Deluce collected 40 evidence questionnaires to support a town green application. They were collected at public meetings, by knocking on doors and by sending out forms. At the time, he was not familiar with the legal requirements for registration of a new green and less familiar with the users. He collected evidence questionnaires from all around the Meadow. About two thirds came from the Hill Top Road/Divinity Road/Southfield Road area and most of the rest from Little Oxford and Highfield to the north of the Meadow. After discussions with other campaigners, he drew up his application on the footing that the locality from which the recreational users of the Meadow came were the ecclesiastical parishes surrounding the Meadow.

[147] However, as preparation for the public inquiry proceeded, it became clear that the recreational users of Warneford Meadow came predominantly from the Divinity Road neighbourhood. He agreed with Mr. Dunabin's perception of the Divinity Road neighbourhood. He thought that the Southfield Park flats were connected with the Divinity Road area and that there would have been more evidence from witnesses in the Southfield Park flats who used the Meadow for recreation if he had been more

¹⁴⁸ R41

¹⁴⁹ R34

energetic in assembling them. He has suffered from depression over the years. As with most witnesses, he did not set out much in the way of hard evidence to support Mr. Dunabin's perception of the Divinity Road neighbourhood. There was no structured survey of users of the Meadow or of any particular locality or neighbourhood.

[148] Mr. Deluce has continued to walk in the Meadow, watching birds and talking to people. He walks all over the Meadow, both on and off the paths and including the orchard. Until he took a job as a landscape gardener in the spring of 2007, he walked on the Meadow most days. Since then he has walked there less frequently because of his work commitments.

[149] *** [Although] Mr. Deluce *** is the figurehead of the application, it seems to me quite clear that the actual management and preparation of his application had been taken over by a team of energetic and highly motivated local people. I entirely accept what Mr. Deluce says about his own use of the Meadow and the use that he has observed by others. However, I think that on the issues of locality and neighbourhood, he has been guided by the team policy rather than by applying much independent analysis.

Mr. Chris Dunabin

[150] Mr. Dunabin produced a witness statement¹⁵⁰ dated 14th September 2007 and gave oral evidence.

[151] Mr. Dunabin is a former senior civil servant with DEFRA (latterly head of the Rural Communities Division) who now works as a self-employed consultant. From his professional work he has some expertise in community and neighbourhood issues. He lives and works in London during the week, but lives in Oxford at the weekends with his partner. They lived in Southfield Road from 1986 to 1996 and, since 1996, they have lived in Hill Top Road.

[152] When he moved to Southfield Road in 1986, he was not aware of Warneford Meadow. However, he discovered it as a short cut to the shops and bus stop in Headington. Although he frequently walks or cycles across the Meadow, he is an intermittent user purely for recreation. However, he has walked on the Meadow for pleasure and has picked blackberries and mushrooms there. It had the appearance of a hay meadow over which one was free to wander, although he was unsure whether the Meadow was cut for hay in his time. If so, it was only for a year or so.

[153] Mr. Dunabin could remember that in 1989 a sign was erected on the Meadow close to the Hill Top Road end of FP80 saying "No public right of way". He thought that it was intended to deter people from leaving FP80.

[154] However, the main purpose of Mr. Dunabin's evidence was not to deal with his own use of the Meadow, but to give evidence about the neighbourhood from which the recreational users of the Meadow have come. Mr. Dunabin's evidence was that there is a recognised neighbourhood known as the Divinity Road neighbourhood,

¹⁵⁰

R44

which lies between Warneford Meadow and the Cowley Road. Its northern boundary is the rear of the houses on the north side of Divinity Road. Its eastern boundary is the rear of the houses on the east side of Hill Top Road. Its southern boundary is Bartlemas Close and the Southfield Park flats. Its western boundary is the Cowley Road. Within this neighbourhood lies Bartlemas Road, Southfield Road, the unnamed access road to the hamlet of Bartlemas, Warneford Road and Minster Road. It is, broadly speaking, a rectangular block of mainly residential development lying between Hill Top Road and the Cowley Road. It contains about 890 dwellings of which 180 are in the Southfield Park flats.

[155] The main factors relied upon by Mr. Dunabin as giving a cohesive quality to the Divinity Road neighbourhood were as follows:

- A geographical integrity caused by the very limited road connections to the north, east and south
- A relatively stable population of houses and flats in single family occupation. On this point, he had a different perception from that of Mrs. Mills (see below), probably because Mr. Dunabin has lived for some years in Hill Top Road, which is the more expensive end of his “neighbourhood”.
- The existence of a residents’ association called the Divinity Road Area Resident’s Association (DRARA) set up in the 1980s
- Social activities such as cricket teams and carol singing enjoyed by residents of the neighbourhood..

[156] Mr. Dunabin explained that the applicant and his team believed that in law they had to identify the single neighbourhood which the recreational users of Warneford Meadow predominantly inhabited. Although some users came from the north of Warneford Meadow, they could not pretend that Little Oxford and Highfield were part of the same neighbourhood as Divinity Road. His recollection was that, on analysis of the evidence questionnaires submitted in support of the application, about 2/3rds came from the Divinity Road neighbourhood, about a quarter came from north of the Meadow and the rest from elsewhere.

[157] Very fairly, Mr. Dunabin referred to a number of factors which are less consistent with the coherent quality of the chosen neighbourhood:

- The age of the buildings within the chosen neighbourhood vary between (a) the medieval hamlet of Bartlemas, (b) the Victorian houses near the Cowley Road, (c) the Edwardian houses higher up the hill towards Hill Top Road and (d) the 1970s Southfields Park flats.
- The facilities serving the chosen neighbourhood are not specific to the neighbourhood, e.g. (a) the neighbourhood is served by shops in the Cowley Road, only a few of which are within the chosen neighbourhood and which serve a much larger area, (b) younger children mostly attend St. Mary and St. John School in Hertford Street and most older children attend Cheney School in Warneford Lane, both of which are outside the chosen neighbourhood and serve a wider area, (c) apart from the medieval chapel of Bartlemas, the places of worship serving the neighbourhood are outside the neighbourhood and serve wider areas.
- So far as residents’ associations are concerned (a) the DRARA catchment area includes Stone Street (outside the chosen neighbourhood) but excludes the Southfield Park flats, (b) Hill Top Road has its own Hill Top Road Residents

Association (“HTRRA”), and (c) the Friends of Warneford Meadow, formed in 2006, includes membership from the residential areas to the north of Warneford Meadow.

[158] I found Mr. Dunabin to be a notably fair, honest and perceptive witness. I accept his evidence about his own use and observations of the Meadow. I also found his analysis of the Divinity Road neighbourhood helpful and thought-provoking, although I think, for the reasons which I will explain below, that he set himself an unnecessarily difficult task in seeking to identify a single relevant neighbourhood.

Professor Keith Dyke

[159] Professor Dyke produced an evidence questionnaire¹⁵¹ dated 15th. August 2007 and a witness statement¹⁵² dated 19th. September 2007.

[160] Professor Dyke is Emeritus Professor of Microbiology in the University of Oxford and an Emeritus Fellow of Wadham College, Oxford. In 1967, Professor Dyke moved with his wife, family and dog to Southfield Road in 1967 and has lived there ever since. His house is about 10 minutes walk from the Hill Top Road entrance to the Meadow. He has 4 children, born in 1963, 1964, 1967 and 1970. He now has 7 grandchildren, ranging in age from 14 to 5. He had dogs from 1967 to 1990.

[161] When they first moved to Southfield Road, there were cows in the Meadow. There was a fence across the Meadow with a gate and a cattle trough. They walked the dog on the Meadow daily and took the children to play there several times a week. When there were cows in the Meadow, they kept to the sides. However, there were not always cows in the Meadow, and, when there were no cows, the dogs wandered everywhere. However, it is fair to say that the general use of the Meadow for recreation came later. Professor Dyke could not remember when the cows went.

[162] Until about 1986, the children played in the Meadow, hiding in the long grass, riding bicycles, picking blackberries, finding golf balls hit onto the Meadow from the golf course and looking for insects in Boundary Brook. After the children grew up, Prof. and Mrs. Dyke continued to walk their dog on the Meadow about once a week until their second dog died in 1990. The dogs loved jumping through the long grass. Prof. Dyke had hip replacement operations in 2000 and 2002 and used the Meadow for gentle exercise. Since the grandchildren came along, Prof. and Mrs. Dyke have taken them to play on the Meadow when they have been visiting, perhaps once every two weeks.

[163] Prof. Dyke has seen many other people using the Meadow for recreation, walkers, joggers, children playing and people riding bicycles. People certainly do not confine themselves to the official footpath. People go off path to pick blackberries and look at the brook.

[164] Prof. Dyke agreed with Mr. Dunabin’s analysis of the Divinity Road neighbourhood. He thought that it was a community with its own identity. Although

¹⁵¹ R55

¹⁵² R53

users of the Meadow did not come exclusively from the Divinity Road neighbourhood, most did. He has lived in the area for 40 years and recognises many of the people who use the land.

[165] Prof. Dyke had no recollection of a sign restricting dog walking on the Meadow or of the 1989 “No public right of way” sign at the Hill Top Road entrance to the Meadow.

[166] I accept Prof. Dyke’s evidence regarding the type of use made of the Meadow by himself, his family and other local people. I do not think that he had given much independent thought to the identification of the Divinity Road neighbourhood. I am very puzzled that he did not see the 1989 sign and this evidence suggests that his visits to the Meadow at this period were less frequent than he recalled.

Mr. Harry Edwards

[167] Mr. Edwards produced an evidence questionnaire¹⁵³ with attached statement dated 7th. December 2006 and a witness statement¹⁵⁴ dated 19th. September 2007.

[168] Mr. and Mrs. Edwards moved to Finch Close with their two children (now aged 29 and 26) in March 1986 and have lived there ever since apart from 20 months living overseas from December 1987 to July 1989. Finch Close is to the north of Warneford Meadow. It is a cul-de-sac leading off the north side of Old Road on the other side of Old Road from the Little Oxford estate. When he moved to Finch Close, the Little Oxford estate had not yet been built and the Fields (as he called the Meadow) extended up to the south side of Old Road. It was possible to enter the Fields through a gap in the fence along the south side of Old Road. From this part of the Fields it was possible to cross Roosevelt Drive into what is now Warneford Meadow. Mr and Mrs Edwards used to play with their young children in the Fields, mostly on the land north of Roosevelt Drive. They also walked around the Meadow, often exiting into Hill Top Road and walking back home along the streets. They saw other people on the Meadow. Mr. Edwards’s impression was that the open land south of Roosevelt Drive was more popular for recreation than the land north of Roosevelt Drive. After the Little Oxford estate was built in about 1991 there was access to the Meadow from his house, either along Mileway Gardens on the Little Oxford estate or by way of a path on the east side of Boundary Brook. He and his family have picked blackberries on the Meadow. Sometimes he walked on the beaten tracks and sometimes he walked off them. Other people he saw on the Meadow did the same. He did not enter the orchard until recently. He refused to be drawn into expressing a view about the relative proportions of on-track and off-track use. He said (very fairly I thought) that he only saw the Meadow for relatively short periods and he was reluctant to generalise from his own snapshot views.

[169] Mr. Edwards did not recollect the 1989 “No public right of way” signs, but he was abroad at the time.

¹⁵³ R64

¹⁵⁴ R58

[170] Mr. Edwards regards himself as a resident of Highfield. He is a member of the Highfield Residents' Association, which has been in existence for 30 years. The boundaries of the Highfield RA catchment area are (a) Old Road to the south, (b) Headington Road to the north, (c) Lime Walk to the east and (d) Finch Close and Brookside to the west. There are two residents' associations in Little Oxford, namely the Little Oxford RA and the Mileway RA. There is a Headington Chairs Co-ordinating Committee which is a committee of the chairs of various residents' associations in Headington. Five RAs collaborated in opposition to the planning applications to develop Warneford Meadow, i.e. the Highfield RA, the two RAs in Little Oxford, DRARA and HTRRA. The main thrust of the Highfield RA's opposition to the planning applications was based on increased traffic on local roads. A petition was got up but it was directed to the planning applications rather than to identification of people who used the Meadow for recreation. When the proposed town green application was first ventilated, the RAs north of the Meadow were asked to assist. He saw a memorandum from one of the Little Oxford RA chairs saying "Don't hold out much hope from us". The Highfield RA was asked to collect statements in support of the town green application. In fact Mr. Edwards did not do so. However, his impression was that there was limited use of Warneford Meadow from the north. Many of the houses in the areas north of the Meadow were occupied by short-term tenants such as students from Oxford Brookes University. Such people tended to make less use of the Meadow than long term residents with dogs and children. His impression was that most recreational users of the Meadow came from the Divinity Road neighbourhood.

[171] I accept Mr. Edwards's evidence about the use of the Meadow by himself and his family and about the use that he saw by other people. I also accept that his perception was that most users came from the east rather than the north of the Meadow, although it was plainly very much a matter of general impression.

Mrs. Helen Ganly

[172] Mrs. Ganly produced an evidence questionnaire¹⁵⁵ dated 9th. December 2006 and a witness statement¹⁵⁶ dated 29th. August 2007.

[173] Mrs. Ganly is an artist and lecturer in fine art. She and her late husband moved to Hill Top Road in 1970 with their two sons, Daniel aged 7 and Ben aged 3. Daniel moved from Hill Top Road in 1981, but in 1995 he returned to Oxford to live in Stapleton Road in the Highfield area north of Warneford Meadow. Daniel has two children, born in 1995 and 1997. Ben was away at school during term time after 1978. He still lives in Oxford. Mr. and Mrs. Ganly had dogs which died in about 1986/88.

