

31 May 2024

Delivered by email

Canterbury City Council
Military Road
Canterbury
Kent
CT1 1YW

Ref: BELR3006

Dear Sir / Madam

CANTERBURY DISTRICT LOCAL PLAN TO 2040 – REPRESENTATIONS ON BEHALF OF BELLWAY STRATEGIC

We write on behalf of our client, Bellway Strategic, to submit representations on the draft Canterbury District Local Plan to 2040 which has been published for consultation. As the Council will be aware, Bellway has a longstanding interest in, and has previously promoted to the call for sites exercise and Local Plan consultations, land south of Staines Hill, Sturry for residential development.

The site promoted through this submission lies to the south and east of the settlement of Sturry. It currently consists of a mix of scrub land and small trees interspersed with more open areas. The topography of the site rises northwards across the site from the railway line to the highway to the north. The site area is approximately 8.2 hectares and is shown on the plan at **Appendix 1**. A Concept Plan, indicating how the Site could be developed is contained at **Appendix 2**.

The Council will be aware this site was subject to an application that it (and an area to the east) be registered as a village green. That matter was considered at KCC's Regulation Committee Member Panel on 22nd April 2024 where it was recommended and agreed that for the reasons set out in the Inspector's report dated 15th September 2023, the application to register the land known as Two Fields at Westbere as a new Village Green has not been accepted. A copy of the Inspector's Report and the Committee Report are at **Appendix 3**. The Inspector found that *"... This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction. Even those witnesses who attest to the widest use of the Land generally, accept that their use was unusual, exceptional or limited and not reflective of how the land was generally used. Even they tended to predominantly use the main paths."* We note that the Inspector also broadly accepted Bellway's characterisation of the land – that *"Here there are [a number] of separate and defined routes with very extensive areas of unused and largely inaccessible land, unattractive for recreational use, in between" and that there has been no use of the whole of lawful sports and pastimes in "any meaningful way"."*

Staines Hill/Island Road (A28) borders the northern boundary of the site. There is an existing footpath that runs along the southern boundary of the site beyond which is the existing railway line. On the southern side of the

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railway line is an existing quarry, and the Westbere Marshes which are a designated Site of Special Scientific Interest (SSSI), Special Protection Area (SPA) and Ramsar site.

To the west are the existing residential properties fronting Island Road and within Fairview Gardens which are a mix of two storey houses and bungalows. To the east, beyond Westbere Lane is St Anne's Convent.

The area within Sturry, on the north side of the railway line, is predominantly residential, built up of one and two-storey dwellings of a varying design and character.

The site presents the following opportunities:

- Development that will provide a continuation of the existing settlement
- Enhance boundaries to provide natural buffers to adjacent properties
- Retain existing protected trees
- Provide green corridors
- Inclusion of an area of open space to serve the development. The Concept Plan shows this area as being just over 4 hectares in size and therefore represents a significant increase in the useability of and availability of publicly accessible open space within the site
- Provide improvements to the quality of green infrastructure and biodiversity enhancements
- Provide additional buffer to the sensitive nature sites to the south
- Access to the site from new junction with the A28

It is acknowledged that the following matters will be key considerations:

- The existing trees covered by the Tree Preservation Order to the east
- Public rights of way to the south of the site
- Topography
- Potential noise from adjacent railway line, quarry and adjacent highway (A28)
- Existing Conservation Area within the site and to the east (although the residential area is proposed outside of the Conservation Area)
- RAMSAR, Special Protection Area (SPA) and Site of Special Scientific Interest (SSSI) to the south of the site

Accommodating around 100 dwellings would require around half of the site area and provide opportunities for extensive open space with the opportunities for formal foot/cycle links through to the existing PROWs surrounding the site. The extensive areas of open space, provide the opportunity to increase the publicly available open space in the area, particularly noting that the Inspector's Report on the Town or Village Green application found that *"Here there are [a number] of separate and defined routes with very extensive areas of unused and largely inaccessible land, unattractive for recreational use, in between" and that there has been no use of the whole of lawful sports and pastimes in "any meaningful way".*

In the Natural Environment and Open Space Topic Paper (October 2022), the conclusion is reached that the “Green gap is to be retained with the existing building to the east removed inline with the previous consultation”. We have seen the ‘Green Gaps and Local Green Space Review’ (April 2021) published in relation to the draft Local Plan. This document purports to undertake a review of the Gap, and in the case of the Sturry-Westbere Gap, the conclusion is to “Retain existing green gap, but amend boundary to exclude the building to the east”.

This site is located within the Green Gap between Sturry and Westbere, however Bellway’s position is that the site plays no role in maintaining the actual, physical or perceived separation of those settlements and therefore no role in the Gap. We note that paragraph 5.46 of the draft Local Plan states that *“Designated green gaps which prevent coalescence between settlements will be protected from development which would harm the openness of these areas.”*

It is of course worth noting that the current Local Plan Policy OS6 explains that development will be permitted within Gaps where it does not:

- Significantly affect the open character of the Green Gap, or lead to coalescence between existing settlements;
- Result in new isolated and obtrusive development within the Green Gap.

Bellway maintains that the land south of Staines Hill, Sturry can accommodate development without resulting in the two issues set out above.

As a consequence of the Town or Village Green application not being accepted, there is no restriction on the land promoted by Bellway being delivered for residential development.

Representations

In relation to the housing requirement, Bellway strongly urges the LPA to treat this, and expressly define it in the Local Plan, as a minimum requirement. This change then ensures consistency with the NPPF. In addition, Bellway strongly urges the LPA to seek opportunities which would enable the affordable housing needs of the area to be addressed. In that regard we note that additional sources of supply, in sustainable locations such as the land promoted by Bellway provide such opportunities.

In relation to the proposed Plan-period, we note:

- Paragraph 22 of the NPPF December 2023 states “Strategic policies should look ahead over a minimum 15 year period from adoption”.
- The PPG states: “The National Planning Policy Framework is clear that strategic policies should be prepared over a minimum 15 year period and a local planning authority should be planning for the full plan period.” (Paragraph: 064 Reference ID: 61-064-20190315).
- The revised draft Local Plan is said to cover the period to 2040. Clarity is required as to the end date of the Plan period and whether this relates to the end of the monitoring period (e.g. 31st March 2040) or the end of the calendar year (e.g. 31st December 2040 – as suggested by Policy SS3 which refers to provision between 2020/21 and 2040/41).
- The March 2024 Local Development Scheme envisages that the Local Plan would be adopted in February / March 2026. Consequently, the first ‘full year’ post adoption would be 2026/2027.
- On that basis, the draft Local Plan would not relate to a 15 year period post adoption, and we encourage the Council to extend the Plan-period accordingly. It is notable that the previous Local Plan consultation

had planned for a Plan-period to 2045 and that the number of new homes has been reduced by a total of 4,149 under the current consultation version.

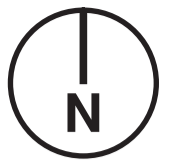
Bellway would be willing to engage with the LPA in order to discuss the relationship of this site to the emerging Local Plan.

Yours sincerely

David Murray-Cox
Director



Appendix 1: Site Location Plan



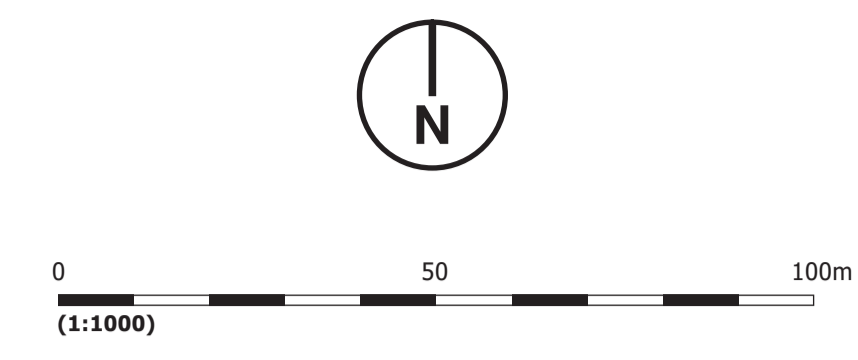
0 50 100m
(1:1250)

KEY
— Site boundary



Existing Site Plan
Staines Hill, Sturry
17354 / C04
1:1250 @ A1 June 2020

Appendix 2: Concept Plan



- KEY**
- Site boundary
 - PROW
 - Development parcels
 - Green infrastructure
 - SuDS pond
 - Tree buffer
 - Suds corridors
 - Key frontages
 - Green corridor
 - Green frontage
 - Green space/landscaping
 - Enhanced ecological/landscape buffer
 - Primary road
 - Secondary road
 - Private drives
 - Site access
 - Footpath links



Concept Plan
Staines Hill, Sturry
17354 / C03A
1:1000 @ A1 June 2020

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Appendix 3: Inspector's Report and Committee Report on the Town or Village Green Application



AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Monday, 22nd April, 2024, at 2.00 pm Ask for: **Hayley Savage**
Darent Room, Sessions House, County Hall, Telephone **03000 414286**
Maidstone

Membership

Mr S C Manion (Chairman), Mr M Baldock, Miss S J Carey, Mr P Cole and Mrs L Parfitt-Reid

UNRESTRICTED ITEMS

(During these items the meeting is likely to be open to the public)

1. Membership and substitutes
2. Declarations of interest for items on the agenda
3. Application to register land known as Two Fields at Westbere as a new Town or Village Green (Pages 1 - 16)
4. Other items which the Chairman decides are urgent

EXEMPT ITEMS

(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)

Benjamin Watts
General Counsel

Friday, 12 April 2024

Please note that any background documents referred to in the accompanying papers maybe inspected by arrangement with the officer responsible for preparing the relevant report.

Application to register land known as Two Fields at Westbere as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Monday 22nd April 2024.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 15th September 2023, that the Applicant be informed that the application to register the land known as Two Fields at Westbere as a new Village Green has not been accepted.

Local Member: Mr. A. Marsh (Herne village and Sturry) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Two Fields at Westbere, near Canterbury, as a new Town or Village Green from the Two Fields Action Group ("the Applicant").
2. The application has been made under section 15 of the Commons Act 2006, which enables any person to apply to a Commons Registration Authority to register land as a Village Green where it can be shown that:

'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;
3. The application was initially supported by 70 user evidence questionnaires, which were subsequently supplemented by a further 18 user questionnaires. The application was made under section 15(2) of the Commons Act – i.e. on the basis that use of the Application Site has continued 'as of right' until the date of the application – such that the relevant twenty-year period for the purposes of the application is November 1999 to November 2019.

The Application Site

4. The land subject to this application ("the Application Site") is situated on the Westbere/Sturry parish boundary, south of Staines Hill and Westbere Lane, and consists of a large area of approximately 37 acres (15 hectares) comprising mixed woodland (some of which has been cleared) as well as more open areas of grassland and scrub.
5. Access to the Application Site is via Public Footpath CB91 which, for the most part, runs alongside the railway line abutting the southern edge of the Application Site and connects Westbere Lane with Fairview Gardens.
6. The Application Site is shown in more detail on the plan at **Appendix A** and the aerial photograph (dated 2009) at **Appendix B**.

