

any) fence along that boundary was given by [REDACTED] who said he erected one after the 2003 ditch clearance works. After that date, I find that [REDACTED] has regularly found it damaged and has repaired it as and when necessary to contain cattle or sheep in the field. Up until then, reliance was placed on the overgrown trees to keep trespassers out (see [REDACTED]'s letter to [REDACTED] of 7 November 2003),<sup>487</sup> but I accept the evidence of the Applicant's witnesses that it was possible to get through at the south-west corner. Much of the damage to the fence, especially by the industrial estate car park, has been done by - according to [REDACTED] - outsiders, mostly bikers, not Ashton Vale people. The inquiry heard no evidence of anyone gaining access by the broken-down fencing on the north-eastern boundary of Field 1 or from FP 422.<sup>488</sup>

535. Access to the Application Land was also possible during the 20-year period in question by crossing the cattle bridge between Field 3 and the land on the opposite side of Colliter's Brook New Cut where footpath LA 12/14 runs, which has not been obstructed by anything more solid than a piece of baler twine tied across which can easily be ducked under;<sup>489</sup> and from the rear gardens of a number of houses in Ashton Drive and Silbury Road. The current position is set out in paragraph 36 above. [REDACTED], and more particularly [REDACTED] vouched for the position having been more or less the same since 1990. The previous landowner, according to them and to [REDACTED], was aware of it and concerned about the potential for trespass, but did nothing about it before selling on the land. I find that the rear accesses were in regular use to gain access to the Application Land for recreational purposes in accordance with the Applicants' witness evidence.

536. I find that at no time during the 20-year period under consideration was it impossible to gain access to Field 2 due to impenetrable scrub, as initially contended by the Objectors. I accept the evidence of the Applicants' witnesses (supported by [REDACTED]) that prior to the 2008 clearance, there were gaps at ground level between the trees/bushes around Field 2 which were large enough for cows and people to go through and gave ready access to and from Field 5; and that between Fields 1 and 2

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<sup>487</sup> Paragraph 339 above.

<sup>488</sup> Paragraph 27 above.

<sup>489</sup> See the photograph at [REDACTED].

there was a small gap in the bushes and also a post and rail fence (replaced by [REDACTED] with the present three-barred metal structure) over which people climbed. Although the margins of Field 2 (particularly the north and south ends) became increasingly overgrown with brambles, hawthorn bushes and stinging nettles (as described by [REDACTED]) I find that it was comparatively dry and attractive to and popular among children, bird watchers, and blackberry pickers as well as being used for walking in and through. I do not think that the majority of people walking through Field 2 were intending to use it as a substitute for FP 424, but it incidentally served that function following the landfill. (The April 1988 aerial photograph suggests that despite the original plan having been to retain FP 424 throughout the landfill, the phase 4 excavation and double ditch went close to the Field 2 boundary and people would have been well advised - even if they could walk along its route - to walk through Field 2 instead).

537. I find that there was no necessity for people to climb over fences to get from field to field and that most users did not do so, although the fences put up by [REDACTED] in 2004 could with care be climbed, stridden or jumped over by adults of suitable physique (such as [REDACTED], [REDACTED], [REDACTED] and [REDACTED]). The most commonly used route between fields was down the western side between Fields 1, 3 and 6. There was at no time during the 20 years in question any impediment to passage between Fields 3 and 6 at that point, and never a locked gate between Fields 1 and 3, although [REDACTED] now and then closed a gate at that point to keep stock on one side or the other. They treated Fields 2 to 6 as a single unit, and both before and after the 2003 ditch clearance works and 2004 fencing works cattle were allowed to move freely between them (meaning that people could do likewise).<sup>490</sup>

538. There was no suggestion (leaving aside the boreholes) that any steps had been taken by the landowners, their agents or anyone else to prohibit, restrict or discourage recreational use of the Application Land. There was no evidence of permission being sought or granted for any recreational activity during this 20 year period (with the isolated exception of [REDACTED]'s questionnaires;<sup>491</sup> I do not regard her as a

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<sup>490</sup> See paragraphs 355, 357 above.

<sup>491</sup> Paragraph 271 above.

particularly reliable witness given the inconsistencies between them). On the contrary, the evidence of ██████████ and ██████████ showed acquiescence. (I interpose here that I do not agree with ██████████'s suggested interpretation of clause 3(r) of the grazing tenancy agreements for 2006-2009,<sup>492</sup> which required ██████████ not to obstruct any public or private right of way or access by any other party to *any other land belonging to the landlord*, and said nothing about not obstructing general public access to the Application Land itself.) Two of the Applicants' uncalled witnesses refer to permission when what they really seem to mean is acquiescence: ██████████ ("[the farmer] never stopped us"), ██████████ ("the farmers are happy so long as you treat fields with respect, closing gates etc").<sup>493</sup> I do not agree with ██████████'s submission that people's having sought permission for pre-October 1989 events made it unlikely that the land was in general recreational use by that date. The Bonfire Night and other large scale events were of an altogether different order from casual dog walking or children's play. They effectively involved taking temporary possession of the land, putting up marquees, bringing in bands, and so on (sometimes for whole weekends at a time). Those activities had potential to interfere with the farmer's use of the land which everyday individual and family pursuits did not. I see no inconsistency between checking with the farmer before embarking on those ambitious projects, and just going ahead with ordinary recreational activity.