[174] When she first moved to Hill Top Road, there were still cows on Warneford Meadow. Mrs. Ganly did not go on the Meadow or allow her children to play on the Meadow when there were cows on the Meadow. She could not remember exactly when the Meadow ceased to be grazed by cows and she started to use the Meadow. However, when there were no cows in the Meadow, she used to walk with her husband and children in the Meadow, her husband walked the dogs on the Meadow

¹⁵⁵ R77

¹⁵⁶ R69

and the children played on their own and with friends in the Meadow. The children usually gained access to the Meadow over the back fences of Hill Top Road either directly or via the orchard. Her husband took the children to pick mushrooms in the Meadow. The family picked apples from the orchard and blackberries from the bramble bushes in the Meadow. Mr. Ganly is a naturalist and used to bring back samples of the flora on the Meadow. Mrs. Ganly sometimes sketches in the Meadow. In 1977, there was a Hill Top Road Queen's Jubilee party which culminated in a tea party on the Meadow. In 1982, there was heavy snow and the family went on the Meadow to play snowballs. The grass on the Meadow was cut for hay in the late 1970s and into the 1980s, although she could not be sure when hay-cutting ceased. Since hay-cutting stopped, the grass on the Meadow was long in the summer, but they used the whole of the Meadow in the winter, spring and autumn when the grass was lower. Even in the summer the children played tigers in the long grass. Mrs. Ganly estimated that she used the Meadow about 2 or 3 times a week in the spring summer and autumn and occasionally in the winter.

[175] Since Daniel has lived in the Highfield area, he has taken his children to play on the Meadow. Mrs. Ganly takes them to the Meadow to play when she is minding them after school or during the school holidays.

[176] Mrs. Ganly has seen many other people on the Meadow. Some are walking or cycling on the beaten tracks. Others are walking and playing off the tracks on the grass. There have been rope swings in the trees. She has seen parties picnicking on the Meadow. She has seen kite-flying on the Meadow, although not in recent years. She could not say what proportion of users were on the tracks and what proportion were off the tracks.

[177] Mrs. Ganly could not recollect any signs about dogs on the Meadow in 1985 or any "No public right of way" signs in 1989.

[178] In a curious passage in her evidence, Mrs Ganly referred to an occasion in August 2007 when the objectors were conducting a survey of users of the Meadow for the purpose of opposing the present application. Some dated digital photographs of flora on the Meadow taken by Mrs. Ganly were produced to establish that she was on the Meadow on the survey date. However, it later emerged that the dates had been subsequently printed onto the photographs by a friend. "I wrongly assumed that dates would assist credibility".

[179] I found the evidence concerning the August 2007 photographs somewhat worrying. I also found it odd that Mrs. Ganly said that she had not seen the 1989 "No public right of way" signs although she must have passed the sign by the Hill Top Road entrance if she used the Meadow as frequently as she said. I also note that in her evidence questionnaire she said that she used the Meadow from 1970, although in her oral evidence she said that she could not remember how long after moving to Hill Top Road it was before she first went onto the Meadow. I think that Mrs. Ganly was over-influenced by her desire to preserve the Meadow from development. However, I do accept that she and her family have been using the Meadow for recreation over the relevant 20 year period and that such use has not been confined to the tracks.

Mrs. Joanna Gilmour

[180] Ms. Gilmour produced an evidence questionnaire¹⁵⁷ dated 8th. December 2006 and a witness statement¹⁵⁸ dated 17th. September 2007.

[181] Mrs. Gilmour moved to Southfield Road with her husband in 1979. Her first son was born later the same year and her second son was born in 1980. Her house is a 5 minute walk from the Hill Top Road access to the Meadow. Since moving to Southfield Road, Mr and Mrs Gilmour have walked on the Meadow, enjoying looking at birds and plants. When their children were young they played on the Meadow. For a few years, her eldest son was keen on bird watching and went to the Meadow for that purpose. In the late 1980s, her husband took the children occasionally onto the Meadow at night to listen to and observe owls. She recalled the children climbing on hay bales in the mid 1980s. The Meadow has not been cut since then. They picked apples from the orchard. They sometimes looked after a neighbour's Jack Russell and walked it on the Meadow. The dog rushed about in the long grass with the family following. In more recent years, Mrs Gilmour has picked brambles in the Meadow to make baskets, using the blackberries as a dye. She and her family have walked all over the Meadow, not just on the paths. It is magical in the snow and frost.

[182] In her evidence questionnaire (Q9) Mrs Gilmour estimated that she has used the Meadow for recreation about once every 6-10 days. By the time of her witness statement (para. 7) she said that she walked in the Meadow about twice a week.

[183] Mrs. Gilmour never goes on the Meadow without seeing other people there. She has seen children playing and adults looking at birds with binoculars. She recognises a proportion of the people on the Meadow as coming from Hill Top Road, Divinity Road and Southfield Road. Some dog walkers come from the Southfield Park flats.

[184] In her evidence questionnaire, Mrs. Gilmour said (Q19) that she had never seen a sign to warn against trespassing.

[185] I accept Mrs. Gilmour's evidence that she and her family have used the Meadow for recreation both on and off the paths. However, I think that there must be a degree of exaggeration about the frequency of use in that (a) her evidence of frequency increased markedly between her 2006 evidence questionnaire and her 2007 witness statement, and (b) if she went to the Meadow as often as she said, it is odd that she did not see the 1989 "No public right of way" sign at the Hill Top Road entrance.

Mr. Chris Goodall

[186] Mr. Goodall produced a written statement¹⁵⁹ dated 10th. December 2007 and a second undated statement¹⁶⁰.

¹⁵⁷ R85
¹⁵⁸ R82
¹⁵⁹ R719
¹⁶⁰ R725

[187] Mr. Goodall lives in North Oxford, is a Green Party parliamentary candidate and has little personal knowledge of the Meadow. He has however assisted the applicants in two previous applications to register new greens in or around Oxford. The topic of his evidence was criticism of the user surveys carried out on behalf of the objectors in 2007. He does not appear to have any relevant academic or vocational qualifications to carry out this task. However, he studied the field data recorded by the surveyors and usefully pointed out a number of inaccuracies in the presentation of the survey results. He also made a number of wide-ranging criticisms of the methodology of the surveys, which I have taken into account when considering the objectors' survey witnesses below.

Mr. Alan Headlam

[188] Mr. Headlam lives in Divinity Road. He is the husband of Mrs Mariabelle Headlam (see below). He was principally called to verify that he had taken the photographs produced by Mrs. Headlam. He did not produce a written statement.

[189] He said that, in 1989, he was entering the Meadow by the Hill Top Road entrance about 4 or 5 times a week but that he did not see the "No public right of way" sign there. I find this hard to explain since there is no doubt that there was such a sign there and that it was seen by many persons who submitted evidence questionnaires in support of the footpath application.

Mrs. Mariabelle Headlam

[190] Mrs. Headlam produced an evidence questionnaire dated 12th. August 2007 and a written statement¹⁶¹ dated 27th. August 2007.

[191] Mr. and Mrs. Headlam moved to Morrell Avenue (just outside the Divinity Road neighbourhood) in 1973. They are both academics. Mrs. Headlam is a lecturer in French at Oxford Brookes University. Mr. Headlam was also a lecturer at Oxford Brookes until he retired in 2005. They have two sons, who were born in 1975 and 1977. Mr. and Mrs. Headlam discovered Warneford Meadow in 1974. It was about a 700m. walk from their house in Morrell Avenue to the Hill Top Road entrance to the Meadow. They used to walk weekly on the Meadow before their sons were born. When the children were born, they began to visit the Meadow almost daily with the children. They played games such as hide and seek with the children all over the Meadow. They picked apples from the orchard and blackberries from the bramble bushes on the Meadow. The children rode their bikes on the Meadow. They went down to Boundary Brook to play pooh sticks and to look at the wildlife such as dragonflies. They did not confine themselves to the paths. As the children got older, they would play with friends on the Meadow. One son was a keen bird watcher and went to the Meadow for that purpose. Mr. Headlam was a keen photographer and he was fond of taking photographs on the Meadow.

[192] In 1984, Mr. and Mrs. Headlam moved to Divinity Road, about a 400m. walk from the Hill Top Road entrance to the Meadow. The family continued to use the Meadow in the same way. In about 1989/90, they acquired a Red Setter and used to

¹⁶¹

walk it at least once a day on the Meadow until it died about 4 years ago. She followed the dog all over the Meadow. As the children grew up they used the Meadow less. Both have now left home although they sometimes walk on the Meadow when they visit. The elder son now has children of his own who are taken to walk on the Meadow when they visit every 4-6 weeks. The younger son has a dog, which he walks on the Meadow when he visits. Since the Red Setter died in about 2004, Mrs. Headlam has used the Meadow less.

[193] Mrs. Headlam said that she always entered the Meadow by the Hill Top Road entrance and that there was never anything to restrict access at that point. There was a stile there, but she never used it as it was possible to walk onto the Meadow by a beaten track without climbing the stile. She could not remember seeing any signs on the Meadow. She saw other adults and children on the Meadow, some of whom she recognised. Many were also using the Meadow for recreation. Like her own family, they did not confine themselves to the paths. Her impression was that most users of the Meadow came from the east rather than from the north. She agreed with Mr. Dunabin's analysis of the Divinity Road neighbourhood.

[194] Mrs. Headlam could not remember cattle grazing on the Meadow. However, she could remember that the Meadow was used to make hay. Once she spoke to the farmer, who complained about pollution of the hay by dog faeces. She could not say in what year the last crop of hay was taken.

[195] Mrs. Headlam produced a number of photographs¹⁶² taken by her husband on or near to the Meadow. There are some photographs taken in 1988-89 which give quite a good impression of the Meadow in winter at this period. It seems quite clear that there was nothing in the nature of the vegetation of the Meadow to prevent people wandering generally over the Meadow.

[196] In 1989, Mrs. Headlam filled in an evidence questionnaire¹⁶³ in support of the application to add new public footpaths to the definitive map. In it, she claimed to have used a path "to Old Road and back to the Churchill using FP 80 back to Chiltern House" twice a day since moving to the area 3 years before. The claimed 3 year period is hard to reconcile with her period of residence in the area. When questioned, she could not really remember what footpath was the subject of the 1989 questionnaire or the circumstances in which she completed the 1989 questionnaire.

[197] Mrs. Headlam's completion of the 1989 questionnaire clearly left something to be desired: it seems to have been filled rather carelessly. It is also odd that Mrs Headlam did not recall the 1989 "No public right of way" sign at the Hill Top Road entrance to the Meadow. This suggests that she was not visiting the Meadow as often as she claimed at that time. However, having seen her give evidence and been questioned, I am satisfied as to the accuracy of the broad thrust of her evidence about the type of use which she and her family made of the Meadow and about the sort of use that she saw others make of the Meadow.

Mr. Stephen Heames

¹⁶² R92A-D

¹⁶³ B560

[198] Mr. Heames produced a witness statement¹⁶⁴ dated 15th September 2007 and an evidence questionnaire¹⁶⁵ dated 12th. December 2006.

[199] Mr. and Mrs. Heames have lived in Hill Top Road since 1985. His house does not back onto Warneford Meadow but it backs onto the grounds of the Warneford Hospital. It is possible to climb over his rear fence and cross the hospital grounds to enter the Meadow from the north. He has two children, now at university. He is a school teacher although he was a house husband for about a year from 1988/89 doing occasional supply work. Mr. Heames and his family have, since moving to Hill Top Road, roamed all over the Meadow, including the orchard area, playing games with the children when they were younger, observing wildlife and picking apples from the orchard. He has used the Meadow 2 or 3 times a week. He and his family have used the beaten tracks but have usually not stayed on the beaten paths. Mr Heames estimated that 70% of users were off the beaten paths. He agreed with Mr. Dunabin's analysis of the Divinity Road neighbourhood and thought that the vast majority of the recreational users of the Meadow came from that neighbourhood.

[200] In answer to question 19 of his evidence questionnaire, Mr. Heames said that he had never seen a sign warning against trespassing. He was cross-examined about the 1989 "No public right of way" signs. He said that he could not remember such a sign in 1989 but remembers a sign near Jack Howarth House within the last 8 years.

[201] I am concerned that Mr. Heames did not mention the "No public right of way" sign in his evidence questionnaire. Nor was it clear to me on what evidential basis he was able to say that the vast majority of recreational users of the Meadow came from the Divinity Road neighbourhood. I also thought that there was a degree of exaggeration in Mr. Heames's evidence as to the frequency of his use of the Meadow and the proportion of his use that was off the beaten paths. However, I have no hesitation in accepting that he and his family were frequent recreational users of the whole of the Meadow (including the orchard) and that they roamed off the beaten paths to a material extent.

Professor Joy Hendry

[202] Prof. Hendry produced an evidence questionnaire¹⁶⁶ dated 15th. December 2006 and a witness statement¹⁶⁷ dated 17th. September 2007.

[203] Prof. Hendry is a professor of anthropology at Oxford Brookes University. She has lived at 56, Hill Top Road since 1980 when she moved there with her husband and two sons (one aged 4 years and the other aged 4 months). The house is on the western side of Hill Top Road, not far from the entrance to the Meadow by Jack Haworth House. Since moving to Hill Top Road, she and her family have used the Meadow for recreation. Her sons played all over the Meadow when they were children. They played ball games when the grass on the Meadow was cut, although she could not remember when the grass ceased to be cut. She often works at home and

¹⁶⁴ R96
¹⁶⁵ R99
¹⁶⁶ R106
¹⁶⁷ R102

walks over the Meadow for relaxation. She takes visitors for a walk on the Meadow after Sunday lunch. She does not always stay on the beaten paths. She walks on the Meadow about once a week in winter and more often in summer until, a few years ago, she started spending the summers in Scotland. She has seen many other people on the Meadow, both on and off the paths. She recognises some of them as local people.

[204] Prof. Hendry could not recollect seeing the “No public right of way” sign at the Hill Top Road entrance to the Meadow in early 1989.

[205] Prof. Hendry agreed with Mr. Dunabin’s evidence as the Divinity Road neighbourhood, although she presented no individual analysis on the point.

[206] I accept Prof. Hendry’s evidence about the recreational use of the Meadow made by her children and others. I also accept that she has used the Meadow a great deal for recreation since 1980, both on and off path, although the fact that she did not see the 1989 sign suggests that her winter visits were less frequent than once a week, at least in the early months of 1989.