Background

7. The ownership of the Application Site is sub-divided into five strips of varying width that are registered with the Land Registry to four different landowners.
8. The western half (approximately) of the Application Site is registered to Bellway Homes Ltd. under title number TT60980. Adjacent to the land owned by Bellway Homes Ltd. is a narrow strip of land registered under Land Registry title number K779440 to Mr. S. Saadat. A further adjoining narrow strip of land, registered under title number TT65696, is owned by Westbere Green Space Protection Ltd. The area of land comprising (approximately) the eastern half of the Application Site is registered to Mr. S. Mahallati under title numbers K779400 and K786421.
9. All landowners have been contacted, although (despite various attempts) it has not been possible to trace Mr. Saadat.
10. Westbere Green Space Protection Ltd has confirmed its support for the application.
11. However, objections to the application have been received from Bellway Homes Ltd. (“the First Objector”) and on behalf of Mr. Mahallati (“the Second Objector”). Those objections have been made on the basis, inter alia, that:
 - The use of the Application Site has not been by a sufficient number to give rise to a general appearance that the land was available for community use, or by the inhabitants of a single locality, or neighbourhood within a locality;
 - Use of the Application Site has not been ‘as of right’ due to the erection of prohibitive notices on parts of the site in 2018 and 2020, and verbal challenges by the landowner;
 - The vast majority of the use relied upon consists of walking and such use falls to be discounted on the basis that it is akin to a right of way usage rather than a general right to recreate;
 - That use of the Application Site ceased to be ‘as of right’ more than one year prior to the submission of the application, such that the tests under sections 15(2) and 15(3) of the Commons Act 2006 are not met.
12. Members will also recall that the application was the subject of a dispute as to whether the Application Site was affected by one of the development-related ‘trigger events’ set out in Schedule 1A of the Commons Act 2006 (which would prevent the County Council from considering the application)¹. The issue was ultimately resolved, following the judgement of the High Court in R (Bellway Homes Ltd.) v Kent County Council², in which the Court determined that the County Council should proceed with the consideration of the application.

¹ That dispute related to the interpretation of the wording of Policy OS6 in Canterbury City Council’s Local Plan (which relates to the Application Site) and whether that policy could be read so as to identify the land for potential development.

² [2022] EWHC 2593 (Admin). Judgement available online here: <https://knyvet.bailii.org/ew/cases/EWHC/Admin/2022/2593.html>

Previous resolution of the Regulation Committee Member Panel

13. The matter was previously considered at a Regulation Committee Member Panel meeting on 2nd December 2021³, at which Members accepted the recommendation that the matter be referred to a Public Inquiry.
14. Following the High Court's decision in respect of the 'trigger events' matter referred to above, Officers instructed a Barrister ("the Inspector") experienced in this area of law to hold a Public Inquiry and to report his findings back to the County Council. A Public Inquiry took place over three days in June 2023 at which the Inspector heard evidence from witnesses both in support of and in opposition to the application. Both the Applicant and the First Objector appeared at the Inquiry, but the Second Objector did not attend⁴ and no other landowners were represented as a separate party at the Inquiry.
15. The Inspector published his report ("the Inspector's report") on 15th September 2023, and his findings are discussed below.

Legal tests and Inspector's findings

16. In dealing with an application to register a new Town or Village Green, the County Council must consider the following criteria:
 - (a) *Whether use of the land has been 'as of right'?*
 - (b) *Whether use of the land has been for the purposes of lawful sports and pastimes?*
 - (c) *Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?*
 - (d) *Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, has ceased no more than one year prior to the making of the application?*
 - (e) *Whether use has taken place over period of twenty years or more?*

I shall now take each of these points and elaborate on them individually:

(a) *Whether use of the land has been 'as of right'?*

17. In order to qualify for registration as a Village Green, recreational use of the Application Site needs to have taken place 'as of right' throughout the relevant twenty year period. This means that use must have taken place without force, without secrecy and without permission (*'nec vi, nec clam, nec precario'*).
18. In this case, there was no suggestion that access to the Application Site had taken place in a secretive manner, by virtue of any specific permission, or that access to the site had been impeded by any physical restrictions (e.g. fencing or locked gates). However, there was some discussion at the Inquiry as to the presence of prohibitive notices on the Application Site, which is relevant to the question of whether use of it has been 'by force'. This is because, for the purposes of the 'as of right' test, the concept of 'force' is not limited solely to

³ The minutes of that meeting are available at: [Agenda for Regulation Committee Member Panel on Thursday, 2nd December, 2021, 10.00 am \(kent.gov.uk\)](https://www.kent.gov.uk/agenda-for-regulation-committee-member-panel-on-thursday-2nd-december-2021-10.00-am)

⁴ Following the Inquiry, the Second Objector advised that he was unable to attend due to ill health and made further written submissions to which the Inspector has had regard in preparing his report.

physical force, but instead applies to any use which is contentious or exercised under protest⁵: “*if, then, the inhabitants’ use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*”⁶. As such, if a landowner takes steps to indicate that he objects to informal use of his land, then that use will not be considered ‘as of right’.

19. Although there was some indication by the Second Objector that signs and fencing had been erected on the eastern part of the Application Site during 2020, the Inspector found⁷ no evidence of the presence of any signs or fences/gates to prevent access to the eastern part of the Application Site during the material period (i.e. 1999 to 2019).

20. However, the Second Objector’s case is that prohibitive notices reading “This land is PRIVATE PROPERTY. The routes are not public rights of way. Any access is granted only by permission of the landowner” were erected on the western half of the Application Site (i.e. the section owned by Bellway Homes Ltd.) in October 2018 and September 2019. The Inspector accepted⁸, that these notices had been erected at the main access points to that part of the Application Site, and these would have been ‘*seen by all (or at least the substantial majority)*’ of those accessing the land at that time. He also noted⁹ that: “*The wording is not ambiguous. The land covered was “Private Property” and the reference to “any” access is not to be understood as limited to the “routes” but to the land generally. The fact that the signs were only in situ for a short period does not undermine their efficacy*”.

21. Accordingly, the Inspector’s view was that any use of the western part of the Application Site after the erection of the prohibitive notices in October 2018 would not have been ‘as of right’.

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

22. The term ‘lawful sports and pastimes’ comprises (for the purpose of Village Green registration) a composite class that can include commonplace activities such as dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. Indeed, the Courts have held that ‘*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*’¹⁰.

23. However, in cases where the use comprises predominantly of walking, it will be necessary to differentiate between use that involves wandering at will over a wide

⁵ Dalton v Angus (1881) 6 App Cas 740 (HL)

⁶ R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 at paragraph 92 per Lord Rodger

⁷ Paragraph 206 of the Inspector’s report

⁸ Paragraphs 207 to 210 of the Inspector’s report

⁹ Paragraph 208 of the Inspector’s report

¹⁰ R v Suffolk County Council, ex parte Steed [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385

area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes¹¹ case, falls to be discounted. In that case, the judge said: *'it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields'*.

24. In this regard, the Inspector considered that the nature of the recreational use of the Application Site was the central question in this application and he agreed¹² that *"it is clear and accepted that there has been extensive use of defined and well-trodden paths over each part of the Land for many years predominantly for walking and dog walking, but also for "rambling", jogging, cycling and horse-riding"*. However, he noted¹³ that the legal question to be addressed was whether the use was attributable to the use of a right of way (or putative right of way) or whether it was attributable to the use of the land as a whole as a town or village green: *"if land is used for generally meandering or roaming not limited to use of defined routes that will be unlikely to be attributable to use as a right of way and will more readily be attributable to use as a TVG [town or village green]"*. Ultimately, the position is to be judged from the point of view of a reasonable landowner.

25. The Inspector's findings in relation to the nature of the use of the Application Site were¹⁴ that:

"The evidence as a whole permits of only one answer as to the nature of the user. It overwhelmingly demonstrates that throughout the statutory period and even more so in the latter half of it, a vast majority of the use made of the Land was by walkers, dog walkers, ramblers, joggers, cyclists and horse riders whose use was overwhelmingly confined to the Main Paths. Those Main Paths were, for the most part, heavily hemmed in by dense vegetation and it was not practical or in many situations physically possible for people other than a few more adventurous individuals to access a substantial majority of the Land for most of the statutory period. Very few people chose to leave the Main Paths for lawful sports and pastimes and there was no clear outward manifestation from 2008 at the latest of any significant such use of the Land generally or any significant part of it. The use of the Land would have appeared to a reasonable landowner as being the user of public rights of way and other Main Paths as such for recreational (normally circular) walks through otherwise inaccessible and unused land.

Intermittently, a relatively small number of people did meander off the Main Paths and roam across the Land more generally but: (1) such user was not, in respect of any part of the Land, by a significant number of inhabitants of either "locality" (or of both localities combined); (2) even the

¹¹ R (Laing Homes) v Buckinghamshire County Council [2003] 3 EGLR 70 at 79 per Sullivan J

¹² Paragraph 39 of the Inspector's report

¹³ Paragraphs 40 and 43 of the Inspector's report

¹⁴ Paragraphs 192 and 193 of the Inspector's report

routes of the most adventurous off the Main Paths were generally heavily constrained from at least 2008 across almost all of the Land; and (3) there was extremely limited scope for lawful sports and pastimes off the Main Paths except in some very small areas adjacent to the Main Paths. I accept that some individuals did leave the Main Paths to access blackberry picking some distance off them; that some adventurous individuals positively chose to walk through the heavily vegetated areas to explore, train dogs and search for wildlife and that children and families sometimes played in the wooded areas although the latter was predominantly in the early years of the period but fundamentally, the use of the Land from 2008 at the latest would have appeared to the landowner as confined to use of the Main Paths as paths principally for walking and ancillary activities and there was nothing to indicate a general wider user by a significant proportion of the inhabitants of any locality or at all.”

26. The Inspector’s conclusion¹⁵ in respect of the nature of the use was therefore that the overwhelming majority of use was focussed on walking and associated activities. In his view, all the ‘physical, documentary and photographic evidence’ supports the contention that this use would have been ‘overwhelmingly focussed’ on the main paths; there was very limited evidence of other use and even those who engaged in that use ‘recognised that they were the exception’. He also¹⁶ considered significant the lack of any picnics, sports, games or other activity on the land for the vast majority of the period, and noted that even those witnesses who spoke of generalised user ‘were clear as to the limited extent of such user’.

27. Accordingly, the Inspector did not consider that the recreational use of the Application Site was of a nature that would be capable of giving rise to the registration of the land as a Village Green.

(c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?

28. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

29. The definition of ‘locality’ for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders¹⁷ case, it was considered that ‘...at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality... there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition’. The judge later went on to suggest that this might mean that locality should normally constitute ‘some legally recognised administrative division of the county’.

¹⁵ Paragraph 197

¹⁶ Paragraph 203

¹⁷ R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90

30. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. On the subject of 'neighbourhood', the Courts have held that *'it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood... The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning'*¹⁸.

The locality

31. In this case, the application was originally made on the basis of "the parishes of Westbere and Sturry". Prior to the Inquiry, and in response to submissions made by the First Objector, the Applicant confirmed that the reference to 'Sturry' was intended to mean the neighbourhood of 'Fairview Gardens' (i.e. the residential estate immediately to the west of the Application Site) within the locality of Sturry.

32. The First Objector submitted that the application must fail on the basis that the statutory construction of section 15 of the Commons Act 2006 (and subsequent case law) does not permit an Applicant to rely on more than one 'locality'. However, the Inspector did not consider that this issue, of itself, would be sufficient to invalidate the application¹⁹ and there was no evidence of any prejudice being caused by the Applicant seeking to register the land as a Village Green on the basis of alternate localities.

33. The Inspector was satisfied²⁰ that both the parish of Westbere and the neighbourhood of Fairview Gardens in the parish of Sturry, individually, would be qualifying localities for the purposes of registration. There is no requirement for user to come predominantly from one locality, and either would be sufficient (if all of the other legal tests were met) in terms of meeting the legal test in this regard. In light of his other conclusions, the Inspector did not consider this issue in detail, but nonetheless he could not see any reason for rejecting the application on the basis of the locality test.

"a significant number"

34. The word "significant" in this context does not mean considerable or substantial: *'a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number... what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers'*²¹. Thus, it is not a case of simply proving that 51% of the local population has used the Application Site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the Application Site.

¹⁸ *ibid* at 92

¹⁹ Paragraph 64 of the Inspector's report

²⁰ Paragraph 188 of the Inspector's report

²¹ *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

35. In this regard, the Inspector was of the view²² that there could be little doubt (given the relatively low populations of the areas relied upon) that the land had been used – *in some way* – by a significant number of the residents of Westbere parish and/or by a significant number of the residents of the Fairview Gardens neighbourhood.

36. However, this conclusion could only be reached ‘*if, but only if, one includes user of the main paths*’²³. Such use (for the reasons discussed above) was not qualifying user for the purposes of the Village Green application and therefore, discounting use of the main paths, there was very little other evidence of use. As the Inspector put it²⁴: ‘*off path use was the relatively rare exception*’.

37. Thus, the sufficiency test has to be viewed in light of the volume of qualifying recreational use, which, in this case, is very low. As such, the Inspector considered²⁵ that “*a conscientious landowner viewing the Land at any time during the statutory period would not have understood that there was any significant wider usage of the Land beyond the use of the Main Paths as such and would not have been aware of anything other than ‘occasional use by individuals...’ [quoting from the McAlpine Homes case referred to above] off those Main Paths*”.

(d) Whether use of the land ‘as of right’ by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

38. The Commons Act 2006 requires use of the land to have taken place ‘as of right’ up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use ‘as of right’ ceased.

39. In this case, the application was originally made on reliance upon section 15(2) of the 2006 Act – i.e. on the basis that use of the Application Site had not ceased at the time of making the application (on 7th November 2019).

40. Following the First Objector’s submissions that prohibitive notices were erected on the western part of the Application Site in October 2018, the Inspector was asked by the Applicant to also consider whether the requirements of section 15(3) might be met in respect of the application (i.e. on the basis that use ‘as of right’ ceased no more than one year prior to the making of the application).

41. As is noted above, the Inspector found that ‘private property’ signs erected on the western part of the Application Site in October 2018 were effective in rendering the use of that part of the Application Site contentious, such that use did not continue ‘as of right’ up until the date of the application in November 2019. He also concluded²⁶ that the period of grace set out in section 15(3) did not assist, since the notices were erected on site more than one year prior to the making of the Village Green application.

²² Paragraphs 190 and 191 of the Inspector’s report

²³ Paragraph 189 of the Inspector’s report

²⁴ Paragraph 194 of the Inspector’s report

²⁵ Paragraph 197 of the Inspector’s report

²⁶ Paragraph 211 of the Inspector’s report

(e) Whether use has taken place over a period of twenty years or more?

42. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, the relevant twenty-year period (“the material period”) is to be calculated retrospectively from the date of the application, and is therefore 7th November 1999 to 7th November 2019.
43. The Inspector accepted²⁷ that there had been extensive use of the land (subject to the comments above as to the nature of that use) ‘for many years’ and a number of the witnesses attested to use of the Application Site throughout the relevant twenty-year period.
44. In respect of the western part of the Application Site, the Inspector found²⁸ that any user which did meet the statutory requirement was, from 2018, not ‘as of right’, such that the statutory period was interrupted.
45. Therefore, although on the face of it there appeared to have been ongoing use of the eastern part of the Application Site throughout the material period, the same could not be said for the western part where use became contentious during the latter part of the material period.

The Inspector’s conclusion

46. Having carefully considered the evidence, the Inspector’s conclusion²⁹ was as follows:

“The evidence demonstrates that the overwhelming preponderance of use of the Land by inhabitants of the claimed localities was on the main, clearly defined footpaths and a statutory footpath on the Land. That user is attributable to exercise of highway rights or putative highway rights across those defined routes and not use of the whole Land generally for lawful sports and pastimes. The evidence demonstrates that a small number of individuals used other parts of the Land more generally for roaming and for other activities. However: (1) this use was limited in frequency and intensity; (2) the number of individuals engaged in such use was not significant; and (3) this user was itself heavily constrained by the nature of the Land. The result is that there were no significant outward manifestations of such use with the result that a reasonable landowner would not have considered that there was any general user of the whole of the Land during the statutory period for lawful sports and pastimes or any assertion of any right to such user but instead that the user was attributable to the use of the defined paths as such.

I therefore recommend that the Application for the whole Land be refused on this point. This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction. Even those witnesses who attest to the widest use of the Land generally, accept that

²⁷ Paragraph 39 of the Inspector’s report

²⁸ Paragraph 210 of the Inspector’s report

²⁹ Paragraphs 3 and 4 of the Inspector’s report

their use was unusual, exceptional or limited and not reflective of how the land was generally used. Even they tended to predominantly use the main paths.”

Subsequent correspondence

47. On receipt, the Inspector's report was circulated to the Applicant and the landowners³⁰ for their comments.
48. The First Objector wrote in full support of the Inspector's conclusions and invited the County Council to reject the application in accordance with the Inspector's recommendation.
49. The Applicant was disappointed that the Inspector did not find in favour of registration of the land as a Village Green. Whilst not accepting the Inspector's findings in relation to the notices on the western part of the land (on the basis that the correspondence relating to those signs was in practice widely understood by users as having an entirely different meaning from what is said to be its legal meaning), the Applicant does not intend to pursue this point.
50. However, the Applicant rejects the Inspector's finding that use of the Application Site was primarily confined to defined paths (i.e. a rights of way type of user) and was not of the site as a whole. It is suggested that this finding is wrong and that the eastern part of the Application Site is capable of registration as a Village Green on the basis that there are substantial differences compared to the western part (in terms of physical terrain and landowner management), such that it cannot be viewed in the same light.
51. There were no prohibitive notices on the eastern part of the Application Site during the relevant period and the land was largely neglected by the relevant landowners, who rarely visited; the only reliable evidence to the Inquiry in respect of this part of the Application Site is that given by the Applicant's witnesses.
52. The aerial photography considered at the Inquiry is unreliable insofar as the eastern part of the site is concerned because the trees are of a species providing more canopy, thereby masking the presence of paths and open areas beneath them. In addition, the Inspector gave insufficient weight to the extent to which there are paths that come and go on the land, and also to the fact that the vegetation on the eastern part of the land dies back on a seasonal basis, making it much more accessible during certain parts of the year. He also failed to distinguish between a path used as a route and one reflecting consistent use of the land itself.
53. The Applicant's submission, therefore, is that it would be open to the County Council - and consistent with the evidence presented to the Inquiry - to register the eastern half of the Application Site as a Village Green.
54. The Westbere Parish Council has also (outside of the formal process) expressed its support for the Applicants position³¹, but did not make any substantive new submissions regarding the Inspector's report.

³⁰ With the exception of Mr. Saadat, whose whereabouts are unknown

Discussion

55. Although it is open to the County Council to consider registration of a smaller area than that applied for³², it is not considered appropriate in this case.
56. Despite the Applicant's criticisms, the Inspector is very clear in his report that, in recommending rejection of the whole Application Site, "*This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction*"³³. He also states, elsewhere in the report³⁴, that "*the Application for **all the land** must fail on the basis the evidence does not demonstrate the requisite user*" (emphasis added in bold).
57. On a fair reading of the report as a whole, it is evident that the Inspector did distinguish between the eastern and western parts of the Application Site. He notes at paragraph 59 of the report that it is open to him to consider a lesser area for registration – and indeed has done so – but that "*it is not possible on the evidence to identify any particular area where the statutory test is met*". He also sets out a detailed analysis of the condition of the eastern half at paragraph 199 of the report, where he specifically addresses the issue of registering a lesser area – "*I have considered whether there are any exceptions to the overall position*" – and concludes that "*I cannot therefore identify any sub-area of the Eastern Land which meets the statutory tests*".
58. In addition to the aerial photography, the Inspector also had regard³⁵ to ground level photographs taken during winter months which showed the eastern part of the site in 2001 '*dominated by tufts of long grass*' where '*the land either side of the [main] path does not appear to be readily usable for sports and recreation*' and, in 2003, showing that '*the grassed area is not realistically capable of any use and there is no indication of any informal paths through it*'.
59. The Inspector was also clearly mindful, in reaching his conclusions, of the need to carefully distinguish between use of the main paths and use of the wider Application Site (and focus on the latter)³⁶, of the need to avoid over-reliance upon the aerial photography (in terms of density of vegetation on the ground and the presence of informal paths)³⁷, and also that his experience of the site during his visits was not necessarily representative of the Application Site during the material period³⁸.
60. It is to be noted that the Inspector has had sight of the Applicant's comments and has confirmed that these do not change his view regarding the recommendations made in his report.