539. Of the sports and pastimes referred to in the Applicants' witness evidence and listed in Appendix A to the Applications,<sup>494</sup> I find that walking (or rambling), dog walking, bird watching, observing wildlife and farm animals, children playing and (in season) blackberry picking were by far the most popular activities, and were often carried on in combination as well as singly. (I do not think that "access to countryside" adds anything; it is a different way of referring to the same things.) Den making, fishing in the brooks and ditches, bike riding and camping took place as part and parcel of children's play. The inquiry heard oral evidence of kite flying, flying remote control aeroplanes, kicking footballs, rounders, hitting golf balls, jogging, hawk flying, ice skating and family bonfires and barbecues, and I accept that all of those activities

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<sup>492</sup> Paragraphs 44, 490 above.

<sup>493</sup> Paragraphs 170, 190 above.

<sup>494</sup> A32.

have taken place on the Application Land during the last 20 years, but on a comparatively small scale. Local people went to the Application Land (in particular Field 1) each August during the balloon fiesta to watch the balloons and sometimes to help them land. There was a well-established use of the Field 1 short-cut route to go to Ashton Court, particularly at that but also at other times, but that does not count for the purposes of the Applications (see paragraph 556 below). I find that picnics were associated with that annual event, but there was very little evidence of picnics at other times during the 20 years preceding the Applications. ██████████ referred to Tarzan swings and raft racing, but again not within the last 20 years.

540. Cricket (and rounders) were associated with the large scale events of the 1970s/early 1980s (according to ██████████'s evidence). There does not seem to have been much photography, or any drawing/painting to speak of. (I should make clear that in reaching my findings, I have taken no account of post-Application photographs, as having no probative value whatsoever.) I do not find there to have been any community celebrations during the 20 years before the Applications; the "Christmas at Colliter's" event (which I take to explain the references in some of the written evidence to carol singing) post-dated the Applications. Brook clearing (and "walk the line") were one-off events which I am doubtful would count as sports or pastimes in any case, and the Colliter's Brook treks were intended to follow FP 424. Those I disregard. As for school uses, I accept the eye-witness evidence of ██████████ and ██████████ (corroborated by the ██████████ statement<sup>495</sup> and by numbers of the other written statements and questionnaires relied on by the Applicants) that they have regularly seen children from the Primary School on the Application Land, in particular Fields 2 and 5, during school hours. If that use had been by permission of the landowner, I would have expected to have heard evidence from the Objectors (whether in the person of ██████████ or otherwise) to that effect; none was given, and I have no basis for finding that use to have been permissive. However, I do not think an educational visit is a pastime in the ordinary meaning of the word, and it is most certainly not a sport. Finally, the inquiry also heard evidence about the Bristol Harriers running regularly across the Application Land, but I do not place any weight

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<sup>495</sup> ██████████.



while the actual drilling and excavating works were going on, most members of the public as a matter of choice gave the operations - in [REDACTED] words - a wide berth. Given that only a small number of locations were being worked on at any one time although they were distributed all over Field 1,<sup>500</sup> there was ample room within the Application Land generally and Field 1 itself for them to do so, as well as plenty of time outside working hours.

543. There was no evidence of any member of the public being told not to go on the Application Land during the operations and [REDACTED] evidence<sup>501</sup> was that the client's instructions were not to obstruct the public footpath or secure the multiple pedestrian access points. Both [REDACTED] and [REDACTED] gave evidence of having seen members of the public in Field 1 and did not claim to have challenged them or sought to ensure that they were on the official route of FP 207. The Objectors did not contend that a notice prohibiting or restricting access or use was put up at the Silbury Road entrance to Field 1, which is where the vast majority of Ashton Vale inhabitants enter the Application Land, or at the Ashton Drive entrance. I am not satisfied on the balance of probabilities that any notice prohibiting or restricting pedestrian access to all or any part of the Application Land and/or indulgence in lawful sports and pastimes on it was erected at or near any entrance to the land. If one was erected, its presence was so fleeting as not to come to the attention of local people generally. [REDACTED] did not attend to give oral evidence and no other witness (including - significantly - [REDACTED] of [REDACTED], the principal contractor with responsibility for the works, who supervised them and did attend to give evidence) gave evidence of the existence of any such notice. [REDACTED]'s evidence was to the opposite effect - that there was nothing there.<sup>502</sup> It would seem to have been pointless to put one by the David Lloyd Centre and not at any other of the multiple pedestrian access points which were being left open. [REDACTED] evidence was that URS had no issue with people on site.

