

Appendix 'C'

Objectors and Applicants Comments

**OBJECTOR'S REPRESENTATIONS ON THE REPORT OF INSPECTOR RICHARD
GROUND DATED 14 JULY 2015 REGARDING SMITHY WOOD VILLAGE GREEN
APPLICATION**

1. Paragraph 6.15 on page 94 - Mr Ground attributes Dr Perring as stating that: "there are a dozen or so footpaths going through the woods."

In fact Dr Perring only refers to this in examination in chief at paragraph 2.171 on page 24. There was no reference in cross-examination which was extremely brief.

2. Paragraph 6.27 on page 23 - Mr Ground attributes Mrs Williams to stating that she "wandered off the path sometimes but the majority of time she would be on the path".

Mrs Williams does not mention this. Mrs Howe actually states this in evidence in chief at paragraph 2.279 on page 39 and paragraph 2.290 on page 40.

3. Paragraph 6.30 on page 96 - Mr Ground states that: "Mr Newton' evidence was that he saw the evidence of track having been made that looked like being made by foot."

There is nothing in the evidence for Mr Newton or any other witness within the report that specifically states this. Mr Newton does say at paragraph 3.88 (page 70) that "there are clearly defined paths". Dr Perring in her evidence at paragraph 2.160 on page 23 does state that there were tracks of others walking. At paragraph 2.307 on page 43 Mr Newton Smith states that on the west side there was a well-worn track.

4. Paragraph vii) page 101 - Mr Ground states that: "Dr Perring for example spoke of leaf mould being on the paths and that some of them being made by one or two people."

Mr Ground in the footnote attached to this paragraph states that the information came from the last answers in re-examination of Dr Perring. There was no re-examination of this witness. Dr Perring refers to leaf mould on the paths in examination in chief at paragraph 2.170 on page 24. Mr Harrison then refers to some paths being made by one or two people in re-examination at paragraph 2.149 on page 22.

28 July 2015

DLA PIPER UK LLP



31.7.15

Application Number 2013/VG02

Smithy Wood Village Green Report

Reply to Inspectors Report

Dear Claire,

We as a group do not agree with the recommendations by the inspector, as we believe that he has misinterpreted certain important aspects of the law, and that our original arguments in response to the Objector on these issues have been disregarded. We do not agree that he could reasonably draw the conclusion he did, when government guidance and case law suggest otherwise. We reiterate our position on the following issues:

1. **The land does not have to be used in its entirety.**

Defra guidance in paragraph 8.10.62 states:

“Another question raised in the Trap Grounds case was whether land can qualify for registration as a green even if some of it was inaccessible throughout all or part of the relevant period. The court was asked whether land could have become a green even though by reason of impenetrable growth only 25% of it was accessible for walkers. The inspector had advised that it could; **recreational use of tracks, glades and clearings could amount to recreational use of the land viewed as a whole.**

In the High Court, Lightman J refused to do any more than give guidance “of the broadest kind”. He agreed that the **existence of inaccessible areas did not preclude land being held to be a green**, and pointed out that such areas might form part of the scenic attraction and might even themselves provide recreational opportunities. For example, a pond could be used for feeding ducks or sailing model boats.

Overgrown areas might provide a habitat for wildlife to the benefit of bird watchers and others interested in nature observation. The question whether land could properly be described, viewed as a whole, as having been used for recreation notwithstanding the inaccessibility of parts was to be approached in a common sense rather than a mathematical way. However, a registration

authority should not strain its finding of fact on that question, and did not need to do so, having regard to the availability of power to register a part or parts of a claimed green."

And in 8.10.63

"In the House of Lords, Lord Hoffmann said he was very reluctant to express a view on the inspector's conclusions without inspecting or at least seeing photographs of the site, but agreed that in principle **it was unnecessary for users to have set foot on every part (or even the majority) of the land** included in an application."

2. A "significant number" does not have to be entirely from the estate.

Quote "In the McAlpine Homes case the High Court provided some useful guidance about what 'a significant number' might mean. The court **did not accept** that the expression was synonymous with a **considerable, or a substantial, number**. The reason given was that a neighbourhood might have a very limited population, and a significant number of its inhabitants might not be capable of being described as considerable or substantial."