³¹ By way of email dated 18th January 2024 circulated to all members of the Regulation Committee

³² Following the decision in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 in which Lord Hoffman said "*the registration authority is entitled... to register only that part of the subject premises which the applicant has proved to have been used for the necessary period.*"

³³ Paragraph 4

³⁴ Paragraph 204

³⁵ Paragraph 83

³⁶ At paragraph 114

³⁷ At paragraph 77

³⁸ At paragraph 176

Conclusion

61. In this case, although it is clear that there has been recreational use of the land by the local residents over a considerable period, it would appear that the nature of that use has been more akin to a 'public rights of way' type of use, rather than the community as a whole exercising a general right to recreate over a wider area (as would be the case for a Village Green). The Inspector – who had the benefit of hearing first-hand the evidence of the witnesses at the Public Inquiry – is clear that the Application Site (either in part or as a whole) does not meet the relevant legal tests for registration as a Village Green.
62. The Officer's view is that the parties' evidence and submissions have been carefully examined by the Inspector, and the matter has been thoroughly scrutinised. It is considered that the Inspector's report accurately represents both the evidence and submissions made, and the law as it currently stands.
63. Accordingly, it is considered that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.
64. It is to be noted that, if Members were to approve the recommendation set out below, and the Applicant remained aggrieved, it is open to the Applicant to apply for a Judicial Review of the decision in the High Court.

Recommendation

65. I recommend, for the reasons set out in the Inspector's report dated 15th September 2023, that the applicant be informed that the application to register the land known as Two Fields at Westbere as a new Village Green has not been accepted.

Accountable Officer:

Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk

Case Officer:

Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

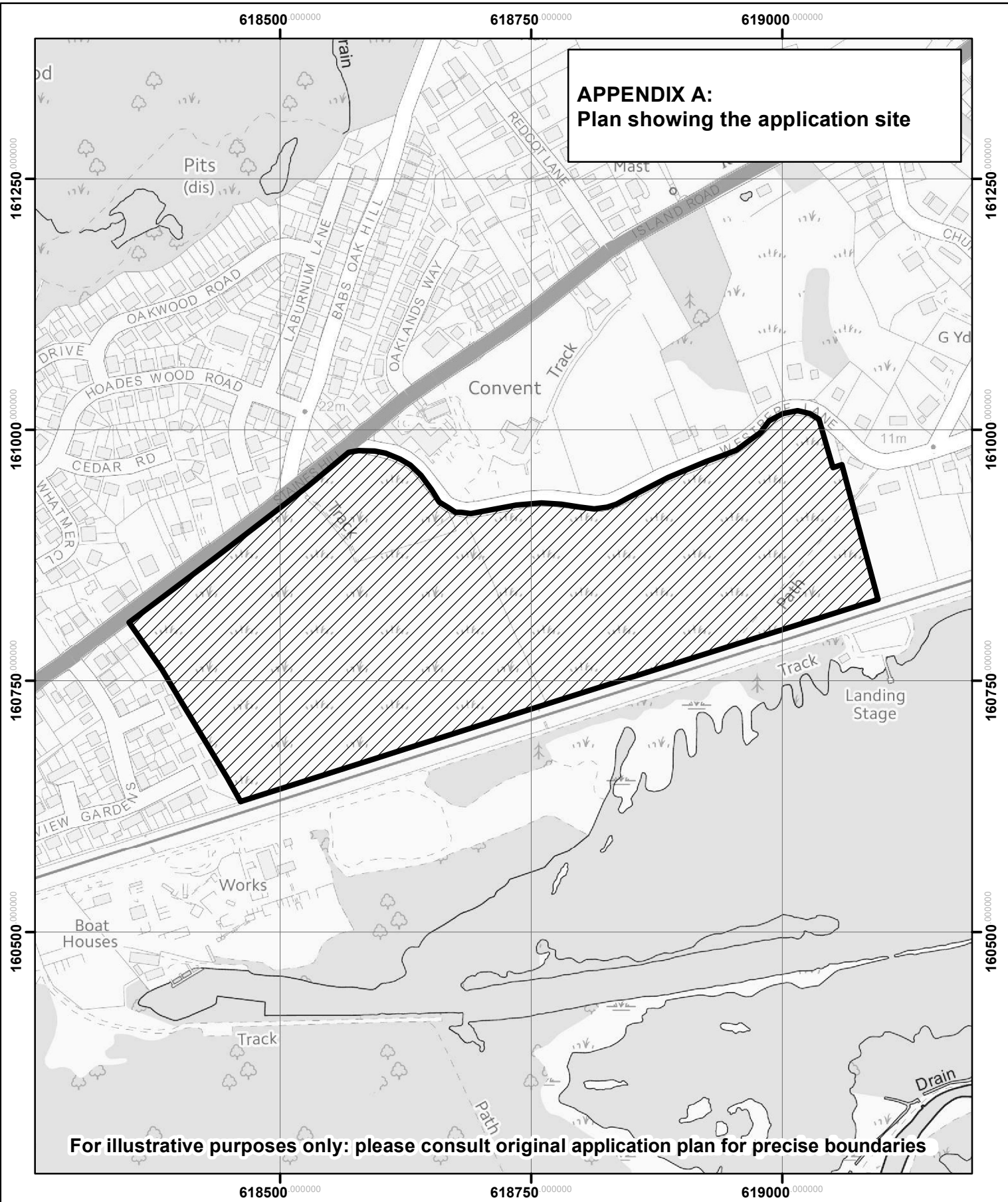
APPENDIX A – Plan showing Application Site

APPENDIX B – Aerial photograph dated 2009

Background documents

Inspector's report dated 15th September 2023

Applicant's comments on the Inspector's report dated 16th October 2023



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**Land subject to Village Green application,
known as Two Fields,
in the parish of Westbere (nr. Canterbury)**



**Kent
County
Council**
kent.gov.uk

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APPENDIX B:
Aerial photograph of the
application site (2009)

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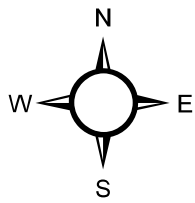
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For illustrative purposes only; please consult original application plan for precise boundaries

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Land subject to Village Green application,
known as Two Fields,
in the parish of Westbere (nr. Canterbury)

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TWO FIELDS, STURRY
TOWN OR VILLAGE GREEN APPLICATION
INSPECTOR'S REPORT

A: Introduction and Summary of Conclusions

1. I have been appointed by Kent County Council (“the Council”) to hold a non-statutory inquiry and to report to it on the application by Lady Elizabeth Laws on behalf of the Two Fields Action Group Sturry and Westbere (“the TFAG”) under s.15(2) of the Commons Act 2006 (“the 2006 Act”) to register land “south of Staines Hill (A28) Sturry between Fairview Gardens and Westbere Lane down to the railway line” (“the Land”) as a town or village green (“TVG”) on the basis that it had been used as of right for twenty years for lawful sports and pastimes by a significant number of the residents of the locality (“the Application”).
2. In short summary my conclusion on the user (which is the fundamental issue on this Application) is as follows.
3. The evidence demonstrates that the overwhelming preponderance of use of the Land by inhabitants of the claimed localities was on the main, clearly defined footpaths and a statutory footpath on the Land. That user is attributable to exercise of highway rights or putative highway rights across those defined routes and not use of the whole Land generally for lawful sports and pastimes. The evidence demonstrates that a small number of individuals used other parts of the Land more generally for roaming and for other activities. However: (1) this use was limited in frequency and intensity; (2) the number of individuals engaged in such use was not significant; and (3) this user was itself heavily constrained by the nature of the Land. The result is that there were no significant outward manifestations of such use with the result that a reasonable landowner would not have considered that there was any general user of the whole of the Land during the statutory period for lawful sports and pastimes or any assertion of any right to such user but instead that the user was attributable to the use of the defined paths as such.
4. I therefore recommend that the Application for the whole Land be refused on this point. This is not, to my mind, a remotely marginal case. Indeed, all the evidence seems to me to point in the same direction. Even those witnesses who attest to the widest use of the Land generally, accept that their use was unusual, exceptional or limited and not reflective of how the land was generally used. Even they tended to predominantly use the main paths.
5. Whilst it is not necessary to my recommendation, I find that the signs on the Bellway Land were effective to prevent any user from February 2018 being “as of right” and this would have been a separate reason for rejecting the Application in respect of that Land. The later email correspondence including with Lady Laws does not undermine their efficacy.
6. I do not think that the Application would fail on any of the other matters raised by the objectors but given my conclusions in paragraph 2 above that is of no significance. I therefore address the law and facts in respect of those other issues very briefly.

B: Procedure and Proceedings

Application and Objections

7. The Application was made on 7th November 2019 and identified the locality as the “Parishes of Westbere and Sturry”. The plans attached showed the boundary of the parish of Westbere and part of the boundary of the parish of Sturry to demonstrate the “locality”.
8. The Land is shown on agreed Plan 1 which I append to this Report (“Plan 1”). I will refer to the various points and paths shown on Plan 1 extensively throughout this Report.
9. The Land comprises 5 titles as shown on Plan 2. The land to the west edged blue on Plan 2 is the Bellway Homes Land (“the Bellway Land”) owned by it under title number TT60980 since February 2017. There are then two relatively small strips running north south (coloured green and purple on Plan 2) the first of which is owned by Mr Seyed Ali Saadat under title number K779440 and the second by Westbere Green Space Protection Limited (“WGSPL”) under title number TT65696. To the immediate east of the purple land are two parcels of land (edged red and yellow on Plan 2) owned by Mr Siamak Mahallati under title numbers K779400 (since March 2010) and K786421 (since June 1998).
10. Bellway, WGSPL and Mr Mahallati were served with the Application and with all subsequent documents. Mr Saadat may not have been aware of the Application or this Inquiry for reasons addressed below.
11. Bellway Homes Limited (“Bellway”) objected to the Application through its solicitors on 9th March 2020 raising a range of issues relevant to each stage of the statutory test (see below).
12. Mr Jamshid Mavaddat as authorised attorney for Mr Mahallati also submitted comprehensive objections through his solicitors on 9th March 2020. Amongst other matters this objection claimed that a trigger event had occurred under s.15C and sch 1A of the 2006 Act such that the Application could not be successful (“the Trigger Event Issue”).
13. TVAG responded to the objections in detail on 26th May 2020 and there was then a further exchange of representations from Bellway and Mr Mavaddat in July 2020 and from TVAG in September 2020.
14. Through this process there were no objections made by Mr Saadat. WGSPL supported the Application.

Trigger Event?

15. On 30th July 2020, Bellway also raised the Trigger Event Issue. That was the subject of various correspondence and legal Opinions and ultimately I was appointed by the Council to advise it as to whether there had been a trigger event. I concluded that there had not been. The Council accepted my conclusions on that and a challenge to the High Court by Bellway against the Council’s rejection of the trigger event was dismissed. The Court of Appeal refused permission to appeal. The result is that there was no trigger event and the merits of the Application now fall to be considered. The parties agree that the Trigger Event Issue is not directly relevant to the matters on which I have to report and I say nothing further about it.