544. I accept the Applicants' evidence and find that recreational use of the Application Land including the whole of Field 1 could and did continue throughout the period of

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<sup>500</sup> See the plan at [REDACTED]

<sup>501</sup> See paragraph 404 above.

<sup>502</sup> Paragraph 85 above.

the URS/CCGI operations, although no user interfered with the workers or with the boreholes or trial pits; and continued afterwards, although the operations left behind some unevenness which particularly upset ██████████.<sup>503</sup> There was no material interruption to recreational use of Field 1 or the Application Land generally.

### *The neighbourhood*

545. I do not find “Ashton Vale village” to be a term in common currency. However, I am satisfied on the oral and documentary evidence adduced by the Applicants that the area edged red on the map attached to their Applications (see Appendix A to this Report) does constitute a neighbourhood, which some of its inhabitants think of as being like a village. It is a distinct self-contained socially cohesive residential area, with a strong sense of identity and community, and of separateness from the urban sprawl of Bristol - which is hardly surprising given that it is virtually isolated from other residential areas. Although as a matter of law it is not necessary for a neighbourhood to have any particular, or indeed any, communal facilities, this area does, in the shape of the Church, the Primary School, the Community Association’s centre and the Club for Young People, at all of which community activities take place. There have been no material changes in its composition since before 1989 and the above factors all pertained before and throughout the 20 year period preceding the Applications. Its boundaries are geographically clear and rational: it embodies the residential part, if not the whole, of the area known as Ashton Vale. It is clear from looking at any map of the area that there is a district on the south-western fringe of Bristol which is known by that name; and the name is of long standing, and widely used.<sup>504</sup> I do not think that the Applicants are to be criticised for leaving out the peripheral industrial estate to the south of the Application Land and of South Liberty Lane and trading estates to the north-east of the Application Land, even though those estates are included in the same polling district of Bedminster council ward<sup>505</sup> and are (in the former case) called Ashton Vale Trading Estate and (in the latter case) situated off Ashton Vale Road. They are not “inhabited” by anyone, or part of the same community. The Objectors called no evidence to the effect that the industrial/trading

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<sup>503</sup> Paragraphs 147-148 above.

<sup>504</sup> See paragraphs 143, 503 above.

<sup>505</sup> A1333M.

estates were properly to be regarded as falling within the area known as Ashton Vale, nor did they put that point to the Applicants' witnesses in cross-examination.

546. The Objectors did however fasten on the difference of opinion between the Applicants' witnesses as to whether the eastern end of Ashton Drive should have been excluded from the neighbourhood to found an argument that the area does not have clear defensible boundaries. With respect to ██████████, ██████████ and ██████████ I prefer the view taken by the Applicants and the majority of their witnesses. In my opinion the railway line provides a clear and defensible boundary (which coincides with that of the polling district). The Applicants' view is strongly supported by the "Ashton Vale" road sign on that stretch of Ashton Drive which points towards the railway bridge arch,<sup>506</sup> implying that it is not itself within Ashton Vale, and the bus stop on the same stretch which proclaims itself to be in Ashton.<sup>507</sup> No one contradicted the evidence of ██████████ that the adjacent Sainsburys store is known as the Ashton store. The evidence of ██████████ that people living at that end of Ashton Drive believed they lived in Ashton is corroborated by the written evidence of people who live there, ██████████'s successor in title to ██████████, ██████████,<sup>508</sup> and ██████████.<sup>509</sup> (██████████'s husband also described himself as having lived "in Ashton Vale" for ██████████ years, which includes the ██████████ years at ██████████.)<sup>510</sup>

547. I do not think that it is a legitimate criticism of the boundary chosen by the Applicants that it does not correspond with the boundary of the super output area,<sup>511</sup> which can only be described as eccentric in the way in which it bisects the trading estate, South Liberty Lane, Swiss Road and Swiss Drive.

548. The Applicants' evidence of user (and for this purpose I think it is legitimate to have regard to their written evidence as well as their oral evidence) was drawn from all over the neighbourhood, and predominantly (indeed almost entirely) from the neighbourhood. Given the geographical proximity of the Application Land and the

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<sup>506</sup> A1267.

<sup>507</sup> A1333R.

<sup>508</sup> A385.

<sup>509</sup> A1078.

<sup>510</sup> A87-95.

<sup>511</sup> A1140.

neighbourhood, and the distance of the Application Land from other residential areas, I think that accords with what one would reasonably expect.

*Applying the statutory criteria*

549. I turn now to consider the section 15(2) criteria for registration and their application to this case. For ease of exposition they are dealt with in a slightly different order from that in which they appear in the subsection.