Dr. Keith Holly

[207] Dr. Holly produced a written statement¹⁶⁸ dated 14th. January 2008.

[208] He lives in North Oxford. He has lived and worked in Oxford since 1946. He is a keen walker and has walked over Warneford Meadow at times since 1946. He was a member of the Ramblers’ Association, although not an active one initially. It was not until he retired in 1986 that he became more familiar with the Meadow. He could remember hay being cut on the Meadow, although he could not date his recollection.

[209] Dr. Holly was aware that FP80 was a long-standing public right of way across Warneford Meadow. He was not personally involved with making the applications to add new footpaths across the Meadow to the definitive map. This started in the 1980s. The preparation of the applications and the gathering of evidence forms were dealt with by a Mr. Tolley. However, in 1991, Dr. Holly became a member of the footpaths sub-committee of the Oxfordshire Area Ramblers’ Association and began to walk the Meadow more regularly. In 1994, he took over from Mr. Tolley (who was unwell and died in 1997) as footpaths secretary for the Oxford City Group of the Ramblers’ Association and held that position until 2006. In that capacity he appeared for the Ramblers’ Association at and gave written evidence¹⁶⁹ to the 2000 footpaths inquiry.

[210] Dr. Holly was at pains to point out that his support for the addition of footpaths across the Meadow to the definitive map did not mean that users of the Meadow only used the paths. On the contrary, he has seen people enjoying recreation off the paths, such as children playing, people walking, picnicking and cycling. There was nothing to prevent people from entering the orchard and picking apples. He understood that the reason why no application was made to add the main diagonal

¹⁶⁸ R728

¹⁶⁹ B697

path to the definitive map was because it was a route which varied considerably over the years. It never occurred to him that the Meadow could be registered as a new green because he was unaware of the legislation dealing with the registration of new greens.

[211] Dr. Holly had not seen any signs erected in 1985 forbidding the exercising of dogs on the Meadow. He was familiar with the metal post at the Hill Top Road entrance to the Meadow. He had not seen a “No public right of way” sign on the post and he had originally thought that it was a post designed to carry a sign indicating the route of FP80. However, he heard stories of signs that were erected by the landowner and quickly torn down. He was aware that a number of evidence forms¹⁷⁰ submitted in support of the application for new path mentioned such signs. He could not really say how long the sign had been up.

[212] Since 2000, Dr. Holly has visited the Meadow less. However, he still visits, although, under cross-examination, he seemed rather vague about exactly what he had done and seen on these visits. I got the impression that he had passed through as part of a longer walk.

[213] Dr. Holly seemed to me to be an honest witness. I think that his main period of interest in Warneford Meadow was from the time when he became active in the Ramblers’ Association in the early 1990s until the 2000 public footpath inquiry. He did not live locally and, no doubt, he walked in many different places as well as the Meadow. I think that this explains why he did not see the 1989 “No public right of way” notice at the Hill Top Road entrance to the Meadow. I accept his evidence that neither he nor other users whom he saw confined their recreation to the paths across the Meadow.

Mrs. Sally Jeffrey

[214] Mrs. Jeffrey produced a witness statement dated 12th. September 2007.

[215] Mrs. Jeffrey has lived in Bartlemas House since 1981. Bartlemas House is an ancient house (the former leper hospital) in the hamlet of Bartlemas. The hamlet is approached by an unnamed road from Cowley Road. Her children have grown up and moved away but are frequent visitors. She has one grandchild. She has always had black Labradors which require a lot of walking.

[216] Warneford Meadow is about 10 minutes walk from Bartlemas House. Mrs. Jeffrey has used the Meadow for never less than 30 minutes every day (except when away on holiday) to walk the dogs, to play with her children and grandchildren, to enjoy nature and to pick apples from the orchard in season. Many other local people use the Meadow similarly. Mrs. Jeffrey knows many of them from regularly meeting and talking to them on the Meadow. Many come from near the Cowley Road as well as from the higher streets near the Meadow.

[217] Mrs. Jeffrey can remember a time when the grass on Warneford Meadow was cut, usually annually in the summer. Sometimes the hay was baled and sometimes left

¹⁷⁰ e.g. B551, 556, 559 & 587

on the ground. She could not remember when cutting stopped but it was at least 10-12 years ago. Mrs. Jeffrey and other users of the Meadow do not stay on the main paths. There are any number of minor grassy paths which criss-cross the Meadow. She and other users play games with children in the long grass. Over the years, she has walked all over the Meadow. Mrs. Jeffrey said that she has never seen any signs on the Meadow. If she had seen signs restricting access, she is a law-abiding person and would probably have obeyed them. She was using the Meadow in 1989 and could not say why she had not seen the “No public right of way” sign at the Hill Top Road entrance to the Meadow, except that it may have been vandalised or she may have been on holiday (although she did not mention any specific holiday in the early months of 1989).

[218] I accept Mrs. Jeffrey’s evidence about the use of the Meadow by herself, her family and other local people. I am however uncomfortable about her evidence relating to the 1989 “No public right of way” sign at the Hill Top Road entrance. That entrance is the nearest to Bartlemas House. There is no doubt that there was such a sign at that entrance for some time in early 1989 which was seen by a considerable number of people and I find it surprising that a daily visitor to the Meadow should not have noticed it.

Dr. Andrew Lack

[219] Dr. Lack produced an evidence questionnaire¹⁷¹ dated 8th. December 2006 and a witness statement¹⁷² dated 17th. September 2007.

[220] Dr. Lack is a Senior Lecturer in Biology at Oxford Brookes University. He has worked for the university since 1987 and has lived in Morrell Road (just north of the “Divinity Road neighbourhood”) since 1999. The biodiversity of the Meadow makes it a site of local ecological significance. Dr. Lack has taken students to the Meadow for ecological studies since 1987 or 1988. The students visit the Meadow up to 4 times a week during 2 or 3 weeks of the year. Since moving to Morrell Road, he and his children (now aged 6 and 4) and their visitors have used the Meadow for recreational purposes about 6 times a year. Although he has visited the Meadow at all times of the year, he mainly visits in the summer. The growth on the Meadow varies according to the time of year and from year to year. There are some areas that are quite overgrown, particularly near Boundary Brook. He has not seen the Meadow being cut, but, judging by the state of vegetation, he thought that the grass must have been cut within the last 10 years. In the summer, the majority of the Meadow is thick grass, but it is still possible for adults and children to walk through it. People tend to start on the beaten paths and then leave the paths to look at objects of interest or (in the case of children) to play.

[221] Dr. Lack has seen other recreational users of the Meadow, including the odd cyclist and jogger. The cyclists mostly stuck to the paths. He does not recognise many of the other users, but he does recognise some users from Hill Top Road. He agreed that people would use the Meadow from the houses to the north of the Meadow. He has seen people entering the Meadow from that side. Questioned about the Divinity

¹⁷¹ R115

¹⁷² R112

Road neighbourhood, Dr. Lack thought that there was no very strong sense of community in Morrell Road although residents at the top end of Morrell Road feel an affinity with Divinity Road. *“All these things are somewhat arbitrary. You can move the boundary as much as you like. You have to define the boundary as best as you can. I do not feel excluded”*. He knew other people from Morrell Avenue who used the Meadow for a walk, although he could not say how frequently.

[222] I considered Dr. Lack to be a very reliable witness and I accept the honesty and accuracy of his evidence..

Mr. David Leake

[223] Mr. Leake produced an evidence questionnaire¹⁷³ dated 3rd. July 2007 and an undated witness statement¹⁷⁴.

[224] Mr. Leake is a professional gardener working for an Oxford college. He lived in Divinity Road from 1980 to 2006. Mr. and Mrs. Leake purchased a dog shortly after moving to Divinity Road. He used to walk the dog on the Meadow every day. In the evenings, he often met his wife after she finished work to have a walk on the Meadow with the dog. Mr. Leake could not remember seeing any cattle on the Meadow. When he first used the Meadow, it was cut for hay. He could not remember when hay-cutting ceased, but it was at least 15 years ago. Some years (the precise date was never given) after moving to Divinity Road Mr and Mrs. Leake had two children. They took the children to play on the Meadow, at first carried on their backs and later on foot or on their bikes. They picked apples and blackberries. When their dog died, they soon purchased another dog which he also walked on the Meadow. That dog died a year or so before he left Divinity Road.

[225] Mr. Leake walked all over the Meadow (including occasionally the orchard). There were all sorts of subsidiary paths which came and went over the years. In some places the grass was longer than in other places. For example, it tended to be longer by Hill Top Road and shorter by Boundary Brook. Other people also used the Meadow. Some were walking or cycling across the Meadow. Some people picked mushrooms on the Meadow. The majority were walking dogs. He talked to a number of other users and made friends with some of them. People did not confine themselves to the public footpaths.

[226] Mr. Leake’s memory of signs on the Meadow was hazy. He seemed to recall a sign about dog walking at the entrance from the Meadow to the Warneford Hospital site. Asked about the “No public right of way” signs, he said that he “sort of remembered them”. However, when this was explored, his recollection seemed more consistent with signs connected with the 1997 modification order.

[227] I accept Mr. Leake’s evidence about use of the Meadow. However, his recollection about signs on the Meadow seemed vague.

Dr. Hrothgar Lindsay-Cashmore

¹⁷³ R126

¹⁷⁴ R119

[228] Dr. Lindsay-Cashmore produced an evidence questionnaire¹⁷⁵ dated 10th. December 2006 and a witness statement¹⁷⁶ dated 5th. September 2007.

[229] Dr. Lindsay-Cashmore was born in 1976. His parents lived in Stapleton Road in the Highfield area. In 1977, the family moved to the southern end of Hill Top Road, backing onto Warneford Meadow. For two years, he was a weekly boarder at a school in Oxford. From September 1989 to July 1994, he was away at boarding school, returning home during the holidays. From 1994 to 2003. he was away at university and medical school, returning home for holidays and week-ends. From August 2003 to August 2004, he was working in the south-west of England, returning home when he was off-duty. He lived abroad from August 2004 to August 2006. Till August 2007, he was at home most weekends and some weekdays and holidays. Since August 2007, he has lived at home full-time with his parents and with his partner, who is also a doctor of medicine.

[230] Clearly, he cannot personally recall using the Meadow from Stapleton Road. However, he said that he was told by his parents that they used the Meadow on a weekly basis from 1975 until they moved to Hill Top Road. His parents did not give evidence themselves.

[231] After moving to Hill Top Road, he was taken onto the Meadow by his mother, largely, it seems, as a route across to Headington. As he got a little older, from about the age of 5 or 6, he used to play on the Meadow both on his own and with local friends. He and his friends played all over the Meadow, including the orchard. He recalls that the grass on the Meadow was cut during the 1980s. When it snowed, they built snowmen and had snowball fights. People did not stick to the tracks. He could not say what proportion went off-track.

[232] Mr. Lindsay-Cashmore could not remember any signs on the Meadow in 1985 forbidding animals or the “No public right of way” signs of 1989. However, he was only 9 in 1985 and 13 in 1989 and it is not surprising that he could not personally remember signs on the Meadow at that age. However, the answer to question 19 in his evidence questionnaire was that there was no sign for the 29 years that he and his parents had been using the land. This seems to have been an answer made after consultation with his parents, and it surprising that they claim not to have seen the 1989 “No public right of way” sign near the Hill Top Road entrance to the Meadow which was so close to their house.

[233] As he grew up, Mr. Lindsay-Cashmore continued to use the Meadow for recreational purposes when he came home. He and many others were enjoying recreational use of the Meadow, both on and off the paths.

[234] Mr. Lindsay-Cashmore agreed with the applicant’s formulation of the Divinity Road neighbourhood, although without much by way of rationalisation. He mentioned residents’ associations, a cricket team and a baby sitting circle, although he did not say specifically how they related to the chosen neighbourhood. It appeared from other

¹⁷⁵ R139

¹⁷⁶ R131

witnesses that neither DRARA nor HTRRA precisely coincided with the chosen neighbourhood. He also said that he thought that the recreational users of the Meadow came predominantly from that neighbourhood, although it was unclear on what evidence he based that view

[235] Questioned about a survey carried out on behalf of the SoS in 2007, he thought that he saw the survey being carried out in August 2007. He was cycling across the Meadow to see a friend in Headington. He was riding a road bike. He carried the bike for a while off the tracks.

[236] I think that Mr. Lindsay-Cashmore was probably carrying his bicycle off track to make a point to the surveyors. However, I accept his evidence that, since he was a child, he has used the Meadow, both on and off the tracks, for informal recreation.

Mr. Norman Long

[237] Mr. Long produced two manuscript letters dated 4th. January 2007¹⁷⁷ and 1st. September 2007¹⁷⁸.

[238] Mr. Long and his wife have lived in the Southfield Park flats since 1975. They took occasional walks in Warneford Meadow, usually entering by the Hill Top Road entrance. It was never necessary to climb the stile at that entrance to gain access to the Meadow because the fence by the stile was down. There were never cattle in the Meadow in his time. Mr. Long used to go and pick apples from the orchard every year. The orchard was never fenced.

[239] In about 1982, the Longs acquired a dog and (subject to short gaps between dogs) have had dogs (sometimes two at the same time) ever since. Mr. Long usually takes the dog on the Meadow in the early morning (6.30-7.00am) and sometimes in the evening. His wife usually does the afternoon dog walk. During the week, Mr. Long is “governed by the clock” and usually walks a circuit of the paths on the Meadow. He goes early in the morning when there are not many other people on the Meadow. However, at the weekends, he usually goes on the Meadow later in the morning (between 8.00-11.00 am) and wanders around the Meadow, looking at the wildlife, “criss-crossing here, there and everywhere”. He picks blackberries in season. He has planted some acorns on the Meadow which have grown into young oak trees. At the weekends there are usually lots of people on the Meadow, including “stacks of people” walking dogs. He has also seen people picnicking, flying kites, playing rough ball games and riding mountain bikes. Particularly at the weekends, people do not stick to the paths.