These Proceedings

16. Following completion of the statutory challenge in respect of the Trigger Event Issue, I was appointed by the Council to hold a non-statutory inquiry and to report to it on the Application.
17. I held a pre-inquiry meeting (“the PIM”) on 20th March 2023 having first sent out “Inspector’s Note 1” (“IN1”) to TFAG and all landowners (I address service on Mr Saadat below). Based on my pre-reading and the lack of precision in much of the evidence with the Application, in IN1 I made clear that any further written evidence in support of the Application would need to particularise in advance the areas claimed to have been used, how they were used and the regularity and periods of use. I noted that the evidence should address the signs that Bellway claimed had been erected within the statutory period (see below) and that further documentary material would only exceptionally be admitted outside the proposed timetable which was then set out. I also asked that Plan 1 be prepared to be the agreed factual base for discussion at the Inquiry.
18. At the PIM, Bellway was represented by Mr Douglas Edwards KC instructed by Winkworth Sherwood Solicitors (who appeared for Bellway throughout) and Mr Van Den Broek appeared for TFAG. Neither Mr Mavaddat or Mr Saadat appeared. I satisfied myself that everything possible and appropriate had been done to bring the PIM to their attention.
19. Following the PIM, I issued Inspector’s Note 2 (“IN2”) confirming the approach to evidence in the light of the discussion at the PIM and the agreed timetable to be followed. I emphasised the importance of the timetables being complied with and the approach I intended to adopt to any late evidence to ensure fairness to all parties.
20. Bellway and TFAG complied with the timetable. The Council produced a core bundle containing all the Application material, all the user evidence forms (“UEFs”), all the objections and representations and the key plans including Plan 1. In Inspector’s Note 3 I raised some detailed questions about some of the documents which were then addressed in various email exchanges.
21. At no point during this process was there any engagement from Mr Mavaddat or Mr Saadat.
22. Shortly before the Inquiry was due to commence, I was informed that Mr Van Den Broek was very unwell and would not be able to attend on behalf of TFAG. Sir Stephen Laws KC (Hon)¹ and Mr McLean agreed to step in for him. That allowed the inquiry to progress as previously planned. I made clear that given the circumstances the inquiry process would be as flexible as possible whilst ensuring fairness between the parties. I am very grateful to Sir Stephen Laws and Mr McLean for stepping in at such short notice and for conducting the case on behalf of TFAG with such skill, professionalism and courtesy. Mr Edwards appeared for Bellway Homes. He provided in advance legal representations which set out (to my mind mostly accurately) the key issues which TFAG would have to address if the Application was to be successful. I am grateful to him and his team for their skill, professionalism and courtesy throughout the inquiry and for the flexibility they showed to accommodate the changed representation of TFAG.

¹ Sir Stephen made it clear that he was not attending as a barrister on behalf of the TFAG but as a lay supporter of the TFAG.

23. The Inquiry sat for three days from 5th June 2023 – with evidence from TFAG on the first two days including an evening session on the Tuesday. Mr Stacey gave evidence for Bellway on the Wednesday morning. Closing speeches including legal submissions were provided in writing and were presented on the Wednesday. Both parties had had full advance notice of the cases the other party was to make. I am satisfied that all parties were given a full opportunity to present their cases, that the last minute substitution of representatives for TFAG did not prejudice its case and that each party had a full and adequate opportunity to respond to the legal and factual points raised by the opposing party. In particular, I am satisfied that TFAG was able to fully present its case including legal submissions on a properly informed basis thanks largely to Sir Stephen’s involvement.
24. Because of the non-attendance of Mr Mavaddat and Mr Saadat, I asked the programme officer to set out in detail the steps which had been taken to contact them. It was clear to me that Mr Mavaddat on behalf of Mr Mahallati had had been given full notice of all stages in the process. It was also clear to me that all reasonable steps had been taken to contact Mr Saadat but that it had not been possible to locate him even going beyond the steps that would normally be regarded as sufficient. Site notices had been displayed, attempts to correspond with Mr Saadat using his last known correspondence address were made and when those failed, further steps were taken to try to find alternative address for him. There was, in practical terms, no further step the Council could sensibly take to locate him.
25. At the end of the Wednesday, I kept the inquiry open in order to receive comments from Bellway Homes on a new aerial photograph provided during the inquiry. I allowed TFAG to make short further comments in response. Their comments went far beyond what was agreed. I address this issue below. Cognisant that those comments have not been subject to testing in the Inquiry and go far beyond what was agreed, I have nonetheless taken them into account in reaching the conclusions of this report.

26. I then closed the inquiry.

Mr Mavaddat’s late contact

27. Mr Mavaddat contacted the programme officer by email on 14th June 2023 referring (wrongly) to the inquiry “due to be held tomorrow”. I am satisfied that Mr Mavaddat had been provided with notice of the inquiry commencing on the 5th June not least by email of 24th April 2023 and was aware of both the Application generally and the inquiry process specifically. On 14th June, he stated that he was unable to attend because of ill-health.
28. He claimed that “over the past several years I have displayed hundreds of notifications informing that my land is private property only to have the notices torn down and discarded within a couple of days”.
29. At my request, an email was sent to Mr Mavaddat giving him 7 days: (1) to explain why his evidence had not been provided in accordance with the directions; and (2) to provide such late evidence as he wished to be allowed to rely on.
30. He provided a covering letter, with some historic documents on planning, tree removal and diversion of the right of way and a large number of photographs of signs erected apparently on

the boundaries of his land in 2020. Those notices were not in the statutory period and will not have been effective to prevent the Application being successful.

31. The covering letter states that he has passed the land onto his nephew. I do not understand how this fits with Mr Mavaddat being the attorney for the landowner Mr Mahallati. In any event no explanation is given as to why his nephew could not have provided evidence or attended the inquiry.
32. Mr Mavaddat refers to many examples over many years of erecting signs but there is no contemporaneous evidence of this and it does not appear consistent with what was said in his original objections in which the only mention of notices or signs is in 2020.
33. The covering letter refers to works to erect fencing and gates in 2019. The earlier objection is clear, with dates, that those works occurred in 2020.
34. On the information available and absent: (1) attendance at the inquiry to give evidence and for it to be tested; and (2) the lack of any contemporaneous material to support what is now said, I do not accept the claim that there were notices displayed during the statutory period in respect of Mr Mavaddat/Mr Mahallati's land.
35. He criticises those supporting the Application and the process they have followed. However, as far as I can tell, they are just exercising their rights under the statutory scheme, have played a full part in the process and have made themselves available for cross-examination. I reject the suggestion that there is anything untoward in the motives for the Application and in any event that is not relevant to whether the statutory test is met.

C: The Legal Framework

36. S.15(2) of the 2006 Act sets out the relevant grounds for claiming the existence of a TVG:

***“(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.”***

37. The burden of proof is on the applicant – here TFAG. Given the importance of the issue and the impacts on the landowner, the evidence must be of sufficient clarity and certainty to justify a conclusion that the s.15(2) requirements are met: see Lord Bingham in *R(Beresford) v. Sunderland City Council* [2003] UKHL 60 [2004] 1 AC 889.
38. I consider that the nature of the user is the key issue on this Application and I thus address the relevant legal principles on it first and in most detail.

The Nature of the User

39. A key issue in this case is the nature of the claimed user of the Land. It is clear and accepted that there has been extensive use of defined and well-trodden paths over each part of the Land for

many years predominantly for walking and dog walking but also for “rambling”, jogging, cycling and horse – riding².

40. The legal question which arises is whether user of a path or paths on or traversing the Land qualifies as user of the whole for lawful sports or pastimes for the purposes of s.15(2). In determining whether the Land has been used for lawful sports and pastimes, should user of such paths for walking and dog-walking be taken into account? In other words is such user attributable to the use of a right of way or putative right of way or is it attributable to user of the Land as a whole as a TVG (or both)?

Public Rights of Way

41. A public right of way on foot is a highway right. Such rights can arise by long user of *defined* routes.
42. A public right of way can arise in respect of paths just for recreational walking and it is not necessary that they be routes between an origin and a destination: see *Dyfed Couty Council v. Secretary of State for Wales* (1989) 59 P&CR 275. Circular routes can thus be public rights of way.

General Roaming

43. It is not however possible to have a public right of way to “stray or meander over land or go where you like”: see *Oxfordshire County Council v. Oxford City Council* [2004] EWHC 12 (Ch) [2004] 2WLR 1291 (“Trap Grounds”) in the High Court @ [101]. The result is that if land is used for generally meandering or roaming not limited to use of defined routes that will be unlikely to be attributable to use as a right of way and will more readily be attributable to use as a TVG.

Use of defined routes

44. Subject to that, the question is in all cases how a reasonable landowner would have interpreted the user made of the land and in particular defined routes on the land. Where the user may be qualifying user for either a claim to dedication as a public highway or for a prescriptive claim to a TVG or for both, the critical question is whether the user of tracks or paths would have appeared to the reasonable landowner to be referable to use of the defined routes as such, general user of the land generally for recreational activities, or both.
45. Thus in *Trap Grounds*, a distinction was made between: (a) a situation where the track leads from A - B and users merely use the track to get from one point to another or where there is a “cul de sac” leading to an attractive viewpoint – readily referable to highway user; and (b) where users of the land do not confine themselves to the tracks but leave the tracks and play or meander leisurely over and enjoy the land on either side as an (undifferentiated) whole - more readily referable to TVG user. Where the evidence is ambiguous and consistent with the approach of Lord Bingham in *Beresford*, the inference should generally be drawn of exercise of the right less onerous to the landowner (the public right of way) rather than the more onerous (the right to use as a green).
46. The distinction between use of tracks as evidence of user of a right of way and users as a village green was considered by Sullivan J in *R (Laing Homes) v Buckinghamshire CC* [2003] EWHC 1578

² It is not my role to determine whether the requirements for a definitive map modification order (“DMMO”) are met here and I do not attempt to do so. I address only the evidence of “user” of paths - not whether that user meets the statutory requirements for a DMMO to be made.

[2004] 1 P&CR 36 @ [88] and following. There the Inspector had concluded that there was abundant evidence of continuous use by local people over the *whole* surface of the fields for 20 years [96]. People were not *just* “sticking to fixed footpaths but using it more informally and generally” [89]. It was contended by the landowner that dog walking around the perimeter of the fields was not relevant user for TVG purposes [90(c)] and should have been excluded from the analysis leading to the above conclusions.