*“the inhabitants of any locality, or of any neighbourhood within a locality”*

550. The Applicants’ abandonment of the “super output area” as a claimed locality was in my view well-advised. The Bristol City Council briefing note on what constitutes “super output areas”<sup>512</sup> supports the Objectors’ contention that they are not legally recognised divisions of the county but an administrative construct devised by the Office for National Statistics to assist in the analysis of statistical data. The area edged red on the plan at A34(b) is not a “locality” within the meaning of section 15 either, as it is not a legally recognised administrative area (paragraph 414 above). However, on my findings (paragraph 545 above), I take the view that it is a “neighbourhood” within the meaning of the section. If that is the case, the Objectors concede that it is “within a locality” (either the City of Bristol or Bedminster council ward, both of which are legally recognised entities). The case law on “neighbourhood” is discussed at paragraphs 415-418 above. For the reasons given in paragraphs 545-546 above, the area identified by the Applicants in my judgment had the requisite quality of cohesiveness before and throughout the 20 year period preceding the making of the Applications, and its boundaries are clear and defensible.

551. On that footing, there is no need for the Registration Authority to consider adjusting the boundaries (e.g. to take in the eastern end of Ashton Drive outside the railway bridge) or address the question whether it has power to do so (paragraphs 419-420 above). If it were necessary to address that question, I am inclined to agree with Mr

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<sup>512</sup> O15-16.

██████ that for the reasons Sullivan J gave in *Laing Homes* in respect of 1965 Act applications (paragraph 419 above) - the likelihood of conflicting views on the topic of where neighbourhood boundaries lie, and the quasi-public interest element in town or village green applications - and in light of the relaxed attitude taken by the House of Lords in *Oxfordshire* to procedural aspects of such applications (paragraphs 9-11 above), the Registration Authority probably would have power to adjust the boundaries without amendment of the Applications provided that all parties had a fair opportunity to make representations about the subject-matter of the adjustment.

***“indulged in lawful sports and pastimes”***

552. The various activities listed in paragraph 539 above all in my opinion constitute “lawful sports and pastimes” within the meaning of section 15 as construed by the courts: paragraphs 421-422 above. The Objectors did not contend otherwise, save insofar as there was walking (with or without dogs) of such a character as would give rise to a presumption of dedication as a public right of way (as to which see paragraphs 556-557 below).

***“on the land”***

553. The Application Land is clearly defined on the large-scale plan at A34a, and is plainly all “land” within the meaning of section 15 (paragraphs 446-447 above) even though some of it (the southern half of Field 5) is permanently wet and parts of it were during (and before) the 20 years preceding the Applications prone to flooding. If “land” is defined to include “land covered by water” (paragraph 6 above), it must include land which is only sometimes covered by water depending on the season and the weather. I do not think that if part of an area of land is periodically covered by water and ceases at those times to be walkable, that part of the land - let alone the whole - is disqualified from registration, so long as it is walked and played on at other times. Moreover, as Lightman J pointed out in *Oxfordshire*, the existence of inaccessible areas such as ponds does not preclude the whole becoming a green. There were a pond and wet areas in the scrubland which achieved registration in the *Oxfordshire* application. What is true of a permanent pond must be true of a temporary one. And

as Lightman J also pointed out, ponds may form part of the scenic attraction and provide recreational opportunities. So, here, the wetness (especially the so-called “lake” which used to form around the junction of Fields 3, 4 and 6) brought wildlife and in particular birds such as swans, ducks and herons, and - in extreme weather - an occasional opportunity for ice-skating. The ditches between the fields occupied only a small proportion of the total area of the Application Land and provided opportunities for nature observation and fishing for tadpoles etc. The southern half of Field 5 too offered opportunities for nature observation and bird watching (see the SNCI register extract at paragraph 58 above), and (in contrast to the reed beds which were not registered in the *Oxfordshire* application) has not been permanently under water and accessible only with wading equipment as the evidence (confirmed by the site inspection) showed.

554. Even before the 2008 clearance, only a small proportion of the surface area of the Application Land was covered with trees, hedges, scrub and brambles. That can be seen from the aerial photographs of June 1989, March 1993, April 2007 and June 2008.<sup>513</sup> Field 2 never became impenetrable or so overgrown as not to be usable and used for children’s play, nature observation and blackberry picking as well as walking (paragraph 536 above).

555. Accordingly, whether the Application Land is viewed on a field-by-field basis or as a whole, I do not think there was anything about its character or condition which precluded eligibility for registration. On a common sense approach, having regard to what Lightman J and Lord Hoffmann said in *Oxfordshire* (paragraphs 448-450 above), I consider that the whole of the Application Land (and of each Field) was used for the 20 year period for informal recreational purposes.