[240] Mr. Long cannot recall seeing any notices on the Meadow except for the odd notice advertising local events. He is aware that there are signs in the Churchill Hospital grounds forbidding the exercising of dogs, but he has never seen such a sign on the Meadow. He is familiar with the metal pole at the Hill Top Road entrance but has never seen a “No public right of way” sign on it.

¹⁷⁷ R142

¹⁷⁸ R145

[241] Mr. Long said that many of the Southfield Park flats (of which there are about 100) were occupied by short term residents. He thought that a few residents walked dogs on the Meadow, but he did not seem very sure. He was not a member of DRARA and he knew of no other resident of the Southfield Park flats who was a member. He did not think that many residents of the flats joined in activities of the local community. He did not seem very convinced by Mr. Dunabin's analysis of the Divinity Road neighbourhood. He commented "It would be about right" in a rather hesitant way.

[242] In 2007, he saw the surveyors watching people from a mound in the Meadow. His wife told him that there were rumours about them, e.g. that they were bag-snatchers or paedophiles. I am bound to say that I found this part of his evidence rather far-fetched.

[243] I find it odd that Mr. Long did not see the 1989 "No public right of way sign" since it was at the entrance which he used daily for dog-walking. Perhaps it was erected during a gap between dogs. However, I accept the general thrust of his evidence about his use of the Meadow and about the use by other people which he saw.

Mr. Colin May

[244] Mr. May produced an evidence questionnaire¹⁷⁹ dated 13th. December 2006 and a witness statement¹⁸⁰ dated 10th. September 2007.

[245] Mr. May moved to Hill Top Road in 1976 with his wife and three children, a daughter then aged 7 and twin son and daughter then aged 4. He took early retirement in about 1993 but has continued to work at home since then. His house backs onto Warneford Meadow and had a gate opening onto the Meadow when the first moved in. The entrance to the Meadow from Hill Top Road is about 2 minutes walk away. Since 1976, Mr and Mrs. May and their children (until they left home) used the Meadow for recreation. Mr. May cannot remember any cattle in the Meadow, but there were the remains of a fence across the middle of the Meadow with a gate and cattle trough. There were pigs in a piggery at the far end of the orchard. For some years (into the 1980s) the Meadow was cut for hay twice a year and the children would play on the bales. Since the grass stopped being cut the surface has become more hummocky.

[246] Mr. May used to jog around the Meadow most days until about 2002, when he replaced the jog by a walk. The Meadow has been a regular walk after Sunday lunch with family and friends when they visited. He jogged and walked both on and off the beaten paths. He enjoyed jogging on the grass. Mrs. May used the Meadow to walk with the children and now the grandchildren and also with friends. The children played on the Meadow as their main play area when they were young. They stayed at the Hill Top Road end when they were small and used the whole Meadow as they grew older. His daughter flew a kite on the Meadow in about 1985. His son used the

¹⁷⁹ R151

¹⁸⁰ R147

Meadow for a get-fit programme before going to Sandhurst in 1995. The family used the whole of the Meadow, including the orchard, both on and off the paths.

[247] Mr. May has seen other people using the Meadow for recreation, e.g. kite-flying, riding BMX bikes, picnicking and dog walking. Some of the use is on the paths and some off the paths. The dog walkers tend to stick to paths, but this includes the many small informal paths that cross the Meadow. It is difficult to assess the balance. His impression was that recently there had been more on-path use.

[248] Mr. May does recall a notice on a post near the Hill Top Road entrance in the 1980s but he cannot remember exactly what it said and his impression was that it was soon vandalised. It made no difference to people's use of the Meadow. He recalls that there were some travellers on the Meadow in 1991. Also, motor-cyclists were a nuisance on the Meadow. Bunds were erected to try to stop them from entering the Meadow.

[249] Mr. May considered that most users of the Meadow come from the Divinity Road neighbourhood (as defined by Mr. Dunabin). He considers that it is a "village" with its own community facilities such as a baby-sitting circle, residents' associations and cricket team.

[250] I accept Mr. May's evidence about use of the Meadow by himself and others. However, I felt that his evidence about the Divinity Road neighbourhood was more toeing the party line than his own independent analysis.

Mrs. Elizabeth Mills OBE

[251] Mrs. Mills produced a witness statement¹⁸¹ dated 15th. September 2007.

[252] Mrs. Mills is a self-employed consultant. She and her husband have lived at the Cowley Road end of Divinity Road since 2002. She acquired a rescue bulldog called Max in early 2004. Later that year she was told of Warneford Meadow by a neighbour. Since then she has used the Meadow for walking her dog. She either walks or drives up to the Hill Top Road entrance to the Meadow, often 2 or 3 times a week. She walks all over the Meadow with the dog. She observes the wildlife. She takes photographs. She picks apples from the orchard, blackberries from the bramble bushes and flowers and grasses for flower arrangements. When friends visit, she often takes them to the Meadow for a walk. She does not stay on the beaten tracks. She has never seen any signs restricting her use of the Meadow. The grass on the Meadow has not been cut in her time.

[253] She has got to know a lot of dog walkers on the Meadow. Most seem to come from the Divinity Road neighbourhood and enter from Hill Top Road. Whether dog walkers leave the main beaten tracks depends on the age of the dog and the time of year. The younger livelier dogs tend to be taken more on the informal tracks. In the winter, it is easier to walk off the tracks because the grass is lower. Most people walk with Wellington boots or walking boots.

¹⁸¹ R154

[254] Mrs. Mills considered that the Divinity Road neighbourhood is a close knit community notwithstanding a diverse socio-economic and ethnic mix and a high proportion of houses in multiple occupancy with several student houses and halfway houses for the recently homeless. On this point, Mrs. Mills had a different perception from that of Mr. Dunabin (see above).

[255] Mrs. Mills is closely involved with DRARA and mentioned a number of community activities organised by DRARA, e.g. outdoor film shows, open garden days, recycling days and litter picking. There are a number of residents' associations in the area which are concerned about the prospective development of the Meadow:

- DRARA
- HTRRA (which Mrs. Mills regarded as a sub-group of DRARA)
- Little Oxford Residents' Association
- Highfield Residents' Association
- Headington Residents' Association, and
- Mileway Garden Residents' Association.

[256] Mrs. Mills struck me as a perfectly honest and genuine witness. I accept her evidence about use of the Meadow, both her own use and the use by others that she has seen. I accept her evidence about DRARA activities although it is fair to say, as Mr Dunabin explained, that the DRARA area is not exactly the same as the Divinity Road neighbourhood as put forward by the applicant. I also note that 4 of the 6 residents' associations interested in protection of the Meadow come from north of the Meadow.

Mrs. Greeba Padbury

[257] Mrs. Padbury produced an evidence questionnaire¹⁸² dated 11th. December 2006 and a witness statement¹⁸³ dated 13th. September 2007.

[258] Mrs. Padbury lives in Hill Top Road, very close to the entrance to the Meadow, with her husband and two daughters, now aged 20 and 17. Mr and Mrs Padbury moved to Hill Top Road in 1986. They have always had dogs, except for a short break after one dog died and before they acquired a new dog. Mrs. Padbury and her family have used the Meadow very extensively. The dogs are walked in the Meadow three times a day except when they are away on holiday. When the children were younger, they used the Meadow extensively for activities such as games, picnics, birthday parties, camping out etc. The family pick fruit from the orchard every year. In her witness statement, Mrs. Padbury said that the family used the Meadow at least 10 times a week (excluding dog walking) even¹⁸⁴ in the bleakest of weeks. In cross-examination, she conceded that this was an over-estimate and that the family used the Meadow 5 times a week without the dogs. They used the whole of the Meadow and did not stick to the beaten paths. About 50% of users of the Meadow did not stick to the paths. Mrs. Padbury said that she was never prevented or discouraged from using the Meadow for recreation. In answer to question 19 of her evidence

¹⁸² R164

¹⁸³ R160

¹⁸⁴ Mrs. Padbury orally amended "except" to "even" in para. 2.2 of her witness statement.

questionnaire¹⁸⁵, she said that she had never seen a sign to warn against trespassing. In cross-examination, she said that she had never seen a sign in the Meadow saying “No public right of way”.

[259] She regarded the neighbourhood in which she lived as the Divinity Road neighbourhood. It included not only Divinity Road but also Hill Top Road, Southfield Road and the Southfield Park flats. The neighbourhood provided a great sense of community spirit.

[260] I approach Mrs. Padbury’s evidence with some caution. I find it difficult to understand how she can claim not to have seen the 1989 “No public right of way” sign when it stood only a few yards from her home and if she passed it several times a day with her dog. Her reduction of non-dog usage from 10 to 5 times a week suggests that her original evidence was considerably over-stated. Her discussion of the Divinity Road neighbourhood was a matter of assertion rather than analysis. I consider that there was an element of exaggeration in Mrs. Padbury’s evidence. However, I do accept that she and her family have made extensive use of the Meadow (including the orchard) for informal recreation since 1986 and that the use was not confined to the beaten tracks.

Professor Kerry David Patterson

[261] Prof. Patterson produced an evidence questionnaire¹⁸⁶ dated 10th. December 2006 and a witness statement¹⁸⁷ dated 17th. September 2007.

[262] Prof. Patterson is Professor of Econometrics at the University of Reading, where he has been a member of the faculty since 1978. He largely works at home. He lived in Warneford Road from 1978 to 1986. Since 1986, he has lived in Hill Top Road. He has 3 children, now aged 26, 24 and 20 (the youngest of whom still lives at home for part of the time) and 5 grandchildren (3 of whom live within walking distance).

[263] Prof. Patterson already knew the Meadow when he moved to Warneford Road, since he had previously lived in East Oxford. His house was about 500 metres from the Hill Top Road entrance to the Meadow. He and his wife and children used to go to the Meadow to walk and play. Prof. Patterson also went to the Meadow on his own to jog, cycle and watch the wildlife. He and his family explored the whole of the Meadow.

[264] They got to know the Meadow better after moving to Hill Top Road in 1986. The house backs onto the Meadow. 1986 was the last year in which the whole of the grass in the Meadow was cut (although some areas have been cleared by local people) Since then, the topography of the Meadow has been little changed. The grass is perhaps longer now than it used to be. At first, there was no fence at all between his back garden and the Meadow. Later, Prof. Patterson installed a fence with a gate. The children played in the Meadow as an extension of the garden. They and their friends roamed all over the Meadow. In early spring, they would collect tadpoles from the

185 R165

186 R181

187 R180

water trough in the middle of the Meadow and bring them home to be raised into frogs. The whole family picked apples from the orchard and blackberries from the many places where they grew in the Meadow. The family used the Meadow every day. There were numerous other people using the Meadow for the same kinds of recreation. It has been a key area for dog walkers. Some people walk on the footpaths. A lot of people walk off the footpaths. His judgment is that most users are local people.

[265] After the children grew up, Prof. Patterson continued to use the Meadow for watching wildlife, taking photographs, jogging, flying model planes, flying kites and (until he retired from the sport in 1997) football training. In recent years, he has taken his grandchildren to play on the Meadow.

[266] Prof. Patterson agreed with Mr. Dunabin's analysis of the Divinity Road neighbourhood and considered that the area has "a degree of cohesion and community spirit akin to a country village and could be called an urban village". The Meadow is an asset of that community. The factor giving cohesiveness was essentially the fact that he and his family had friends and acquaintances who lived within the Divinity Road neighbourhood. The baby-sitting circle members were all within the Divinity Road neighbourhood. Although Hill Top Road had its own residents' association, "*it would be inappropriate to describe Hill Top Road as a neighbourhood*"

[267] Prof. Patterson said that he had never seen the 1989 "No public right of way" sign, although he was familiar with the metal post on which it used to stand.

[268] Prof. Patterson was an extremely enthusiastic witness. I accept that he and his family have made extensive recreational use of the Meadow, both on and off the paths, particularly since they moved to Hill Top Road in 1986. I accept his evidence that he saw many other local people enjoying the Meadow in much the same way as himself and his family. However, I felt that there was a degree of exaggeration in his evidence concerning the amount of use made of the Meadow by himself and his family. It is odd that he did not see the 1989 sign if he was on the Meadow virtually every day as he claimed.

Rev. Adam Romanis

[269] The Rev. Adam Romanis has been vicar of the parish of Cowley St. John since 1999. The parish boundaries include the Divinity Road neighbourhood as put forward by the applicant but exclude most of Warneford Meadow as shown on the plan produced by the applicant¹⁸⁸. Mr. Romanis was not familiar with the parish boundaries before they were altered in 1992.

[270] The parish church is the church of SS Mary and John on the west side of Cowley Road. The vicarage is also on the west side of Cowley Road. He "broadly" agreed with Mr. Dunabin's analysis of the neighbourhood. He mentioned some church activities, such as a barn dance and Christian Aid collections which were focussed on the Divinity Road/Southfield Road area Whether this exactly coincided

¹⁸⁸

with the applicant's Divinity Road neighbourhood was unclear. The Southfield Park flats "could be regarded as the fringe of the Southfield-Divinity village".

[271] Mr. Romanis uses the Meadow infrequently:

- as a short cut when visiting the Churchill Hospital, and
- as part of the route used for cycle rides with his children.

He did not suggest that he went off the beaten paths. He did not say that he saw off-track recreation.

[272] I accept Mr. Romanis as a witness of truth. I thought that Mr. Romanis was anxious to show his support for the application but had limited personal knowledge of the Meadow. He was (quite rightly) equally anxious not to give any evidence that was not scrupulously accurate. I felt that his support for the cohesive quality of the applicant's Divinity Road neighbourhood was not wholly unqualified. Further, he was unable to give evidence of general recreational use of the Meadow as opposed to his and his children's personal use for passage.

Dr. Graeme Salmon

[273] Dr. Salmon produced an evidence questionnaire¹⁸⁹ dated 12th. December 2006, an undated written statement¹⁹⁰, a supplemental statement¹⁹¹ dated 11th. December 2007 and a second supplemental statement¹⁹² dated 15th. January 2008.