47. In the context of a footpath inquiry, the applicants for a DMMO had contended that defined routes had been used and that people had not roamed at will [100] whilst the landowner had positively contended the dog walking was not along a defined route [98] to defeat the DMMO. Various footpaths were confirmed based on the extensive user of defined routes.
48. However the TVG Inspector held that there was no conflict or inconsistency between the defined paths found to be rights of way and the more general user of the fields for dog walking which was relevant to TVG status [101]. That must be right and I adopt the same approach.
49. The judge distinguished between the use for dog walking along rights of way or putative rights of way and use which would suggest to such a landowner that the users believe that they were exercising a right to indulge in lawful sports and pastimes across the whole.
50. In that context, the issue of dogs off the lead was addressed. Sullivan J did “not consider that the dog’s wanderings or the owner’s attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the limits of the footpath for informal recreation”: [104]. Even if *obiter*, that analysis is compelling and I adopt that approach too (in line with the approach of other Inspectors to whom I have been referred).
51. The judge held that the Inspector was obliged to grapple with the principal point made by the landowner in that case – that looking over the 20 year period walking including dog walking was the principal activity and that it was largely confined to the footpaths around the perimeter of the fields. If that use was discounted from the assessment the other limited (off track) activities did not meet the s.15(2) requirements – because the other user was not of such a character and frequency as to indicate an assertion of a right over the entirety of the 38 acres for 20 years. It was held that whilst the two rights may not be mutually exclusive [108] it was important to distinguish between them. On the facts there, the footpath use was substantial (as confirmed in the footpath inquiry), the majority of users stuck to the boundary paths and other activities off path were very occasional. The Inspector had relied on the use of the footpaths as such to justify the TVG registration but “to Laing as a reasonably vigilant and not an absentee landowner those walkers would have appeared to [be exercising] public rights of way not indulging in lawful sports and pastimes”: [110].
52. I thus direct myself that:
 - a. use of a defined route may be the exercise of a right of way or putative right of way over that route and may not appear to the reasonable landowner to be user of the land more generally for sports and pastimes;
 - b. such defined routes may be just for recreational purposes rather than to get from A – B and may be circular - the use of such routes would normally be attributable to the

public right of way or putative public right of way because that is how it would appear to the reasonable landowner;

- c. conversely where there is no defined route, and general meandering that will evidence relevant user for sports and pastimes rather than use of footpaths as such;
- d. in ambiguous situations, an exercise of the lesser right will be assumed;
- e. retrieval of dogs off lead does not indicate to the reasonable landowner that the dog walker was asserting a general right to use the land beyond the footpath; but
- f. use of footpaths as part of a more general use of the land - wandering off the paths, using the land for other activities and using the land more generally may be evidence of a general right to use the land rather than just the track in question.

Extent of the User

53. TVG applications vary from very small scale applications to the sort of scale in *Laing* above. Whilst it is not necessary to show that all parts of the Land in question have been actually used throughout the 20 year period or been accessible through that period, it is necessary to demonstrate that, addressing the issue broadly and with common sense, the whole has been used for lawful sports and pastimes throughout the period in question.

54. In *Trap Grounds*, only 25% of the relatively small overall area was practically accessible but looked at as a whole, it had all been used for lawful sports and pastimes. There, there was a main track but the user involved wandering onto subsidiary tracks and entering various glades and clearings within the scrubland – see Inspector’s Report cited by the House of Lords [2006] UKHL 25 [2006] 2 AC 674 @ [65].

55. It is obvious that in many TVG cases there will be vegetation and water bodies that are part and parcel of the whole and inherent to the character of the whole but which are inaccessible and which cannot be used for lawful sports and pastimes. When looked at as a whole, the reasonable landowner would recognise that a general user over the whole was being exercised [67].

56. In *R (Cheltenham Builders) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), Sullivan J held that the Inspector had correctly stated that the applicants had to demonstrate that the “whole and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years”. The Inspector accepted that the site was largely or in the main overgrown and inaccessible and thus it was unlikely that lawful sports and pastimes had occurred there but that it was “quite possible” that some of the claimed activities had taken place on the site. That, of course, was not legally adequate to meet the burden. The questions as to which activities claimed had in fact taken place and over how much of the site (since it was, in the main, overgrown) had not been resolved.

57. It is clear law that the user does not have to be continuous (all day every day) to meet the s.15(2) requirements (see e.g. *Laing* @ [95]) but it has to be of sufficient intensity and regularity to indicate to the landowner that there was a general user of the land for lawful sports and pastimes and not just occasional use by a few.

58. Especially for large sites, I thus direct myself that:

- a. it is necessary for the applicant to demonstrate that looked as a whole, the whole of the Land has been used for lawful sports and pastimes for the requisite period – and not just part or parts of it;

- b. that does not mean that all of it has to be in fact used or even accessible for use – as, for example, in *Trap Grounds*;
- c. a common sense approach is required – it is not necessary to see evidence that every part has been used but I have to ask myself whether I am persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years.

59. If the evidence shows that a smaller area of the Land than the totality of that covered by the Application meets the above requirements, I can recommend that just that area is registered. I have considered whether there are any such areas which meet the statutory test but have concluded that it is not possible on the evidence to identify any particular area where the statutory test is met – see analysis of the evidence below.

60. I now move on to address shortly the other legal principles.

The Relevant Period

61. The relevant period here is 8th November 1999 to 7th November 2019 (“the Period”). I will focus on user in that period. The user satisfying the s.15(2) requirements has to have continued up to 7th November 2019 if the Land (or part of it) is to be registered.

The Locality

62. I have to be satisfied that the claimed user has been by the inhabitants of an area that could properly be described as a “locality”. It is clear that a parish may be a locality for the purposes of s.15(2). A neighbourhood within a locality may be a housing estate or similar as long as there is a community of interests of the inhabitants. I do not need to examine the case law in detail on this because of the conclusions I reach below.

63. Bellway contend that the legislation means that TFAG has to: (1) identify only a single locality and that the Application by relying on two localities must therefore fail as a matter of law; and (2) demonstrate that the statutory test has to be met in respect of a single locality.

64. I agree with (2), it is clear law that the user relied on has to be by the inhabitants of a single locality: *Paddico 267 Ltd* [2012] 2 P&CR 1 although in what follows I make findings of fact even if both localities fall to be considered individually or cumulatively. As to (1), I agree that the naming of two localities in the Application is not in accordance with the relevant regulations or with *Paddico*. However, I consider that that does not invalidate the Application as Bellway contends. In all cases of breach of statutory requirements like this the focus is on what the legislature intended to be the consequences of non-compliance. Previous Inspector’s reports to which I have been referred have not addressed that issue. There is ample authority that the fact of a breach does not mean that everything which follows is invalid. In most cases, prejudice to other parties from the breach is likely to be highly relevant. Here none is claimed. I reject Bellway’s case the Application is invalid because two localities were named in the Application and do not consider that issue further. My conclusion on this point makes no difference to my ultimate recommendation. I reject the claim that to consider the case on the basis of the Westbere Parish and/or the Fairview Gardens neighbourhood would be unfair – I can see no route to unfairness and no such route is asserted.

User as of right

65. The main issue on the facts here is the effect of any signs erected on the Land.
66. Other issues which sometimes arise do not arise here. It is clear that there were no physical impediments to accessing the Land from outside its boundaries – there were multiple routes in and there were no locked gates or fencing to prevent access. Bellway expressly retained the routes in and through the Land when placing signs on their Land. There is no remotely convincing evidence that users were challenged by any of the owners. I therefore do not need to consider the law on those issues.
67. As to the signs, the interpretation of a notice and what instruction it conveys is to be considered objectively in a common sense and not legalistic way (see e.g. *Oxfordshire and Buckinghamshire NHS Foundation Trust v. Oxfordshire County Council* [2010] EWHC 530 (Admin) @ [22])³.
68. The fact that a notice is only in place for a relatively short period does not undermine its efficacy. A notice which would have been sufficient to indicate that the user is contested would not lose that effect by reason of being defaced or removed. In such circumstances the correct approach is to consider the effect of the notice had it remained in place undisturbed: see *Betterment Properties (Weymouth) Ltd v Dorset CC* [2012] 2 P&CR @ [60-63] cited with approval in *Winterburn v Bennett* [2017] 1 WLR 646 @ [30-36]. The cases relied on by TFAG do not accurately recite the law in this regard.
69. If notice is given that access is pursuant to permission of the owner, subsequent access is not “as of right” but permissive.
70. As long as a landowners do enough to make their position clear and to make use of the Land contentious, they are not required to take further action in the event that trespassory use continues.

Significant Number

71. Assessing whether the number of residents is “significant” is not a simple numerical exercise. The central question is whether the number of people using the land signifies that it is general use by the local community for informal recreation rather than occasional use by individuals or trespassers: see e.g. Sullivan J in *R (Alfred McAlpine Homes Limited) v. Staffordshire County Council* [2002] EWHC 76 (Admin).

D: The Evidence

72. In what follows all references to points and paths are to those shown on Plan 1. During the Inquiry: (1) two further points were identified – point “P”, south of point A where the blue dotted line turns to the east and point “H” where the statutory footpath stops running parallel to the railway and turns north east; and (2) a further path was added to Plan 1 running from point P west/southwest before turning south to point F – “Path PF”. I have annotated these on Plan 1 attached. Where I refer to paths, I use the names e.g. Path BC which is the path running from point B to C as shown on Plan 1. I refer to the statutory footpath CG via points H, D, E and F as the

³ Although para 22(5) must be read as subject to Winterburn.

“Statutory Footpath”. I refer to Paths AP, BP, BC, the Statutory Footpath, FP, EP and BD as “the Main Paths”.

73. A further path was referred to in evidence by some running north from point G broadly along the back garden fences of Fairview Gardens, then broadly north/north-west through the trees before meandering to point P – “the Western Path”.
74. References to pages of the Core Bundles are given as e.g “[CB/1/page number]”; to the bundle of aerial photographs as “[AB/tab number]”; to the exhibits of Mr Stacey as “[BSA/tab number/page number⁴]”; to the Further Evidence submitted by TFAG as “[FE/page number]”.

Pre-Statutory Period

75. Historically the Land comprised what were commonly referred to as Two Fields⁵ in arable use with what is called the Drove or Droveaway separating them and running north/south. The western of the two fields is broadly the Bellway Land and the eastern field is broadly the other 4 titles. I will refer to the land to the west of the Drove belonging to Bellway as the Bellway Land and the rest as the Eastern Land. There was a statutory footpath running as shown dotted blue on Plan 1 on the definitive map from 1952.
76. By 1990 the agricultural use had ceased but the whole of the Land was predominantly still grassed. From a 1990 aerial photograph [AB/3] there appears to have been at least the following well-defined and well-trodden paths - CB; BP; PG (in a broadly straight line) and PE⁶ - and this is consistent with the evidence from residents who used the Land at around this time. There was no physical impediment to use of the rest of the Land at this time and some witnesses talk of general recreational activities being carried out on the fields around this time which is consistent with all the surrounding evidence. A photograph taken from the upper floors of a house on Westbere Lane [FE/70] shows part of the Eastern Land as an open grassed area akin to a meadow.