### *Highway-type use*

556. It was common ground that what ██████████ called “transit use” (e.g. crossing Field 1 by the short-cut route from Silbury Road to go to Ashton Court or to Ashton Park School) was to be left out of account. If people making such journeys had walked

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<sup>513</sup> ██████████, ██████████, ██████████ and ██████████

along the official route of FP 207 then they would have been exercising their public right of passage over the highway and their use would have been *of* right or *by* right rather than *as of* right (paragraph 428 above). I have found that such use did not happen to any material extent (paragraph 526 above). People used the straight short-cut route instead, not necessarily in the knowledge that they were diverging from the official footpath or even that there was an official footpath across there. That use could not have been an exercise of the public's right to deviate (paragraph 461 above) because the official route was not obstructed. If anything (and I make no findings in this regard) it might have led to the creation of a second right of way between the same termini (paragraph 460 above). However, I do not think that such use counts towards a town or village green claim. Whether as a matter of statutory construction that is because walking straight along a defined track across a piece of land to get from one side to the other is not a "pastime", or does not constitute "indulging in a pastime on the land", within the meaning of the legislation is unclear from Lightman J's treatment of the subject in *Oxfordshire* (paragraph 454 above), but it is implicit that it must be one or the other.

557. I agree with ██████████'s submission that the Supreme Court in *Lewis* did not address this issue or say expressly or impliedly that Lightman J's approach, or that of Sullivan J in *Laing Homes* to the perimeter footpaths issue, was wrong. Indeed, those judges' reasoning (that a landowner who acquiesces in people walking on a defined track across or around the edge of his land in a manner which would give rise to a public right of way should not as a result find the whole of his land burdened with rights of general recreation) would seem to be entirely consistent with the Supreme Court's acceptance of the principle of equivalence. See, in particular, the passage from Lord Hope's speech quoted in paragraph 432 above. If the acts that the landowner has acquiesced in would give rise and give rise only to a public right of way over a defined route then that is the measure of the right they should acquire as a result. I do not accept ██████████'s submission that Field 1 could become registrable as a green even if all that had happened was that a significant number of local people had walked around the edge, despite the purpose of their use being recreational. That purpose does not prevent a public right of way being acquired: see the *Dyfed County Council* case (paragraph 456 above). Besides, in that scenario there would not have

been any recreational activity “on” the majority of the land the subject of the application.

558. However, I do not as a matter of fact and evidence accept the Objectors’ contention that walking along the short-cut route across Field 1 and around the perimeter of Field 1 were the only, or predominant, uses of Field 1 and of the entire Application Land during the 20 year period preceding the Applications (paragraphs 523-527 above). I have found that there was extensive use for a variety of lawful sports and pastimes spread over the whole of the Application Land.

559. In closing, the Objectors submitted that there had not even been 20 years’ user for footpath purposes of those routes, use of the short cut developing only tentatively after the landfill and use of the perimeter for dog walking developing even later. They relied for those propositions on the absence from the 1993 aerial photograph<sup>514</sup> (contrasted with the 2007 aerial photograph)<sup>515</sup> of evidence of concentrated use along either route. But that is equally consistent with people having made more generalised use of the land as with their having made no use of it at all, and the former seems to me the more probable given its history, situation, and accessibility. The version of events which the Registration Authority is being asked by the Objectors to accept involves almost complete abstinence from any recreational use of the land by local residents for several years after completion of the landfill, followed (without any suggested explanation for the change) by a commencement of recreational use restricted to walking dogs around the perimeter of Field 1. I do not regard that as a likely scenario.

560. I have found that general awareness of the existence of FP 424 was low during the material period (paragraph 533 above), and there was little evidence of people seeking out an alternative means of passing between its termini in exercise of their right to deviate following the landfill. Usage of its actual route (insofar as not obstructed) was not use of its route as a whole but only in part: as a means of getting on to or off the Application Land, at either end, or in between, by coincidence rather than design.

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<sup>514</sup> O329.

<sup>515</sup> O13.

*Concurrent user by landowner*

561. Before the Supreme Court's reversal of the lower courts' decisions in *Lewis*, the Objectors could have invoked *Laing Homes* and relied on the agricultural uses of the Application Land (cattle and sheep grazing, hay and silage cropping, manuring, fertilising, seeding) and local residents' deference to those activities to defeat the Applications - as in their objection statement they did.<sup>516</sup> That defence is no longer available to them (paragraphs 429-431 above). The uses made of the Application Land by the ██████████ were compatible with informal recreational use provided that the recreational users showed respect for the ██████████ activities, which they did. The Application Land was not intensively farmed; it was not used for growing arable crops or in the manner envisaged by Lord Walker in *Lewis* (paragraph 443 above) (i.e. as fenced fields used for intensive grazing for nine months of the year when recreational users were excluded and then left open for three months when the animals were indoors). On the contrary, this seems to have been an example of "co-operative mutually respecting uses" which could endure after registration as a green (paragraph 430 above). Harmonious co-existence with Ashton Vale people was a theme of the evidence given by ██████████ (paragraphs 348-349, 360 above). As ██████████ put it, local residents had their use and her family had its use. They did not harm each other.