[274] Dr. Salmon is a retired university lecturer in physics and Emeritus Fellow of Queen's College, Oxford. He and his wife have lived in Hill Top Road since 1972, when their son, David, was 3 years old.

[275] Much of Dr. Salmon's first statement usefully dealt with the geography and history of Warneford Meadow and the surrounding area and buildings. It is a meticulously researched piece of work which I accept as accurate¹⁹³. I have drawn on this material heavily in the historical survey above.

[276] After moving to Hill Top Road, Dr. and Mrs. Salmon took their son to the Meadow about once a week to walk, pick blackberries and look at the cows. They knew it as "the cows' field". Dr. Salmon thought that the use of the Meadow for grazing cattle ceased in about 1974. At that time the Meadow must have been fenced and he thinks that they entered over the stile from Hill Top Road, although his memory of the fencing in that period is not clear. The Meadow was divided into two parts and they were cautious about entering the part of the Meadow in which cows were grazing. Dr. Salmon thought that the fences fell down after the Meadow was no longer used for grazing and that people thereafter by-passed the stile. He could not recall how long the Meadow was used for taking a hay crop.

[277] From about 1978-1982, David played with friends in the Meadow, often unsupervised. They made camps, played along Boundary Brook, picked apples and

¹⁸⁹ R228

¹⁹⁰ R193

¹⁹¹ R732

¹⁹² R736

¹⁹³ Dr. Salmon discovered an error in para. 2.3 and produced a new para. 2.3 at R196A.

conkers and played in the snow. David went away to school in 1982 but still used the Meadow sometimes at weekends and in school holidays. He collected golf balls which had been mishit into the Meadow from the Southfield Golf Club course. His use stopped when he went to university in 1987.

[278] Dr. Salmon enjoys painting landscape watercolours. He painted about once a month in the Meadow in the years around 1978. Then he painted in the Meadow about once a year until 2006 when he again started to paint more often in the Meadow. He produced colour photographs¹⁹⁴ of some of his watercolours of the Meadow. He has seen Mrs. Ganly, a close neighbour, also painting in the Meadow. Dr. Salmon is also interested in photography, but has only started photographing in the Meadow since 2006. He and his wife pick blackberries in the Meadow most years and often windfall apples.

[279] A sign appeared reading “No public right of way” near the Hill Top Road entrance to the Meadow in 1989. It only lasted a week or two. He was visiting the Meadow about once a week at the time and only saw the sign once. In cross-examination, however, he said that he had “no real close recollection” of the frequency of his visits at the time when the sign was erected. Dr. Salmon assumed that the purpose of the sign was to prevent the diagonal path across the Meadow from becoming recognised as a public right of way. It was “not inconceivable” that the NHS did not object to general use of the Meadow. It did not say that nobody could come on the Meadow at all. He did not recollect seeing any other signs on the Meadow, although he accepted (very fairly) that there may have been signs that he has forgotten.

[280] Dr. Salmon’s evidence about the frequency of his personal visits to the Meadow was not very clear. I got the impression that he did not normally visit very often over the years. When he has visited, he has seen other people enjoying recreation on the Meadow, such as children playing. He has seen kite-flying on the Meadow. His impression was that the majority of the recreational users of the Meadow came from the Divinity Road neighbourhood side of the Meadow.

[281] The Divinity Road neighbourhood “always had a sense of community and mutual support”. He is a member of DRARA which has social events. He is chairman of the HTRRA, which does not have a social programme. The Southfield Park flats are not within the DRARA or HTRRA areas. He did not regard Hill Top Road as a “neighbourhood”. He would not call Mrs Jeffrey of Bartlemas a “neighbour”.

[282] Dr. Salmon said that he was on the Meadow over the weekend of 22nd & 23rd. August 2007 when Mr. John was carrying out a survey on behalf of the objectors. Dr. Salmon did not consider that Mr. John had accurately recorded his movements.

[283] I thought that Dr. Salmon was an honest and careful witness. The only real doubt that I have about his evidence was his estimate of how long the 1989 sign was in place. I am not convinced that he had the evidence to say that it was only up for a week or two.

¹⁹⁴

R226-227

Ms. Jane Felicity Slee

[284] Ms. Slee produced an evidence questionnaire¹⁹⁵ dated 13th. December 2006 and a witness statement¹⁹⁶ dated 16th. September 2007.

[285] Ms. Slee has lived in Hill Top Road with her partner and two children (born 1988 and 1992) since 1994. Her house backs onto the Warneford Hospital grounds and it is possible to enter the Warneford Hospital grounds through a gate in her back fence and to walk across those grounds to enter Warneford Meadow. Ms. Slee has walked on the Meadow for relaxation, to pick apples from the orchard and to take her children to play on the Meadow, either by themselves or with friends. Her use has varied from most days to every 2 or 3 weeks. It has got less since she no longer has to accompany the children. As the children got older, they played on the Meadow unsupervised, cycling, building dens or just hanging out with friends. The family did not stay on the beaten tracks. When she was on the Meadow, she saw other adults and children enjoying the Meadow in the same way as herself and her family.

[286] She agreed with Mr. Dunabin's analysis of the Divinity Road neighbourhood and considered that many users of the Meadow came from that neighbourhood.

[287] I accept Ms. Slee's evidence about the use that she has made (and seen) of the Meadow.

Dr. Bernard Alan Sufrin

[288] Dr. Sufrin produced witness statements dated 15th. September 2007¹⁹⁷ and 18th. May 2008¹⁹⁸.

[289] Dr. Sufrin is a Fellow and Tutor in Computation at Worcester College, Oxford, University Lecturer in Computation in Oxford University and an elected member of the Audit Committee of the University. He and his wife have lived in Southfield Road since 1984. They have two teenaged children. When they moved to Southfield Road, they were told of the Meadow by a neighbour who said that he had been walking his dog there since the 1940s. They have easy access to Warneford Meadow by walking up Southfield Road and along Hill Top Road to the entrance at the southern end of Hill Top Road. For the first ten years that they lived in Southfield Road, they had an alternative route to the same entrance via the Oriel College playing fields and the Southfield Park flats. From 1985, Dr and Mrs Sufrin used to walk in the Meadow, particularly on summer weekends. Dr. Sufrin also used to run around the circumference of the Meadow 2 or 3 times a week before or after work until 1994. When the children were young Dr. Sufrin used to take them up to the Meadow several times a week to play and look at the insects. They wandered all over the Meadow and did not stay on the beaten paths. As the children got older he took them blackberrying or picking apples in the orchard. Between about 1996 and 2000, they were friendly with a family with children who lived beside the Meadow and the children used to play impromptu games together on the Meadow. In the summer, when the grass was

¹⁹⁵ R234

¹⁹⁶ R231

¹⁹⁷ R237

¹⁹⁸ R755

long, it was difficult to walk off the paths, but it was easier in the winter when the grass died down. It was then possible to ride mountain bikes over the grass. Dr. Sufrin is interested in flying kites and has flown them on the Meadow. He can remember the grass on the Meadow being cut, but not when: certainly not in the last few years. When using the Meadow he saw quite a lot of people using the tracks, especially going to and from work. He did not see people off path every day

[290] Dr. Sufrin's evidence was that he had no recollection of any "No public right of way" signs in the Meadow.

[291] Dr. Sufrin agreed with Mr. Dunabin's analysis of the Divinity Road neighbourhood and said that he recognised many people on the Meadow who lived in that neighbourhood

[292] Dr. Sufrin was recalled to give evidence about a bund that was erected along the southern side of Roosevelt Drive in the early 1990s. He thought that it was always possible to walk through gaps in the bund, as shown in a 1996 photograph¹⁹⁹ produced to the public inquiry.

[293] I found Dr. Sufrin a difficult witness to assess. He was very extrovert and dramatic which always raises a suspicion of exaggeration. In giving evidence about the Roosevelt Drive bund, he first described the scene as if from his mind's eye and then professed astonishment that the photograph so exactly accorded with his recollection. At the time I noted down that I thought that he was pretending that he had not seen the photograph before. On the other hand, on rereading my note of his cross-examination, I noted several occasions where he was careful to qualify his answer in the interests of accuracy. I think that there may have been some play-acting with the photograph, but I do not think that Dr. Sufrin would deliberately give inaccurate evidence on any material factual matter. Accordingly, I accept the broad accuracy of Dr. Sufrin's evidence about his use of the Meadow, subject to one qualification. I do not think that he can have been running around the Meadow as much as 2 or 3 times a week in early 1989 or he would surely have seen the "No public right of way" sign at the Hill Top Road entrance to the Meadow.

Mrs. Kate Whitworth-Jones

[294] Mrs. Whitworth-Jones produced a witness statement²⁰⁰ dated September 2007.

[295] Mrs. Whitworth-Jones lived in Southfield Road from 1981-90 and has lived in Minster Road since 1993. She has three children, now aged 30, 23 and 14. She has always had dogs. While living in Southfield Road and Minster Road, she has walked her dogs on the Meadow almost every day and has played there with her children when they were young. When the children were old enough, they played on the Meadow by themselves. She usually enters via Hill Top Road. She walks all over the Meadow, not sticking to the beaten tracks. She visits the orchard to watch birdlife rather than pick apples since she has apples in her own garden. There are often other adults and children on the Meadow, some from the Divinity Road neighbourhood,

¹⁹⁹ R751

²⁰⁰ R244

using the Meadow for informal recreation both on and off the paths. She has seen people picking blackberries and apples, watching birds, picnicking and just sitting in the grass on a hot day. She could not remember cattle on the Meadow, although she remembers its being cut for hay although she could not put a date on it. It was at least 10 years ago. She said that she had never seen any signs on the Meadow suggesting that it was private or that people were trespassing. This evidence was not explored in cross-examination.

[296] Mrs. Whitworth-Jones agreed with Mr. Dunabin’s analysis of the Divinity Road neighbourhood although she did not put forward any detailed discussion of the neighbourhood.

[297] I accept the evidence of Mrs. Whitworth-Jones.

Written evidence for applicant

[298] I now turn to deal with the written statements submitted in support of the application from witnesses who did not attend the public inquiry to give oral evidence. Clearly, this evidence has to be approached with caution as I did not see the witnesses and the objectors had no opportunity to cross-examine them. I summarise the user evidence as follows:

Name	Address	User period	Off path user	Reference
Nicholas Allnatt	Mileway Gardens	1999-date	No	R246
Cecilia Altmann	Old Road	1995-date	Yes	R249
Ali Anwar	Hill Top Road (1978-1999)	1978-1999	Yes	R252
Trish Atwooll	Divinity Road	1985-date	Yes	R256
Jane Bell	Mileway Gardens	1994-date	Yes	R259
Alison Berman	Southfield Road	1988-date	“not really”	R262
Phyllis Bolt	Barrington Close	1985-1990	“sometimes”	R265
David Bradbury	Hill Top Road (1962-1985)	1965-1980	Yes	R268
Mike Bradbury	Hill Top Road (1964-1983)	1964-1983	Yes	R271
Christopher Jonathan Brazier	Southfield Road (1991-2001) Hill Top Road (2001-date)	1991-date	Yes	R277
Anne Brown	Hill Top Road	1983-date	Yes	R280
Ken Brownsey	Hill Top Road	1994-date	Yes	R283
Maggie Budden	Southfield Road (1984-1990) Hill Top Road (1990-date)	1996-date	Yes	R286
Deirdre J. Butt	Warneford Road	1964-1985	Yes	R289 &

	(1964-1966) Southfield Road (1966-1975) Hill Top Road (1975-1985)			R293
Fida Butt	Not stated	Not stated	Yes	R292
Elizabeth & James Cann	Demesne Furze (1993-2002) Mileway Gardens (2002-date)	1993-date	Yes	R296
Andrew Carter	Hill Top Road	1982-date	“occasionally”	R304
Diana Chandler-Sanders	Southfield Road (1986-1989) Stapleton Road (1991-date)	1988-1989, 1991-1999, 2002-date	“occasionally”	R307
Alan Chapman	Silver Road (1980-1998) Divinity Road (1998-date)	“hard to say”	Yes	R311
Helen & David Constantine	Hill Top Road	1981-date	Yes	R29
Jackie Dymond	Old Road	1977-date	“sometimes”	R314
Anthony Eccles	Bartlemas Road (1994-2001) Southfield Road (2001-date)	1994-date	Yes	R317
Anna Eden	Southfield Road	1991-date	Yes	R320
Evelyn Ellis	Hill Top Road	Not stated	Yes	R325
Linda Forrest-Sufrin	Southfield Road	1984-date	Yes	R328
Daniel Ganly	Hill Top Road (1970-1986) Stapleton Road (1996-date)	1970-date	Yes	R331
Isobel Gilham	Southfield Road (1982-1997) Hill Top Road (1997-date)	1982-date	Yes	R334
Roy & Valerie Harvey	Minster Road	Not stated	“some & some”	R338
Chris Headlam	Divinity Road (1984-1999)	1984-1999	Yes	R342
Nick Holmes	Southfield Road	2003-date	No	R345
Shirley Ann Jordan	Hill Top Road	2001-date	Yes	R348
Kate Jury	Minster Road	1988-date	Yes	R351
Wilfred Knapp	Hill Top Road	1951-date	Yes	R354
Tom Knollys	Divinity Road	2004-date	Yes	R357
Raymond Kuhn	Hill Top Road	2001-date	Yes	R359