"Whether the evidence shows that a significant number of the inhabitants of any locality or neighbourhood within a locality used the land for informal recreation is, according to the court, very much a matter of impression. The key question is whether the number of inhabitants using the land was sufficient to signify that it was in **general use by the local community** (i.e. the inhabitants of the relevant locality or neighbourhood) for informal recreation, rather than occasional use by individual trespassers."

3. We believe that there has been a misinterpretation of the definition of a public right of way and the use of footpaths as part of recreation, and that its application to our use is incorrect.

Common law has established that a highway is a defined route **over which** "the public at large" can pass and repass as frequently as they wish, without hindrance and without charge. The common law defined three categories of highway:

Footpath, Bridleway, and Carriageway.

Footpath

A footpath is a way over which the public has a **right of way on foot only** and which is not a footway (section 66, WCA 1981).

Right of way

Defined as an Easement, a privilege to **pass over** the land of another, whereby the holder of the easement acquires only a reasonable and **usual** enjoyment of the property, and the owner of the land retains the benefits and privileges of ownership consistent with the easement.

n.

1) a pathway or road with a specific description (e.g. "right to access and egress 20 feet wide along the northern line of Lot 7 of the Cobb subdivision in page 75 of maps").

2) the right to **cross** property **to go to and from** another parcel. The right of way may be a specific grant of land or an "easement," which is a **right to pass across** another's land. The mere right to cross without a specific description is a "**floating**" **easement**. Some rights of way are for limited use such as repair of electric lines or for deliveries to the back door of a store. Railroads own title to a right of way upon which to build permanent tracks.

Floating easement

n. an easement (a right to use another's property for a **particular purpose**) which allows **access and/or egress** but does not spell out the exact dimensions and location of the easement.

To a large extent, the phrase public right of way is interchangeable with highway, but public right of way tends to be used to refer to the **minor ways required to be shown on a definitive map**, so Footpath, Bridleway, Restricted byway and Byway open to all traffic (BOAT). In general terms the public are allowed to pass and re-pass as a genuine **traveller**, and **undertake closely allied** activities such as stopping to rest or look at views. The public have no right to undertake unrelated activities such as metal-detecting or flying model aircraft, den building, bicycle riding, or other recreational activities.

Riding of motorbikes on footpaths is a criminal offence if done without lawful authority, which may be the landowner's permission, and even with permission it can still be an offence if motorbikes are ridden inconsiderately or cause damage. Based on the testimony from all concerned, if the paths used by local people for recreation were indeed being used in accordance with the legal definition of a footpath, as interpreted by the inspector, then the land owner was knowingly allowing a criminal offence to be committed.

The number and use of 'footpaths' and tracks show that the woodland has been well used by local people. While some people may have remained on the paths, their use of them was not merely to transit from one side of the woodland to another, that is to say, as a **traveller** to transition from point A to point B on their way to somewhere else, as one would if using the footpath in the context of a public right of way. Their use of footpaths and tracks was part of their recreational use of the woodland.

Provision is made under the Highways Act 1980 and the Commons Act 2006 for landowners to submit a Statement to their local Council setting out where any public rights already exist and making a declaration that they do not want to see **any further** rights created.

The inspector describes the need to consider what a reasonable landowner would have thought upon observing the myriad of footpaths and tracks within the woodland. The land owner in this case said that he had seen the tracks and had considered the possibility of a public right of way arising, but that he was not concerned about that. It begs the question why the landowner did not reasonably consider the possibility of other rights being established. To suggest that any reasonable person would not consider the possibility of further rights arising under these circumstances, is to our minds not reasonable at all.

It is a question that we do not feel was given adequate consideration by the inspector, especially since there was also evidence over the years of den building and rope swings, consistent with use by children. The reasonable assumption could not have been that individuals **were occasionally trespassing in order to transit** through the woodland to other places – as would be consistent with the legal definition of footpath use. Local people have testified that their use of paths and tracks was part of and facilitated their enjoyment of the woodland.

It should be remembered that this woodland is not typical of historical village greens, and does not consist of grass or grassland where all or most parts are accessible.

We believe that the inspector's interpretation on the law regarding these issues is mistaken and incorrectly applied, and if appropriate, we would appreciate it if you could bring this to his attention for further consideration. We look forward to hearing your reply.

Regards,

Jean Howe (CRAG)