*"as of right"*

562. On the basis that "as of right" means "*nec vi, nec clam, nec precario*", no more, no less (the "tripartite test"), I conclude that the overwhelming majority of use for lawful sports and pastimes by Ashton Vale inhabitants of the Application Land during the 20 year period preceding the Applications satisfied that test.

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<sup>516</sup> Paragraphs [25]-[26]: 07.

*Nec vi*

563. The only suggestion of a notice prohibiting entry to the Application Land was made in relation to the URS/CCGI borehole drilling works (paragraphs 404, 543 above). In my view there is insufficient evidence to substantiate a finding that any such notice was erected at all, let alone one the terms of which purported or would have been effective to communicate to the inhabitants of Ashton Vale that indulgence in sports and pastimes by them on all or any part of the Application Land was forbidden. A notice by the David Lloyd Centre would not have been effective to communicate its message to users of the Application Land in any event; Ashton Vale inhabitants for the most part approached from and left in the opposite direction.

564. I have found that most users of the Application Land entered through what ██████ described in his closing submissions as the three legitimate public accesses (from Ashton Drive via FP 424, at the Silbury Road entrance to FP 207 and FP 424, and from the Long Ashton direction to FP 207) and that the majority of them entered from Silbury Road. Residents of adjoining properties who used their rear accesses to get on to the land were not entering forcibly or in defiance of any prohibition. I do not think that anyone ducking under the baler twine to cross the cattle bridge could reasonably be regarded as making a contentious entry, or that there was anything contentious about going through the gate between Fields 1 and 3 even at the times when tied shut with baler twine. ██████ and ██████, and ██████ seem to have shared the perception of ██████ and ██████ that climbing, striding or jumping over the low fences alongside the ditches was nothing untoward, provided that no damage was done to them; their purpose was to keep cattle out of the ditches. ██████ looked on the post and rail and replacement metal structures between Fields 1 and 2 as a stile to be climbed over rather than a barrier to human access, as did the Applicants' witnesses. Clearly, those are common local perceptions. The only access to the Application Land which I consider to have been gained *vi* is that which was gained by entry through the barbed wire fence along the southern boundary of Field 6 after its erection in 2003/2004 by ██████. After that time it

was repeatedly vandalised and repaired, and taking an objective view I think M [REDACTED] was right to agree in cross-examination that it was obvious that the public were not allowed in or out at that point. However, that only taints a small proportion of user (paragraph 534 above), and only in the period after that fence was erected, and does not alter my overall conclusion.

*Nec clam*

565. I do not consider that recreational use of any part of the Application Land at any time during (or before) the 20 year period preceding the Applications was by stealth. In my judgment, a reasonable landowner who was on the spot (Lord Walker's words in *Lewis* - paragraph 437 above) would have been aware of it. I do not think that the Applicants were arguing that local people kept out of the landowners' sight (paragraph 466 above), but rather that they kept out of their way in the sense that they did not interfere with (as [REDACTED] put it, did not block or disturb) the activities of [REDACTED] or their or the landowners' contractors. To hold that against users would be to undermine the Supreme Court's approach in *Lewis* to concurrent uses and its rejection of the 'deference' doctrine. The hypothetical reasonable landowner may not be expected to patrol his land day *and night* looking for trespassers, but must surely be expected to look at it on days and at times when he and his tenants/licensees/contractors are not conducting their own activities as well as when they are, and to look at the whole of it and not just those parts of it where he has his own business to conduct. A reasonable landowner on the spot would have seen people going in and out of Field 2 through the gaps in the hedges, and the remainder of the Application Land was open although the aerial photographs<sup>517</sup> show there was vegetation along parts of the boundary between Fields 5 and 6 before the 2008 clearance.

*Nec precario*

566. There was no suggestion that the landowners expressly or impliedly gave permission to local people to indulge in sports and pastimes on any part of the Application Land

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<sup>517</sup> A195A, 1199, 1200.

at any time during the 20 year period preceding the Applications. The permissions given in the 1970s/early 1980s had been for specific large-scale events, were long since spent, and had had no relevance to or implications for general informal recreation either contemporaneously or subsequently.

*The correct approach*

567. I do not agree with ██████████'s submission that determination of the question whether use is "as of right" is a two-stage process (paragraph 465 above). I read the speeches in *Lewis* as unequivocally affirming that what "as of right" means is *nec vi, nec clam, nec precario* - no more, no less. See the quotations in paragraph 435 above.

568. As I read Lord Hope's speech at paragraph 67, where he was saying that the "assertion of a public right" came in was at an earlier stage, going to the "quality of the user" ("the first question"), before getting on to the separate question ("the second question") whether use was "as of right". Reading paragraph 67 together with paragraph 63,<sup>518</sup> I am disposed to agree with ██████████ that what Lord Hope really had in mind was quantity of user and that he was not intending to construe section 15 as implying an additional hurdle for applicants to overcome, in addition to the "significant number" criterion.