Christopher John Lewendon	Southfield Road	1968-1987 or 1990	“occasionally”	R362
Lucy-Jean Lloyd	Divinity Road	1987-date	“No rarely once or twice”	R368
Margaret Lloyd	Southfield Road	1987-date	Yes	R371
The Lloyds	Hill Top Road	1989-date	Yes	R375
Dominic May	Hill Top Road (1976-1997)	1976-1997 (and subsequently on visits to parents)	Yes	R378
S. McKenna	Grays Road	1964-date	Yes	R381
Rebecca Miles	Hill Top Road	2000-date	Yes	R384
R.F. More	Highfield Avenue	1993-date	Yes	R387
Rachel Nuttall	Minster Road	2002-date	Yes	R390
Jean Organ	Hill Top Road (since 1953: previous addresses undisclosed)	1928-date	“Yes: my sons certainly do”	R393
Corin David Patterson	Warneford Road (1980-1986) Hill Top Road (1986-2005)	?1983- ?2005	Yes	R396
Mike Peckett	Southfield Road	1998-date	Yes	R400
Rebecca Phillipson	Southfield Road (2001-2006) Minster Road (2006-date)	2001-date	“sometimes”	R403
Rosie Pocock	Hill Top Road	1978-date	Yes	R406
Elisabeth Reed	Minster Road (1986-1998) Fair View (2001-2004) Southfield Road (2004-date)	1986-1998 2001-date	?Yes	R411
Marilyn Relf	Southfield Road	1999-date	No	R414
Harold Roffey	Mileway Gardens	1998-date	“occasionally”	R418
Sandy Ruxton	Southfield Road	2004-date	“Occasionally: dog certainly does”	R421
Pamela Rye	Harcourt Terrace (1985-1987) Southfield Road (1996-date)	1985-1987 1996-date	Yes	R424
Giuseppina Sawyer	Divinity Road	1985-date	“not really”	R427

Margaret Scott	Divinity Road (1963-1973) Hill Top Road (1973-2000)	1963-2000	“some- times”	R430
Floris van den Broecke	Hill Top Road	2002-date	“Yes, especially for picking berries”	R433
Peter Ward	Southfield Road	2004-date	Yes	R436
Rob & Harriet Waterston	Minster Road	1990-date	Yes	R439
Nick Welch	Southfield Road	1979-date	“yes, to look at plants”	R443
Mary Welford	Highfield Avenue	1984-date	“some- times”	R446
Pat Whitehouse ²⁰¹	Nurses’ residences, Headington (1971-1987) Bickerton Road (1987-date)	1976-date	Yes	R449
George Wormald	Minster Road	2003-date	Yes	R452
RA Young	Hill Top Road (1979-1989)	1979-1989	? ²⁰²	R455

[299] In addition, the applicant submitted three written statements not involving user evidence:

Professor Vic Barnett²⁰³

[300] Prof. Barnett is Emeritus Professor of Statistics at Nottingham University and visiting Professor of Statistics at Nottingham Trent University. He has 40 years’ experience as a professional statistician. He criticised the objectors’ 2007 user surveys of Warneford Meadow as not complying with professional statistical procedures and methods and threw doubt on the conclusions of the surveys as a result.

[301] If Prof. Barnett is saying that one cannot rely on the 2007 surveys as definitive proof of the way in which the Meadow was used between 1986 and 2006, I agree with him. However, what the surveyors saw in 2007 is evidence to be weighed in the balance with all the other evidence.

Dr. Daniel Lunn²⁰⁴

²⁰¹ Mrs. Whitehouse says that she saw a sign saying “No public access” in about 2004 for 3 weeks on Roosevelt Drive to the right of the brook if facing Warneford Meadow. No other witness mentions such a sign.

²⁰² Relevant page is missing from applicant’s bundle

²⁰³ R701

²⁰⁴ R730

[302] Dr. Lunn is a Fellow and Tutor in Mathematics at Worcester College, Oxford. He is a professional statistician. He also criticised the objectors' 2007 user surveys of Warneford Meadow as not complying with professional statistical procedures and methods and also threw doubt on the conclusions of the surveys as a result.

[303] The same comments apply as to Prof. Barnett's evidence. If Dr. Lunn is saying that one cannot rely on the 2007 surveys as definitive proof of the way in which the Meadow was used between 1986 and 2006, I agree with him. However, what the surveyors saw in 2007 is evidence to be weighed in the balance with all the other evidence.

Nuala Young²⁰⁵

[304] Ms. Young is a city councillor for St. Clements and has lived in East Oxford for 37 years. She supported the cohesive nature of the Divinity Road area as defined by Mr. Dunabin. She said that it formed a community, although her statement was long on generalisations and short of specific supporting evidence.

6. Evidence for objectors

[305] I begin with the witnesses for the objectors who gave oral evidence. I deal with them in alphabetical order rather than in the order in which they gave evidence.

Mr. John Banbury

[306] Mr. Banbury produced a written statement²⁰⁶ dated 28th. April 2008.

[307] Mr. Banbury worked as a self-employed grounds maintenance contractor for various Oxford hospitals from 1963 to 1980. From 1980 until he retired in 2002, he was employed (under various job titles) as a grounds maintenance manager by various NHS bodies (which were reorganised and renamed on several occasions over that period). He was responsible for Warneford Meadow from 1980 to 1994. He visited the Meadow 2 or 3 times a month but had no regular pattern of inspection.

[308] Mr. Banbury could not recollect cattle grazing on the Meadow although in the early 1980s a lady was allowed to graze her horse on the land. This was not for long because people let the horses out.

[309] In 1985 signs were erected in order to stop people walking their dogs on the hospital land. He produced a memorandum²⁰⁷ that he had written on 22nd February 1989 concerning the erection of these signs. He was not personally involved in the erection of these signs. Under cross-examination, he accepted that he had no independent recollection of the erection or position of these signs. All one can gather from the memorandum is that there was a sign where the unofficial footpath from Old Road crosses the Churchill Drive (i.e. Roosevelt Drive). However, Mr. Banbury accepted that he could not say in what direction that sign was facing.

²⁰⁵ R739

²⁰⁶ B977

²⁰⁷ B34

[310] He recalled that the Meadow and other hospital land was cut for hay until after 1985. It was then impossible to find a farmer willing to pay for the hay crop because of pollution by dog faeces. He could not remember in what year hay ceased to be cut. It was probably in one of the years 1986-1988. After hay ceased to be taken, he arranged for the grass to be cut with a rotary mower to prevent fires. I got the impression that this practice continued until he ceased to be involved with the Meadow in 1994 but that it was not an annual practice. The grass was cut only when dry conditions produced a fire danger.

[311] However, Mr. Banbury was personally involved in the erection of the 1989 “No public right of way” signs. He produced a plan²⁰⁸ showing the position of the signs. Three are relevant to Warneford Meadow:

- Point C, at the Hill Top Road entrance to the Meadow
- Point B, at the point where what is now known as Roosevelt Drive crossed the Meadow, and
- Point D, where it was possible to enter the Meadow from Old Road before the construction of the Little Oxford estate north of Roosevelt Drive.

The sign at the Hill Top Road entrance was placed to the north of the then route of FP80 at the point where unofficial paths were diverging from FP80. He stated in his written statement that the purpose of the signs was “to prevent access and vandalism on the hospital land and to protect the legal rights of the hospital authority”²⁰⁹.

However, the contemporaneous documents suggest that the specific purpose was to prevent the creation of new public rights of way across the hospital land. Mr. Banbury agreed that none of these three signs lasted very long. Many of the signs were torn down very quickly.

[312] Mr. Banbury was also involved in the erection of a bund along the south side of Roosevelt Drive in the early 1990s. The purpose was to prevent access by travellers. There was a locked gate in the bund to allow access to the Meadow for authorised vehicles but there were no gaps left for pedestrian access, although pedestrians could and did walk over the bund and gaps were soon created. The bund did not, of course, affect access by way of FP80.

[313] When he visited the Meadow he saw members of the public on the Meadow. They were “often” on the line of the official or claimed public footpaths. However, the routes of these paths varied from year to year depending on ground conditions.

[314] Save for his evidence about the purpose of the 1989 signs (where I prefer the contemporaneous written evidence) I accept the evidence of Mr. Banbury as summarised above.

Mr. Michael Christopher Philip Box

[315] Mr. Box produced three written statements:

- A statement²¹⁰ dated 13th. September 2007
- A second statement²¹¹ also dated 13th. September 2007, and

²⁰⁸ B984

²⁰⁹ para. 16 at B981

²¹⁰ B143

- A third statement²¹² dated 21st. December 2007.

[316] Mr. Box is property services manager for Oxford Radcliffe Hospitals NHS Trust. Mr. Box visited Warneford Meadow on 3rd. April 2007 and noticed signs of someone sleeping rough on the Meadow adjacent to the boundary with Hill Top Road. He visited again on 13th. April 2007 between 2.10pm and c. 2.45pm. He entered the Meadow from Hill Top Road and walked around the formal and informal paths. He saw about 10 people, including some dog walkers. All were on the paths. The signs of the rough sleeper had gone. He visited again on 2nd. May 2007 in order to take photographs²¹³ of the Meadow (which he produced). He walked FPs 80, 111 & 130 as well as the informal diagonal path from the Hill Top Road entrance towards the Teaching Nursing Home. He saw about 6 people, some with dogs and some on bicycles. All were on the formal public footpaths or the informal diagonal path. He also saw a lady painting on the line of FP111. A small group of people formed around her. This seems to have been Mrs. Ganly.

[317] In his third statement, Mr. Box produced and reviewed the evidence before the footpath inquiry. I have taken this material into account in my historical survey above. He also gave hearsay evidence of what he had been told by Mr. Banbury but this was overtaken by Mr. Banbury's own written and oral evidence.

[318] I accept Mr. Box's evidence of his own visits to the Meadow and what he saw there. As he himself agreed in cross-examination, his visits were not intended to be a formal survey of use of the Meadow and he did not necessarily see everything that went on in the Meadow on his visits. His third statement was really only a review of other people's evidence.

Mr. Harold Caldwell

[319] Mr. Caldwell produced a written statement²¹⁴ dated 12th. September 2007.

[320] Mr. Caldwell is a MBA and a MSc in Health Planning. He is a Member of the Chartered Institute of Building. Until 1990 he worked in Northern Ireland. He had no personal knowledge of Warneford Meadow before that date. In 1990, he was appointed Estates Manager with Oxfordshire Health Authority with specific responsibility for the Mental Health Unit properties. In 1994, the Mental Health Unit became the Oxfordshire and Buckinghamshire Mental Health Partnership NHS Trust and he was appointed Director of Estates and facilities, a post which he still retains. Mr. Caldwell had operational responsibility for Warneford Meadow between 1990 and 1994. Day to day management of the Meadow was dealt with by his senior facilities officer, Mr. John Banbury. He did not personally need to go to the site very often during this period. Since 1994, Mr. Caldwell has had no operational responsibility for the Meadow, although he has passed through about 10-15 times on other business.

²¹¹ B146
²¹² B500
²¹³ B151-158
²¹⁴ B12

[321] Mr. Caldwell produced a number of documents from local NHS Trust archives dating from before 1990. I have taken these documents into account in the historical survey above.

[322] In his written statement, Mr. Caldwell stated that “access and the claimed use of the Site would have been disrupted if not prevented for periods during the 20 years claimed by the Applicant”²¹⁵. However, Mr. Caldwell could not recall seeing any signs on the Meadow from 1990 onwards. In 1991, travellers invaded the Meadow and court proceedings were taken to evict them. As a result, earth bunds were installed along the south side of Roosevelt Drive and at the Hill Top Road entrance. In his written statement, Mr. Caldwell said that the bunds would have had a significant impact on any alleged recreational use of the Meadow. In cross-examination, he agreed that the bunds were directed against vehicular access. There were no gaps left in the bunds but pedestrians could walk over them and gaps had appeared by 1994. At the Hill Top Road entrance, there was pedestrian access over a stile on FP80 in any event. Mr. Caldwell was unaware of any other action taken to deter access to the Meadow.

[323] In his written statement, Mr. Caldwell said that the nature of the terrain made it difficult to access any part of the Meadow other than the clearly trodden footpaths. “There had never been any indication that the Site has been used other than along clearly trodden footpaths, as a route to various local amenities”²¹⁶. “The use of the Site is limited to the footpaths which are used as a shortcut between key local amenities”²¹⁷ However, in cross-examination, he accepted that the Meadow was not used only as a shortcut but that people also walked around the Meadow. He accepted that there are various informal paths and tracks across the Meadow and that there was nothing to prevent people from using those paths and tracks. He accepted that there was occasional recreational use of the Meadow. However, he had difficulty in accepting the degree and intensity of recreational use put forward by the applicant.

[324] Cross-examined about the case put forward by the Secretary of State in relation to the footpath inquiry, i.e. that there was general public access to the Meadow rather than use of defined paths, Mr. Caldwell was unable to offer any explanation for the inconsistency between the Secretary of State’s respective cases to the footpath inquiry and to the town green inquiry other than that NHS estates staff were not alerted to the risk of registration of NHS land as a new green until guidance was issued in 2001/2002²¹⁸. Even then, Mr. Caldwell decided that the guidance was not relevant to Warneford Meadow.

[325] The impression that I received from Mr. Caldwell’s evidence was that he had very limited personal knowledge about the use made of the Meadow and that his understandable desire to support his employer’s case had led him into taking a more dogmatic stance in his written statement than he was able to support in his oral evidence.

Mr. Anthony Francis Richard Collins

²¹⁵ para. 35 at B23

²¹⁶ para. 22 at B20

²¹⁷ para. 33 at B23

²¹⁸ B97A&B

[326] Mr. Collins produced a Report²¹⁹ dated 12th. September 2007 and a Supplementary Report²²⁰ dated 28th. December 2007 which he supplemented considerably in his oral evidence. His reports and oral evidence were very lengthy and I can only summarise the most important points that he raised. I have, of course, taken everything he wrote and said into account.

[327] Mr. Collins is a director of Collins and Coward, a consultancy firm specialising in planning and development advice. He is highly qualified professionally, being a MRICS, DipTP, MRTPI, MILT, & MEWI. He has over 30 years' professional experience in this field, both in the public and private sectors. He was instructed by Clarkslegal (solicitors to the Secretary of State) to provide an expert report into Warneford Meadow and the town green application.