Contemporaneous Material including photographs and aerial photographs

77. I have a large number of aerial photographs but I do not have the benefit of any expert evidence as to what they show. Whilst some features are obvious from them, others are less clear and absent expert evidence I am not in a position to reach firm conclusions as to whether e.g. what appear to be lines on the aerial photographs are paths, animal tracks or something else. I use the aerial photographs as a high-level indicator of how the land appeared at various points in time, the apparent extent of vegetation and the existence of obvious paths/glades and similar but I approach the aerial photographs with a considerable degree of caution given that: (1) it is not possible to tell from them how high, dense or impenetrable vegetation in particular areas was or whether areas under the tree canopy were in fact open or had understorey growth; and (2) how the informal “paths” which are just discernible on the aerial photographs would have appeared to the landowner on the ground.
78. I have been provided with a limited number of ground level photographs of people using the Land during the relevant 20 year period. There are some documents produced during the statutory period which provide evidence as to the state of parts of the land at points in time particularly in

⁴ Where the relevant page is paginated – the pagination is not complete in this bundle.

⁵ Even though some of the historical aerial photographs show it as comprising more than two fields

⁶ PE at this time does not appear to have followed the current alignment of it.

respect of the Bellway Land. Save for a very few photographs provided by witnesses for the TFAG, there is a marked paucity of contemporaneous material and photographs relating to the state of all of the Eastern Land.

79. The relevant statutory period starts in November 1999.
80. There are no ground level photographs at the commencement of the period⁷. However, there is no evidence of any significant changes to the land between 1999 and 2000 and an aerial photograph from 2000 was provided by KCC during the inquiry⁸. It shows most of the land still mainly as what appears to be grassland (save for the much more vegetated Drove and an emerging area of denser growth in the south-western corner, up part of the western boundary and along a short part of the southern boundary). A number of paths are visible in addition to the statutory footpath: Paths AP; PG, PB, BC and ones running north south either side of the Drove. Whilst I do not have the benefit of expert analysis of the aerial photographs it was agreed by those present at the inquiry that there are also the following less distinct paths visible on this 2000 photograph: (1) from Path BC opposite the western most house on Westbere Lane in a broadly south easterly direction to the statutory footpath; (2) south from Path PG to the Statutory Footpath at about F; (3) from that path, in an L shape to broadly D; and (4) from P to the A28 further west than A. Another layer down there appear to be some just identifiable indications of possible routes across the grassland at various points. I conclude that there was a network of routes criss-crossing the land at this time. This is consistent with the oral evidence I heard from residents of there being a network of paths, which changed over time, with variations in how well defined they were. It also appears consistent with the oral evidence that: (1) much of the land could be readily accessed off the paths; (2) the land was largely flat and unvegetated; and (3) games could be (and were) played on parts of the land including occasional informal football.
81. In 2001, an investigation into the agricultural classification of the Bellway Land was undertaken [BSA/7/127]. It distinguished between the generally open central area and the perimeter “shelter belts and dense scrub”. However, the land had become “overgrown” with areas of brambles and small trees”. It notes that the Bellway Land is “currently heavily trespassed” with many dog walkers seen. That is consistent with what the UEFs claim.
82. A key point is that even by this point it is clear that what were previously arable fields were gradually becoming more heavily vegetated.
83. A ground level photograph taken in the Eastern Land in 2001 (apparently in winter) [FE/87] shows Path CH looking south-west towards the railway and illustrates how the increased vegetation manifested itself at ground level. All of the land either side of the path appears to be dominated by tufts of long grass. No informal paths off the main path are visible and the land either side of the path does not appear to be readily useable for sports or recreation. A further photograph taken in late 2003 [FE/68] shows the same path but looking in the other direction – the grasses on either side of the path are several feet high and are not realistically penetrable. The grassed area is not realistically capable of any use and there is no indication of any informal paths through it on the photograph. All the other photographs from about this time of this area at FE/68 appear to show use of paths with limited ability to venture off the paths.

⁷ It is agreed that the aerial photograph at [AB/4] cannot have been from 1999 despite what is said in the index

⁸ To replace an aerial photograph provided by BH which was wrongly thought to have been from 1999

84. Aerial photographs from 2003 - 2007 [AB/5 – 6] are not as clear as the 2000 aerial photograph referred to above and smaller footpaths are not readily discernible on them but the vegetation in the south-west and west is expanding and clearly becoming more dense and other vegetation is emerging across the land most notably near points B and F but also more generally.
85. There are numerous aerial photographs from 2008 [AB/8]. They all show some well-established paths - AP, PB, BC and apparently BD. A further path (PE) runs on broadly the same route as shown on Plan 1 although it is not clear whether it is on the same alignment as now throughout its length. PF is just discernible in places. PG is no longer visible. There appears to be a path from P to the A28 west of A. Whilst there are some “lines” in the area to the north west, it is not possible to discern any continuous paths there and absent expert evidence as to what those lines are, I do not think it is possible to infer from the aerial photographs alone that they are informal recreational paths or how they would appear to a landowner on the ground. On the basis of just the aerial photographs, I cannot be satisfied that there were any other paths west of P.
86. It appears that the 2008 aerial photographs centred on the Bellway Land and my caution above as to what they show thus applies if anything even more strongly for the land east of the Drove. It is not possible to discern any obvious paths other than those referred to above here although I do not give this much weight given that even the heavily used statutory footpath between C and H is difficult to make out on these aerial photographs.
87. It is not possible to discern any large open unvegetated areas from the aerial photographs although that is not to say there were none.
88. In 2008, the Bellway Land was promoted for a housing allocation supported by a detailed evaluation of its suitability for allocation [BSA/7/95]. It confirms the informal dog walking on the land [BSA/7/99]. Various ground level photographs were provided. Viewpoint 2 – BSA/7/133] shows a part of the central area of the Bellway Land [BSA/102] with high grasses and bushes and clearly not readily accessible. Marrying that viewpoint up with the 2008 aerial photographs, there is no reason to conclude from the photographic material alone that that viewpoint was not typical of the central area of the Bellway Land at that time. Viewpoint 3 is from about point F looking towards point G. It shows dense vegetation to the north of the statutory footpath without any obvious gaps in the vegetation. Again, marrying that viewpoint up with the 2008 aerial photographs there is no reason to think from the photographic material alone that that viewpoint is other than representative of the density of vegetation on the southern boundary of the Bellway Land between points F and G.
89. The local planning authority evaluated the Bellway Land for an allocation in response to the above document shortly thereafter. It included a photograph showing the density of the vegetation [BSA/9/176] and described the land as “vacant and overgrown” with “dense undergrowth and numerous trees” [BSA/9/177]. Google Street View photographs from 2009 looking from point A into the Bellway Land shows the open areas to be heavily overgrown and apparently largely impenetrable [BSA/14/198 and 204].
90. There were no equivalent contemporaneous reports or photographs of the Eastern Land at around this time.

91. Aerial photographs in 2011 [AB/10-11] show the same broad picture as described above in 2008 but with the density and extent of vegetation being notably greater than in 2008. The same paths are generally discernible although Path PF is not readily identifiable along much of its length.
92. In a statutory declaration dated 13th January 2017 [BSA/6/93] the former landowner of the Bellway Land described the land in around 2011 as being “extensively and heavily overgrown with dense vegetation”. There had been no maintenance by him in terms of cutting back vegetation for 15 years. That is consistent with all I have seen with the gradual increase in vegetation over the years and the extent to which the Bellway Land had become overgrown by 2017.
93. The statutory declaration goes on to describe the footpaths on the Bellway Land. The former landowner claimed that the informal routes identified by him at BSA/6/94 were “not clearly delineated as being used due to vegetation growth” in 2011. I do not think that can be correct at least in respect of Paths AP, PB and PE but I accept that even the defined paths would have been heavily constrained (and even overgrown) in places. There is no evidence of the historic gates he refers to impeding access in any part of the statutory period.
94. Aerial photographs in 2012 – 15 [AB/12 – 14] tell broadly the same story. There is no clear evidence of any paths west of point P on the Bellway Land (except perhaps part of Path PF). The Bellway Land is becoming increasingly heavily treed and vegetated. Google Street View photographs from point A into the Bellway Land in 2014 show the “open areas” to be even more overgrown than in 2009 and apparently largely impenetrable [BSA/14/199 and 206].
95. The same paths are discernible on the Eastern Land as in 2008. The extent of the trees is notably less than on the Bellway Land but there is no clear evidence from the aerial photographs of a significant number of other informal paths criss-crossing that area.
96. In 2015, an initial ecological assessment was undertaken of the Bellway Land [BSA/10/182]. It described that land as being dominated by scrub and secondary woodland with smaller areas of coarse grassland and ruderal vegetation adjacent to the A28. Discrete patches of short rabbit grazed grassland were present within a mosaic of coarser grassers, ruderal vegetation and scrub. In the grassland, dense bramble was developing. Various photographs of the coarse grassland are provided in the report. There are small patches of rabbit grazed grassland interspersed with large areas of ruderal vegetation, bramble, dense areas of trees and bramble/scrub – all largely for all practical purposes impenetrable and unusable by the general population⁹. I have no reason to doubt that these photographs are other than broadly representative of what was seen at that time on the Bellway Land.
97. Google Street View photographs from point A into the Bellway Land in 2016 show the “open areas” to be heavily overgrown and apparently largely impenetrable [BSA/14/200 and BSA/15/207].
98. An aerial photograph in 2017 shows the same overall picture with the vegetation becoming yet more dense but with broadly the same footpaths discernible. The Bellway Land is now heavily treed across most of its extent with notably fewer trees in the area around Paths AP and PB. The

⁹ I return to the specific evidence of use by individuals of these areas below

Eastern Land is notably more densely vegetated than previously with the un-treed areas becoming more limited over time.

99. In 2017, Bellway undertook its own assessment of the Bellway Land which included a number of photographs. They show the broad extent of vegetation coverage. Looking east from AP, towards a “more open area”, view 2 shows grassland with tall grasses making this area largely incapable of use for all practical purposes. The path AP is shown passing through dense and largely impenetrable vegetation on either side. View 7 shows a treed area - which is largely devoid of understorey growth and thus apparently accessible and potentially useable. This all seems consistent with the general position described in the 2015 ecological assessment.
100. Works were carried out to the Bellway Land in January to February 2018 (“the 2018 Works”) to clear “all bramble, scrub and small trees” [BSA/19/233] whilst leaving the paths AP and PE in situ¹⁰. Photographs were taken in April of the extent of these works [BSA/21/235] which were very extensive. Branches were laid out by persons unknown to create defined paths through the area.
101. There is a set of ground level photographs in August 2018 in respect of the Bellway Land [BSA/12/189ff] which show the extent of the recovery of much of the vegetation even in just the short period from the February of that year. The vegetation shown in the photographs was dense and appears largely impenetrable. It is not known where all these photographs are taken from and it is not therefore possible to be sure that they are representative of the whole. Other photographs at the same time [BSA/22/240 and following] show less regenerated vegetation which would have been easily penetrable and large areas appear potentially accessible.
102. Subject to the 2018 Works, the 2018 aerial photographs show the same overall picture with the vegetation elsewhere becoming yet more dense but with broadly the same footpaths discernible. The Bellway Land is more open than previously given the 2018 Works particularly in the central and northern parts of it. The Eastern Land is notably more densely treed and vegetated than previously with the untried open areas becoming more limited over time.
103. On 5th October 2018, signs were erected at points A, B and C on the Bellway Land. None was provided at points D, F or G. They stated in capitals that “This Land is private property. The routes are not a public right of way. Any access is granted only by permission of the landowner”. The photographs of the signs *in situ* [BSA/34/283] show the extent of the vegetation immediately to the side of the paths at points A and E but also how open the understorey area was at point B. The signs were not in place for long before being removed by persons unknown.
104. It is clear that the signs were in place and were seen by a significant number of those using the Land – see the UEFs generally.
105. On 18th July 2019, the Westbere Parish Council applied for a Definitive Map Modification Order (“DMMO”) to add footpaths AP, PE, BD, PB and BC to the definitive map on the basis that they were defined paths meeting the statutory requirements for dedication. A large number of

¹⁰ There is a dispute as to whether the works required a felling licence but that issue is not for me to resolve and does not go directly to the matters I have to report on.