569. To repeat the latter part of paragraph 63:

*"[Sullivan J's] approach [in Laing Homes] has also been taken as indicating that in cases where the land has been used by a significant number of inhabitants for 20 years for recreational purposes nec vi, nec clam, nec precario, there is an additional question that must be addressed: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging? I am not sure that Sullivan J was really saying that there was an*

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<sup>518</sup> Quoted at paragraphs 434 and 441 above.

*additional question that had to be addressed. But if he was, I would respectfully disagree with him ...”*

***“a significant number of”***

570. Whether, and if so how, Lord Hope’s interpretation of that expression (informed by the approach that to establish a prescriptive right, the acts of user should be sufficient to amount to the assertion of a continuous right: see paragraphs 436-439 above) would have differed from the test enunciated by Sullivan J in *McAlpine Homes* (paragraph 412 above) is a matter of speculation. *McAlpine Homes* was not even cited to, let alone considered by, the Supreme Court in *Lewis*. It was not a case about the meaning of “significant number”; it was about the meaning of “as of right”, the effect of deference, and the extent of the rights which registration confers. Anything said expressly or impliedly about “significant number” was obiter. None of Lords Walker, Rodger, Brown and Kerr said anything about it. There was no issue as to the satisfaction of that criterion and no necessity for them to say anything about it. It seems to me that the *McAlpine Homes* interpretation of the expression (paragraph 412 above), which was part of the ratio of that decision as I see it, has not been disapproved or overruled, but stands, and is the test which the Registration Authority is bound to apply.

571. That said, I do not perceive general use by the local community for informal recreation to be in practice a lower test than the appearance of the assertion of a right to indulge in informal recreation by the local community. It is by general use (not otherwise) that the appearance of the assertion of a right will be given. (The assertion of a “public” right cannot be requisite, because it is not a public right which registration as a green confers, only a right for inhabitants of the relevant locality or neighbourhood.)

572. I do not think that Pill LJ's "properly and strictly proved" remark in *ex p Steed*<sup>519</sup> was intended to say anything about the quantum of use required to found a successful registration application.

573. It is my impression on the totality of the evidence that there were throughout the relevant 20 year period a sufficient number of Ashton Vale inhabitants using the Application Land for lawful sports and pastimes to signify that the land was in general use by their community for that purpose, and to give the appearance to a reasonable landowner on the spot that a continuous right for members of their community to enjoy sports and pastimes on the land was being asserted; and I so find. That is so even after discounting use of the short cut route across Field 1 and the Field 1 perimeter dog-walking circuit, some walking through Field 2 (as attributable to the exercise of the right to deviate from the route of FP 424) and use by persons climbing through the barbed wire fence along the southern boundary of Field 6. In forming that impression I have had regard to the 2008 ONS statistics for the Ashton Vale super output area produced by the Objectors,<sup>520</sup> which (omitting about 100 households in Swiss Drive, Swiss Road and South Liberty Lane) give figures of 717 for dwellings and 1,539 estimated population. The size of the population of the relevant community seems to me to bear on the issue of whether enough of its members used land to signify general use (or the assertion of a right).

*"for a period of at least twenty years"*

574. I have found that by June 1989 at the latest, the post-landfill restoration of Field 1 was complete; it was usable all over for sports and pastimes; and user of the whole for sports and pastimes by Ashton Vale inhabitants had resumed (paragraphs 521-522 above). I have also found that neither of the borehole drilling episodes in 2008 and 2009 respectively constituted a material interruption to recreational use of Field 1 or the Application Land generally (paragraphs 541-544 above). In my view the periodic flooding of parts of the other fields did not prevent the continuation of user of those fields or of the land as a whole (paragraphs 524, 553 above).

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<sup>519</sup> Paragraphs 13 and 463 above.

<sup>520</sup> O368G.

575. I am satisfied that there was use of the Application Land for lawful sports and pastimes by a significant number of Ashton Vale inhabitants as of right throughout a period of at least 20 years preceding the Applications and that such use was continuing at the time of the Applications.

**L. Recommendation**

576. My overall conclusion on the totality of the evidence presented at the inquiry is that the Applicants [REDACTED]s and [REDACTED] have proved their case under each of the two Applications, and the totality of the Application Land qualifies for registration as a town or village green under section 15(2) of the Commons Act 2006, as being land on which a significant number of the inhabitants of a neighbourhood within a locality indulged in lawful sports and pastimes as of right for a period of at least twenty years, and continued to do so at the time of the Applications.

577. My recommendation is that the Registration Authority should grant both Applications and register the Application Land as a town or village green.