[328] Mr. Collins's evidence was a mixture of original research and commentary on the evidence of other witnesses. He did not personally know the site before 2005 although he has subsequently visited it 6-10 times. His personal impression of the land was that it was overgrown scrubland crossed by defined paths. He was familiar with the law relating to the registration of new greens and never considered that there was a danger of such registration. I have, of course, had the advantage of viewing the Meadow myself on several occasions and I am bound to say that I cannot agree with Mr. Collins's description of the Meadow as overgrown scrubland. Although there are parts that are overgrown and scrub, most of the Meadow is grassland.

[329] Mr. Collins described the site and surroundings of Warneford Meadow and illustrated the history of the Meadow by producing a number of aerial photographs of the Meadow. I have dealt with the most important of these in my historical survey above. There was nothing controversial in this part of his evidence.

[330] Mr. Collins analysed the planning history of Warneford Meadow. Although the details of the planning history are not relevant to the present town green application, Mr. Collins pointed out that there has been considerable opposition by local people to the development of the Meadow. He considered that the town green application was driven by opposition to the development of the Meadow. In this, I think that he is probably right. Of course, the existence of such a motive does not invalidate the application. Nonetheless, I accept that it is necessary very carefully and sceptically to scrutinise the evidence in support of the application in case it has been swayed by the ulterior motive of preventing development.

[331] Mr. Collins considered the question of the locality/neighbourhood from which users of the Meadow came. He criticised the original locality chosen by the applicant, i.e. the four surrounding ecclesiastical parishes, and argued (a) that the original 40 supporters of the application did not form a significant number of the combined population of those parishes and (b) that the supporters were more geared to local residents' association areas than ecclesiastical parishes. As for the Divinity Road neighbourhood, he argued that it was too small and lacked the common facilities to amount to a neighbourhood. It did not coincide with the planning concept of

²¹⁹ B98
²²⁰ B761

neighbourhood or any neighbourhood within Oxford recognised on an internet search. All this was really a matter of argument, which I will address in due course.

[332] Mr. Collins analysed the 2007 user surveys commissioned by the objectors and argued that the surveys proved that it was the footpaths across the Meadow which were used rather than the Meadow as a whole. Any off-footpath use was merely ancillary to footpath use. He also argued that use of the footpaths was predominantly as a through route. This is a matter of comment and argument which I take into account in reaching my findings of fact below.

[333] Mr. Collins argued that the aerial photographs showed evidence of use of paths across the Meadow but did not show evidence of general recreational use of the Meadow. I am not very impressed by that argument. Aerial photographs are not very useful in disproving recreational use of open land as such use does not necessarily leave evidence apparent on an aerial photograph.

[334] Mr. Collins was a very forceful witness and a powerful advocate for his client. Insofar as his evidence contained factual material deriving from his own researches, I accept its accuracy. As for his opinion whether the applicants have proved that the Meadow has become registrable as a new green, I take his opinion carefully into account.

Ms. Michelle Harding

[335] Ms. Harding produced a written statement²²¹ dated 30th. August 2007.

[336] Ms. Harding worked at the Warneford Hospital from 1990 to 2006. She started as a staff nurse. She occasionally walked with patients in the Meadow. However, in 1998 she acquired a dog which she took to work with her. She walked the dog in the Meadow most days, usually once at about 6.30 am, once at lunchtime and once after 5pm. Each walk was for 10-25 minutes (the longer walks being in the evenings). Ms. Harding's general impression was that few people used the Meadow. There were people who seemed to be in work clothes, whom she assumed to be walking to and from work. There were also dog walkers. She "very rarely" or "occasionally" saw people walking off the paths, although the dogs went everywhere. She estimated that she saw somebody walking right off the paths about every couple of weeks.

[337] I thought that Ms. Harding was an honest witness and I accept the accuracy of her evidence.

Mr. Tim John

[338] Mr. John produced a written statement²²² dated 19th. September 2007 and an undated supplementary written statement²²³.

[339] Mr. John is a graduate surveyor working for Atisreal. In 2007, he was instructed to carry out a 4 day survey of use of the Meadow, with particular reference

²²¹ B166

²²² B167

²²³ B902

to whether users remained on the paths. The days and times of the surveys were as follows:

- Tuesday 13th. March 2007 from 0800-1800
- Thursday 12th. April 2007 from 0800-1800
- Wednesday 22nd August 2007 from 0600-2000
- Thursday 23rd. August 2007 from 0600-2000

On the first two days, Mr. John was on his own. On the last two days, he was accompanied by a colleague, Mr. Michael Waller. The survey was carried out in the following way. Before the survey started, Mr. John was orally briefed by a senior colleague as to the purpose and method of the survey. Each morning of a survey day, he walked around the Meadow. Then he set himself up on a mound close to the Teaching Nursing Home, from where he had a good view of the Meadow apart from the orchard and the dogleg towards Roosevelt Drive. He had with him a bundle of sheets of paper with a sketch map of the Meadow and its paths. He then recorded the routes of people using the Meadow both diagrammatically on the sketch maps and in writing on the reverse of the sketch maps. Subsequently, the field data was entered onto spread sheets by a colleague. These spread sheets were used to prepare Mr. John's original statement. Unfortunately, it turned out that there had been substantial inaccuracies in transferring the field data to the spreadsheets and Mr. John's second statement was designed to correct these errors and to deal with various criticisms made of his first statement.

[340] The overall result of Mr. John's survey was that most users remained on the established beaten paths (Mr. John did not confine the concept of paths to public footpaths). However, he observed some off-path use:

- On 13th. March, he observed 6 instances
- On 12th. April, he observed 1 instance
- On 22nd. August, he and his colleague observed "a few" users off-path
- On 23rd August, he and his colleague observed numerous users off-path, although he put that down to contrivance, on the basis that local people had guessed the purpose of the survey.

[341] The methodology, accuracy and statistical significance of this survey were subject to a barrage of criticism by witnesses for the applicant. I accept that it was rather a rough and ready survey. The vantage point chosen did not cover the orchard or the dog-leg of the Meadow towards Roosevelt Drive. Having stood on the vantage point myself, I doubt whether it was possible to be sure whether people on the far side of the Meadow were on a path or not. The field data record system was rather amateurish. There may well have been mistakes in failing to record some off-path users. However, Mr. John struck me as a totally honest man, doing his best to carry out the task that he had been set. Although the survey system may not have been perfect, I accept that what Mr. John saw was that most users of the Meadow were sticking to the paths, but that some were not. I think that he was probably right in suspecting a degree of contrivance on the last day, although it is unlikely that all off-path use which he saw on that day was contrived.

Mr. Chris Key

[342] Mr. Key produced a written statement²²⁴ dated 7th. September 2007 and a supplemental written statement²²⁵ dated 12th. December 2007.

[343] Mr. Key is an assistant planner employed by Indigo Planning Ltd. He has a BSc in City and Regional Planning and a MSc in Regeneration Studies. In 2007, Indigo Planning Ltd. was retained by the Secretary of State to carry out a survey of the use made of Warneford Meadow. He and another assistant planner called Emma Warren were detailed to carry out the survey. They were briefed orally by a senior colleague called Hannah Baker. They were told that the purpose of the survey was to observe how people were using the Meadow. They were also told that the client was hoping to establish that little use was made of the Meadow. They were supplied with a plan of the Meadow on which was drawn various entrance points and paths and given a copy of a spreadsheet prepared after an earlier survey by Mr. Tim John of Atisreal.

[344] Mr. Key and Ms. Warren carried out the survey on Saturday 7th. and Sunday 8th. April 2007, which was the Easter bank holiday weekend. They carried out the survey from 0800 to 1800 each day. They established their base about half way along FP80 near the southern boundary of the Meadow. They had a good view of the Meadow, except for the orchard and the northern dog-leg towards Roosevelt Drive. Weather conditions were a mixture of sun and light cloud. They took it in turns to observe people on the Meadow and to write the activities and routes taken in their field records. Subsequently, the data from the field records were transferred to spreadsheets by Ms. Warren. Mr. Key did not check that the transfer was accurate. Three or four months later, Mr. Key wrote up his first report. That report was edited by Hannah Baker, who also edited Mr. John's report. Unfortunately, the field records have been lost and Ms. Warren was not available to give evidence.

[345] The result of Mr. Key's survey was that, on the two days surveyed, no one left the beaten paths to wander generally over the Meadow. Many users walked around the Meadow rather than using it as a through route, but they all stuck to the paths. Mr. Key included certain paths that were not public footpaths. Indeed the diagonal path from the Hill Top Road entrance towards the Teaching Nursing Home was the most used of all the paths. Mr. Key said that he recognised Professor Patterson as a person who had used the Meadow that weekend and had stuck to the paths.

[346] There were some unsatisfactory features about Mr. Key's evidence:

- The loss of the field records
- The absence from the public inquiry of Ms. Warren who alone transferred the field records to spreadsheets
- The editing of Mr. Key's first report by Hannah Baker which seems to have resulted in certain identical wording in Mr. John's and Mr. Key's reports
- The fact that Mr. Key's supplemental report was rather more qualified than his original report.

[347] In my judgment, Mr. Key was an honest witness. I doubt whether he could tell conclusively from his vantage point whether every user was on a path but I accept that he honestly formed the impression that all users stuck to the paths.

²²⁴ B195

²²⁵ B973

Written evidence for objectors

[348] I now turn to the witnesses for the objectors who submitted written statements but did not give oral evidence. I deal with them in alphabetical order.

Ann Callen²²⁶

[349] Ms. Callen worked at the Warneford Hospital from 2002 to 2005. She walked her dog on the pathways of Warneford Meadow one or twice a day on weekdays between 09.00 and 15.30. She only saw a handful of other people on the Meadow. They were also dog walkers. She does not comment on whether the other dog walkers stayed on the paths.

Pauline Scully²²⁷

[350] Ms. Scully worked at the Warneford Hospital on and off since 1986. She often walked on Warneford Meadow, sometimes with Michelle Harding and her dog. She always used the paths and seldom saw other users. Other users also stuck to the paths “with very few exceptions”. Those who departed from the paths seemed to be doing so to take an access route. There has been little change in use of the Meadow over her time.

Debbie Hollis²²⁸

[351] Ms. Hollis has worked at the Warneford Hospital since 1988. She has not been aware of people using the Meadow except for a few patients picking apples. Over the years 2004-2007, she walked over the Meadow from the Warneford Hospital to the Churchill site. She could not recall seeing any other users of the Meadow. She often found it “perilous” to walk across the Meadow because of briars and nettles.

Edward McLaughlin²²⁹

[352] Mr. McLaughlin has worked at the Warneford Hospital and at the Churchill site for unspecified periods from 1984. He has rarely seen people using the Meadow except as a short cut or for dog walking along a pathway “around the back of the Churchill site”. The Meadow was overgrown and large areas were difficult to access.

Samantha Holmes²³⁰

[353] Ms. Holmes has worked at the Warneford Hospital on and off since 1989 and lived on the Fair View estate overlooking Warneford Meadow from 1992-1996. She has rarely seen people using the Meadow except as a short cut “around the back of the Churchill land” or very occasionally for dog walking “along this small pathway”. She

²²⁶ B165

²²⁷ B197

²²⁸ B198

²²⁹ B199

²³⁰ B200

has only once attempted to walk through the Meadow and found it unpleasant “due to overgrowth”.

Jackie Thomas²³¹

[354] Ms. Thomas has worked at the Warneford Hospital and Churchill sites for 5 (unspecified) years. She has used the Meadow on foot and by bicycle as a short cut between the sites. It was only possible to ride a bicycle on the path. She has rarely seen other people on the Meadow and they have been on the path. It would be difficult to access large parts of the Meadow for recreation because of stinging nettles.

Daphne Marsden²³²

[355] Ms. Marsden has worked at the Warneford Hospital and Churchill sites since 2004. In the spring and summer she has fairly regularly walked over the Meadow between the sites. She always used the paths and rarely saw anyone else. Those she did see were on the paths “with very few exceptions”. The grass was overgrown and at times difficult to walk through.

7. Evidence of member of the public

[356] Only one member of the public gave evidence.

Mrs. Margaret Coombs

[357] Mrs. Coombs’s parents lived in Latimer Road in Headington from the 1950s to the 1970s. She moved to Divinity Road 9 years ago. She walks on the Meadow to enjoy the changing seasons. She usually walks on the paths but she has walked off them. She knows other people in Divinity Road, Minster Road and Southfield Road who use the Meadow. There are also people from the other side of the Cowley Road. Patients from the Warneford Hospital use the Meadow. On the whole people do stick to the defined paths.

[358] Mrs. Coombs seemed to me a perfectly honest and genuine witness and I accept her evidence.

8. Findings of fact

[359] On consideration of all the oral and written evidence submitted to the public inquiry (whether or not specifically mentioned above) I make the following findings of fact.

Recreational use

[360] I find that throughout the relevant 20 year period, the Meadow (including the orchard) has been extensively used by local people for informal recreation such as walking (with or without dogs) and children’s play and that such use has extended to

²³¹ B201

²³² B202

the Meadow (including the orchard) as a whole and has not been confined to the public footpaths and the informal diagonal path from the Hill Top Road entrance towards the Teaching Nursing Home .

[361] In making this finding, I rely principally on the credible evidence of the many witnesses called on behalf of the applicant to give oral evidence to the public inquiry, as supported by many written statements. I acknowledge that there is evidence (including in particular the survey evidence) given by honest witnesses called by the objectors that they saw little or no general recreational use of the Meadow. However, many of these witnesses saw at least some off-path recreational use. Negative evidence from witnesses who spent limited time on the Meadow cannot, in my judgment, override the positive evidence of credible witnesses. Also, many of the objectors' witnesses were focussing on the question whether the predominant use of the Meadow was for passage or recreation. I accept that their honest perception was that the predominant use was for passage. However, I do not think that this is decisive. The issue is not the predominant use of the Meadow but whether the Meadow was generally used for recreation to a sufficiently material extent to qualify as being used as a whole for lawful sports and pastimes by a significant number of local people. In my judgment, it was.

[362] I also rely on my own perception of the Meadow as seen on my site views. I had the advantage of viewing the Meadow both in the summer and the winter. Contrary to the evidence of some of the objectors' witnesses, the general vegetation of the Meadow is grassland and not scrubland. There are patches of bramble and a few trees but they are a small part of the whole. Although there are main tracks, i.e. FPs 80, 111, 112, 113 & 130 and the informal but well-used diagonal path, there are also many smaller paths and tracks criss-crossing the Meadow. Although the grass is high in the centre of the Meadow during the summer, it is fairly low in the winter. It seems to me perfectly obvious that the Meadow is a very attractive place for informal recreation such as walking (with or without dogs) and children's play and that such activities would not be confined to the main or any paths. As for the orchard, its character is predominantly wooded but there are numerous informal tracks and glades through the trees, it is easily accessible from the Meadow and it seems to me equally obvious that children would have played in the orchard and that local people would have walked there and picked the apples in season.

[363] I also take account of the fact that, in relation to the footpath modification application, it was the landowner's own case that use of the Meadow by the public was general recreational use of the Meadow not confined to passage on specific paths. This case must have been put forward on the instructions of the landowner and must have reflected the landowner's perception at the time.

Use by landowner

[364] I find that agricultural use of the Meadow had ceased by the start of the relevant 20 year period in December 1986 Use for grazing cattle had stopped during the mid 1970s. There was use for grazing horses for a short time in the early 1980s. The Meadow was cut for hay until the mid 1980s. I find that the last cut for hay was in the summer of 1986. This was the evidence of Professor Patterson (who had good reason to remember the year) and it is consistent with the evidence of Mr. Banbury

and others. There has been no agricultural use of the Meadow since the summer of 1986. There is evidence from Mr. Banbury that the grass was sometimes cut for fire precaution purposes until at least 1994. There is also some evidence that the routes of the rights of way have been cleared and the edges of the Meadow cut for a fun run. This evidence no doubt explains why the Meadow has retained its grassland character and the varying perceptions of witnesses as to when the grass was last cut. It appears to me that any grass-cutting during the relevant 20 year period has facilitated rather than conflicted with recreational use by local people.

[365] As for the orchard, I find that it was abandoned by the landowner long before 1986.

[366] The only other use made of the Meadow by the landowner since the start of the relevant 20 year period was the January 2006 archaeological investigations. This evidence emerged during the course of the public inquiry after most of the applicant's witnesses had given evidence and so they had no opportunity to comment on it. The only witness to comment on this work was Mrs. Capon. I find, on the basis of her evidence, that any interference with recreational use of the Meadow was minimal. The investigations lasted only a very short period and involved shallow excavations of a very small proportion of the surface area of the Meadow. There was no evidence that the investigations conflicted with recreational use of the Meadow by local people.

Contentiousness

[367] I now consider whether the landowner took steps during the 20 year period to prevent recreational use of the Meadow by local people or to render such user contentious.

[368] There is evidence that in 1985, signs were erected in the Warneford, Churchill and John Radcliffe hospital grounds designed to stop people walking animals across those grounds. However, the only substantial evidence as to the position of any such sign is the memorandum of 22nd February 1989²³³, from which it appears that a sign to this effect was in place from 1985 to 1989 "at the position where the unofficial footpath from Old Road crosses the Churchill Drive". It is not possible to say in what direction this sign faced. It may, for example, have been facing visitors to the Churchill approaching along the drive. Nor is it clear exactly what the words on these signs said. Like the footpath inspector, I consider that the evidence about these signs is too weak to rely upon.

[369] I find that in January 1989, the landowner erected a number of signs stating "No public right of way". Two of these signs were on Warneford Meadow (as subject to the present application). These were at points B and C on Mr Banbury's plan JNB1²³⁴. Point B was where FP111 left Roosevelt Drive in a southerly direction. That sign was referential to FP111. Point C was near the Hill Top Road entrance to the Meadow. I find that the sign at point C was referential to FP 111 and the diagonal path. Although Mr Banbury claimed that the purpose of the signs was to restrict general access to the Meadow, I find that the purpose of the signs was to prevent

²³³ B34
²³⁴ B984

FP111 and the diagonal path from acquiring the status of public rights of way. First, the case of the landowner in relation to the modification order was that it had no objection to general public recreational access to the Meadow, but only to the creation of public rights of way. Second, if the signs had been intended to forbid general access to the Meadow, I do not understand why they did not say so. With hindsight, it seems odd to challenge the creation of public footpaths but not the creation of a new green, but this is explained by the fact that the landowner was unaware of the law relating to new greens.

[370] I find that, in about 1991, the landowner erected two earth bunds. One was along the south side of Roosevelt Drive. The other was along the edge of the land leased to the Spastics Society near the Hill Top Road entrance to the Meadow. The bunds were erected in reaction to an invasion of the Meadow by travellers and the purpose was to keep out travellers by preventing vehicular access. I do not consider that the bunds were intended to or had the effect of impeding access to the Meadow on foot. Pedestrians could simply walk over them. It must be borne in mind that the Hill Top Road access was at all material times a public right of way (FP80) and there was clearly no intention to obstruct that right of way. Pedestrians were in any event free to access the Meadow over the stile at the west end of FP80 or over the bridge at the east end of FP80. In my view the bunding was not intended to have the effect, and did not have the effect, of rendering pedestrian access to the Meadow contentious.

[371] I find that in January 2006, 31 shallow trenches were excavated on the Meadow for archaeological investigation purposes. The trenches involved 2% of the surface of the Meadow, were infilled as soon as possible after excavation and the whole work was completed within 7 days. Signs²³⁵ were erected which requested the public not to enter the excavations but did not purport to restrict access to the Meadow as a whole. I find that this work was not intended to and did not render contentious recreational use of the Meadow as a whole.

[372] Accordingly, I find that, during the relevant 20 year period, the landowner did not take any action to render general pedestrian recreational use of the Meadow contentious. On the contrary, I find that the landowner knew of and acquiesced in such use.

Where did recreational users come from?

[373] I find that recreational users of the Meadow (including the orchard) predominantly came from the residential area to the west of the Meadow. This was the perception of many of the applicant's witnesses and I think that it accords with common sense. The main recreational activities were walking (with or without dogs) and children's play and these activities are principally generated from family homes. There are no residential areas adjoining the Meadow to the south or east and the residential areas to the north are interspersed with areas of institutional use. The residential area to the west is also more closely connected to the Meadow by the facts that (a) many houses in Hill Top Road back onto the Meadow and (b) there is, and has at all material times been, a very convenient and safe lawful access onto the Meadow from Hill Top Road via FP80.

²³⁵

B1031

[374] I also find, on overwhelming evidence from witnesses for the applicant, that a significant number of the recreational users of the Meadow came from the area defined by Mr. Dunabin as the Divinity Road neighbourhood.

[375] I do however have some difficulty in regarding Mr. Dunabin's Divinity Road neighbourhood as being a "neighbourhood" in the usual sense of the word. I have no difficulty in regarding the Southfield Park flats or the hamlet of Bartlemas as being neighbourhoods. They have their own names and obvious cohesive qualities, one as a 1970s housing estate and the other as a medieval settlement. Nor, despite the views of Professor Paterson and Dr. Salmon, do I have any difficulty in regarding Hill Top Road as a neighbourhood. It has its own name, its own geographical integrity, and its own residents' association (the HTRRA). However, I cannot put my finger upon the cohesive qualities of Mr. Dunabin's Divinity Road neighbourhood. Residents of Bartlemas would not consider themselves the neighbours of residents of the Southfield Park flats. The Divinity Road neighbourhood has no pre-existing name other than that given to it by Mr. Dunabin. There are no facilities such as shops, schools or churches which are specifically referential to the Divinity Road neighbourhood. Residents of the Southfield Park flats are not members of DRARA. Many witnesses spoke of community spirit and general social activities, but this all seemed rather vague. I think that the Divinity Road neighbourhood is an artificial construction for the purposes of this application, the team behind the applicant considering that it was necessary to identify a single neighbourhood which recreational users of the Meadow predominantly inhabited.

[376] If, as I find, Hill Top Road is a neighbourhood, I have no difficulty in finding that a significant number of residents of Hill Top Road used the Meadow (including the orchard) for recreation throughout the relevant 20 year period. Very many of the witnesses who gave oral and written evidence of recreational use of the Meadow lived in Hill Top Road.

9. Applying the law to the facts

[377] I now turn to apply the law to the facts that I have found. I propose to do so by reference to the various elements of the relevant definition of a prescriptive green.

Land...

[378] The boundaries of the application land are most clearly shown on the large scale plan²³⁶ produced by the applicant to the public inquiry. I am satisfied that this plan shows with acceptable accuracy the land which has been used by local people for recreation.

...on which for not less than twenty years...

[379] I am satisfied that the applicant has established that there has been general informal recreational use of the Meadow (including the orchard) throughout the relevant 20 year period from December 1986 to December 2006.

²³⁶

R10

...a significant number of the inhabitants of...any neighbourhood...

[380] I am satisfied that Hill Top Road is a neighbourhood and that a significant number of the inhabitants of the Hill Top Road neighbourhood have used the application land for recreation throughout the relevant 20 year period. I think that it is probable that the application land has been used for recreation by a significant number of the inhabitants of other neighbourhoods both to the west and north of the application land. However, I do not consider that this is damaging to the application. The legislation requires proof of user by a significant number of the inhabitants of “any” neighbourhood. I think that, if the land is registered, recreational rights will enure for the benefit of the inhabitants of any neighbourhood who can establish that a significant number of them have used the land in a qualifying manner and for the qualifying time. The register does not define the neighbourhood or locality.

[381] If I were wrong in finding that Mr. Dunabin’s Divinity Road neighbourhood was not a “neighbourhood”, I would also be satisfied that the application land had been used for recreation by a significant number of the inhabitants of the Divinity Road neighbourhood.

...within a locality...

[382] The Hill Top Road neighbourhood is within the locality of the City of Oxford. It is therefore “a neighbourhood within a locality”. One might well question what was the purpose of requiring that a neighbourhood should be within a locality. I think that the answer is that the expression is simply explaining the legislative perception that a neighbourhood should be a smaller geographical unit than a locality.

...have indulged in lawful sports and pastimes...

[383] I am satisfied that a significant number of the inhabitants of the Hill Top Road neighbourhood (or indeed Mr. Dunabin’s Divinity Road neighbourhood) have indulged in informal recreation of the application land, such as walking (with or without dogs) and children’s play, and that the informal recreation amounted to “lawful sports and pastimes” as that expression was construed by the House of Lords in the *Sunningwell* case.

...as of right...

[384] In my judgment, recreational use of the application land by the inhabitants of Hill Top Road (or indeed Mr Dunabin’s Divinity Road neighbourhood) was not *vi* (forcible or contentious). Access was predominantly by way of the Hill Top Road entrance to FP80 which was at all times an open and unobstructed lawful entrance. For the reasons explained above, I do not consider that the landowner took any steps which made informal recreational use of the application land by local people contentious.

- I am not satisfied that the 1985-1989 notice on the approach road to the Churchill Hospital restricting the exercising of animals (even if such a sign would make any other recreational use contentious) was ever referential to the application land.

- The 1989 “No public right of way” signs were erected in an attempt to prevent FP111 and the diagonal path from becoming public rights of way and did not purport to, were not intended to, and did not in fact restrict general use of the Meadow for recreation by local people.
- The 1991 bunds were installed to prevent vehicular access to the Meadow and had no material impact on recreational use by pedestrians. The bunds, in any event, did not affect the Hill Top Road access via FP80.
- The 2006 archaeological survey did not have and was not intended to have any material effect on public access to the Meadow.

If one asked whether the landowner was doing everything, consistent with his means and proportionately to the user, to contest and to continue and to endeavour to interrupt recreational use of the Meadow as a whole²³⁷, one could only answer in the negative. The cases explain that the thinking behind the *nec vi* requirement is that if use is *vi* (being forcible or contentious) such use negatives the inference that the landowner is acquiescing in the recreational use of his land. It appears to me in this case that the evidence strongly shows that the landowner **did** acquiesce in general recreational use of his land. He said as much in his case to the footpath inquiry.

[385] I do not consider that general recreational use of the Meadow (including the orchard) by local people was secret (*clam*). In my judgment, such use was open. Not only would the reasonable landowner have been aware of such use, but, as is clear from the landowner’s case to the footpath inquiry, this landowner was aware of it.

[386] There is no suggestion that the landowner ever gave permission (*precario*) to local people to enjoy general recreation on the Meadow (including the orchard).

[387] I do not consider that the general recreational use of the Meadow (including the orchard) can be regarded simply as ancillary to use of the public footpaths crossing the land so as to render such use “by right” rather than “as of right”. Recreational use by local people was of the Meadow as a whole and such use was not pursuant to any legal right.

[388] I do not consider that recreational use of the Meadow (including the orchard) by local people during the relevant 20 year period conflicted with or deferred to any use of the land made by the landowner so as to negative the appearance to the landowner of the exercise of a right.

[389] Accordingly, I conclude that recreational use of the Meadow (including the orchard) by local people was use “as of right”.

...and...continue to do so...

[390] I am satisfied that the Meadow (including the orchard) was still being used for informal recreation by local people at the date of the application in December 1986.

10. Conclusion and recommendation

²³⁷ *Smith v Brudenell-Bruce* [2002] 2 P&CR 4 at para. 12

[391] I conclude that the applicant has established that the Meadow (including the orchard) is land on which for not less than 20 years a significant number of the inhabitants of any neighbourhood within a locality have indulged in lawful sports and pastimes as of right and continued to do so at the date of his application. Accordingly, the applicant has established that the Meadow (including the orchard) has become a new green for the purposes of CRA 1965 s. 13.

[392] Therefore, I recommend to OCC as registration authority that it should amend the register of town or village greens by adding the Meadow (including the orchard), i.e. the land shown on the applicant's large scale plan²³⁸, as a new town or village green.

Vivian Chapman QC
15th. October 2008
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN

²³⁸

R10