578. As mentioned above, the Registration Authority must make its own decision and is in law free to follow or not follow my recommendation as it thinks right, applying the correct legal principles and after due consideration of the evidence. It must, of course, leave out of account, as being wholly irrelevant to the statutory question which it has to decide (namely, whether the Application Land or any part of it is land which satisfies the criteria for registrability laid down in section 15(2) of the 2006 Act), all considerations of the desirability of the land's being registered as a green or being developed or put to other uses.

Ross Crail  
New Square Chambers  
Lincoln's Inn  
26 August 2010





IN THE MATTER OF TWO APPLICATIONS

[REDACTED]

FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN  
OF LAND AT ASHTON VALE FIELDS, BRISTOL

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INSPECTOR'S REPORT

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Appendices

- A Copy of small scale map attached to Applications showing Application Land and claimed locality/neighbourhood
- B Copy of plan prepared by [REDACTED] with Fields 1-6 marked
- C Copy of sketch plan showing landfill phases 1-6

APPENDIX A

Exhibit 18 J L 1

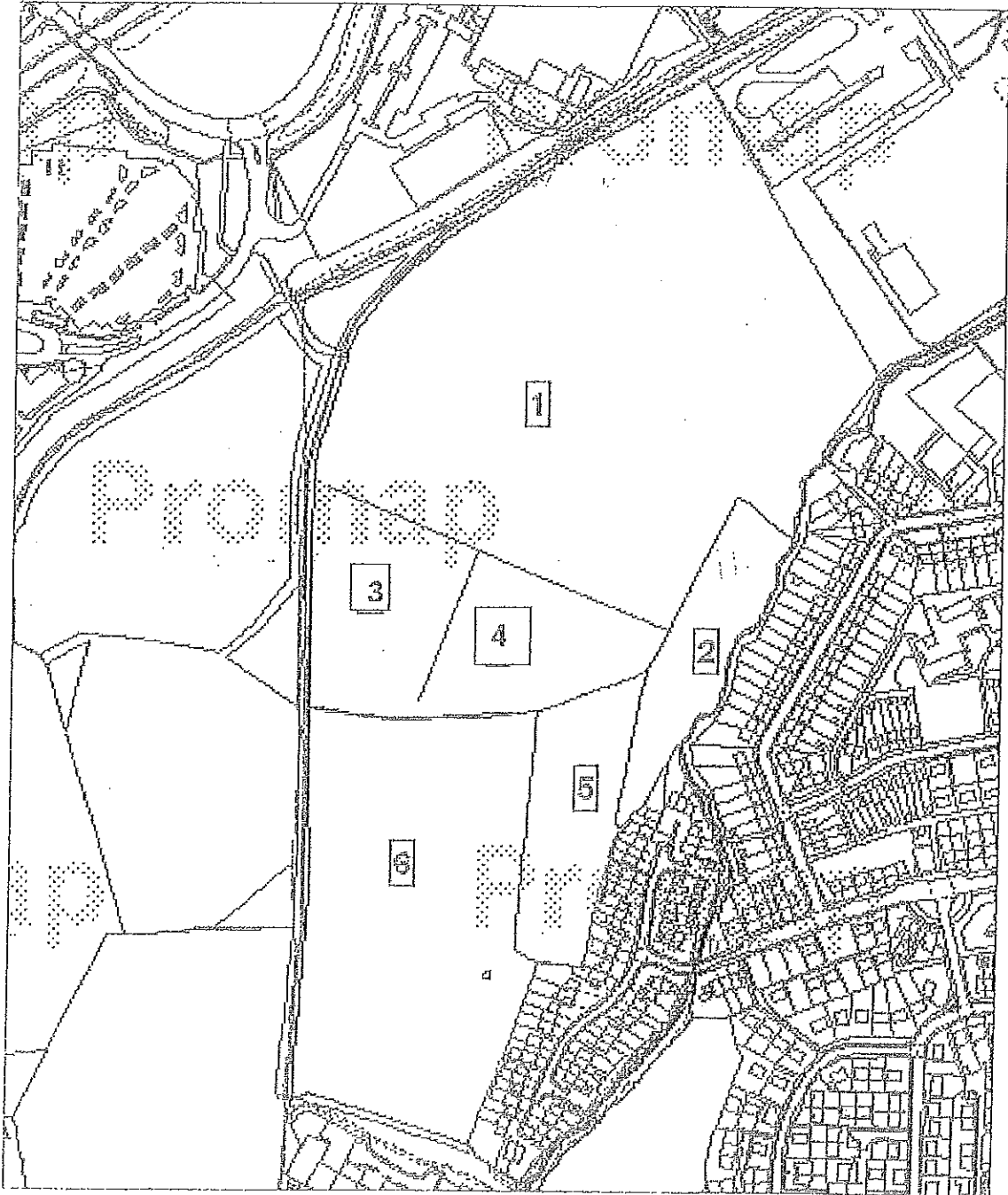
# Bedminster Poling Districts



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APPENDIX B

FIELD PLAN



GW 1

APPENDIX C

PLAN 3