UEFs including from many of the same people who prepared UEFs for the current Application were provided describing the recreational use of those paths for walking including dog walking (often described as a circular walk). The overwhelming predominance of that evidence is that the paths were used clockwise or anti-clockwise either entering from:

- a. Point C and then going via H,D,E,P and B then back to C (or H/D/B/C);
- b. Point G and then going via E,P,B,C,H,D and E then back to G (or a shorter route – E/P/B/D); or
- c. Point A and then going P,B,C,H,D,E and P then back to A

with various permutations of these routes. There is some evidence in the UEFs of other routes also being used in particular on the Eastern Land. Some refer to signs erected on the Bellway Land in 2018. It is not for me to assess whether the DMMO application meets the statutory tests but for present purposes the key point is that there was substantial evidence of regular use of the Main Paths for recreational walking including with dogs through the Land. I note that there was no application for a DMMO to reflect path PF or the Western Path. Given the case law analysed above, this extensive user appears predominantly to go to whether there are public rights of way over on defined routes over the Land and not to the separate question as to whether the whole was used for lawful sports and pastimes.

106. In August and September 2019, Bellway carried out work to fell trees in a defined area pursuant to a felling licence¹¹. The works were extensive: see e.g. BSA/26/256; BSA/29/264 and BSA/33/272 and following and resulted in extensive correspondence between local residents, Bellway and the Forestry Commission. On 10th September 2019¹², Bellway responded so far as relevant stating that the land was private (and signs had previously been erected to that effect – presumably those in 2018) but recognising that the public used the land but “do so at their own risk”. It is notable that there was no suggestion in this letter that public access was prohibited.

107. On 19th September 2019 signs were re-erected with the same words and in the same location as in 2018. They were removed within a few days by persons unknown. A gate was erected at point A but allowed for pedestrian access round it. It too was removed within a few days. An email from Bellway of 19th September stated that the land was private “and there are no public rights of way. However, we do understand that the land is accessed by the public but this remains at their own risk”: FE/24. Bellway wrote on 3rd October to Lady Laws confirming that the new gates were intended to have pedestrian access and “it is certainly not our intention to prevent residents from utilising the fields for recreational purposes”. On 25th October Bellway confirmed that it had “no intention of restricting access...”. I return to the significance of this under the consideration of “as of right” later.

108. On 7th November 2019 the current Application was submitted.

¹¹ There is a dispute as to whether the works were carried out in accordance with the terms of the licence granted by the Forestry Commission but that issue is not for me to resolve and does not go directly to the matters I have to report on.

¹² The document at BSA/31/267 is only a draft and was not actually sent at that point but was sent out with substantially different wording on 10th September [FE/20].

The Application and supporting evidence including User Evidence Forms

109. The application was accompanied by 70 UEFs (some on behalf of families and not just individual users of the Land). A helpful summary of the UEFs was provided along with a timeline which showed the periods to which each UEF referred. A plan showing where the signatories of the UEFs lived was provided. It shows that UEFs were overwhelmingly provided by residents of Westbere Parish to the east of the Land and of the area referred to as Fairview Gardens in Sturry Parish to the west with a small number in Sturry Parish to the north of the A28.
110. More detailed evidence from a number of Westbere residents was included [CB/1/31]. It is notable how the focus of most of that evidence is on use for walking predominantly on the Main Paths. Only a few UEFs refer to other user which may have been off the Main Paths – e.g. use for remote control cars; painting; blackberry picking and one refers to running across the fields.
111. The “Justification” referred to various uses alongside the farming use in the 1980s. Those are not relevant to the issue I have to address. It went on to note that the vegetation on the Land gradually established itself “so that the Land became woodland with some open glades and pathways that criss-cross the land.” The Land is “frequently used by local people for observing and enjoying the proximity of wildlife” and collecting fruits, sketching and bird watching. It acknowledged the placing of signs in 2019 but claimed it was unclear what area the signs were referring to. It described the lawful sports and pastimes on the Land principally by reference to the use by walkers and dog walkers but there is included: (1) a photograph of children at play possibly off the paths; and (2) a photograph of dogs off the lead and off the paths.
112. Analysis of the UEFs at [CB/1/43] shows that of the 70 UEFs, 56 refer to walking, 41 to dog walking, 21 to foraging, 4 to picnics, 32 to nature rambles, 13 to children playing (which covered “bear hunts”, hide and seek and climbing trees additional to flying kites/playing with remote control cars and similar – all of which were likely to have been off the Main Paths at least to a significant extent) and 6 to photography and sketching. Other uses were minimal and I find that jogging, cycling and pony walking were overwhelmingly likely to have predominantly been on the Main Paths.
113. The Justification was updated in January 2020 with now a total of 88 UEFs. Analysis of those UEFs shows the main categories referred to are 68 to walking, 51 to dog walking, 28 to foraging, 5 to picnics, 40 to nature rambles, and 20 to children playing.

TFAG Further Evidence and Witness Evidence

114. The strong initial impression I got from the Justification and the UEFs was of the Land being predominantly used for walking and associated/ancillary activities on defined paths - such as picking fruits, observing wildlife and rambles. It was for that reason that I indicated in IN1 referred to at para 17 above that any further evidence would need to be particularised as to the areas claimed to be used, how they were used and the regularity and periods of use. On a preliminary view it seemed to me that a more careful delineation of uses to distinguish between uses of the Main Paths as such and user of the land as a TVG was required. I remain of that view. During the inquiry, I asked questions specifically aimed at this issue to seek to understand the extent of user other than that which would normally be attributable to user of a path as such.

115. In what follows I only refer to what I consider to be the most salient points from the evidence. Where I have referred to evidence from one witness I do not refer to similar evidence from later witnesses. Further I have found it appropriate to address evidence from later witnesses more shortly as the issues will by then have already been identified.

Paul Glover

116. Paul Glover lives in Westbere and provided a UEF for the Application [CB/1/284] and for the DMMO Application [CB/2/680] and Further Evidence [FE/36]. He was born in 1969 and used the Land throughout much of this childhood. During the statutory period he has regularly used the land mainly for dog walking and general walking following a fairly standard route – CBPFC or CBDG. He said that “we do not necessarily always stick to paths” and “we will wander off” the “well defined tracks” although he stated that “you have to be quite adventurous - more than most – to wander off the paths.” He accepted that the Bellway Land in particular was “pretty impenetrable” and that it was “always more difficult to access west of “P””- “an average person wouldn’t veer off the paths because no reason to do that; not an obvious desire line and far easier to stick to the paths.” He noted how his dog often ran off lead through the undergrowth off the paths and that he sometimes had to go and retrieve it. The only reference he made to seeing other people on the Land was on the paths mainly for walking but “I have seen other people using [the Land] with bikes and a horse once”. His aunt walked on the footpaths every day.

117. As to other use off the main paths, he described the Land as his son’s playground – in particular he had a distinct memory of his son playing in the woods because when 16, he lost his mobile phone and they had to search for it. His family also foraged for blackberries in two distinct areas one on the Bellway Land and one in the Eastern Land both well off the Main Paths. He said he spent about 25% of his time on the Land wandering off the Main Paths.

118. I found this evidence to be clear, measured and consistent. I find that: (1) he and his family predominantly used the Land for recreational walks (with his dog leaving the paths and having to be retrieved at times); and (2) he and his family did not confine their use to the Main Paths especially in the Eastern Land but that in using the land more generally they were being “more adventurous” than most and he was not aware of significant use by others of the Land off the main paths.

119. His evidence was inconsistent about whether he had seen signs and I did not find his answers in cross-examination about that inconsistency convincing but ultimately he accepts that he was aware of a sign being in situ for a period in 2018.

Glanville Glover

120. Glanville Glover provided a UEF in the DMMO [CB/2/670] and further evidence [FE/62]. He has a life-long knowledge of the Land having lived in Westbere since his birth in 1943. In respect of the statutory period, he used the Land for dog walking – one of his dogs knew the paths so well that on one occasion when the dog had gone missing, he found it on the paths a significant distance from the house even though the dog was partly blind and deaf. He followed defined routes daily often with his sister until her death in 2016 - and they had preferred shorter and longer routes. His dogs would regularly run off the paths into the woods and undergrowth. He described a perimeter walk including the Western Path. I walked this well defined path in the woods on my site visit - up to the point where it had been erased by the 2018 or 2019 Works which is consistent with Glanville Glover last using this path in around 2017. He would wander off

the Path CH to the north to his favoured blackberry spot towards the Drove. His historic hop and grass picking predated 1999. He was aware of the Bellway signs in 2018.

121. I accept all his evidence. The overwhelming thrust of his evidence in the statutory period was of use by him of the Main Paths for walking especially dog walking. He wandered off the paths at times predominantly for blackberry picking in the Eastern Land between path CH and the Drove. He did not refer to any significant use by others of the Land other than on the Main Paths.

Steve Stanley

122. Mr Stanley provided a UEF on the Application at CB/2/529 and further evidence at FE/82. He can only give evidence from 2018 being a new resident of Westbere. He predominantly used the Main Paths for walking and his further evidence focusses on the use of the Paths. He did not venture into the Land west of point P.

123. He is an ecologist and so has a particular interest in wandering through the woods - "what is open to me may not be regarded as open to other people" he said accepting that access was often difficult off the paths especially on the Bellway Land until the 2018 Works (which must have occurred very shortly after he moved in). He had picnics on the Bellway Land 3 or 4 times after the 2018 Works sitting on the tree stumps left after the works.

124. As to use by others, his written evidence refers only to other walkers which, in cross-examination, he confirmed was predominantly on the Main Paths. Orally he referred to informal paths criss- crossing the Land and being relatively well used. He had seen other people on land to the west of PF after the works. He referred to people being "all over the Land – not just on footpaths" although little detail was provided either in writing or orally and I repeat that he accepted in cross examination that the predominant user he observed by others was on the Main Paths.

125. I accept his evidence. The overwhelming thrust of his evidence both oral and written was as to the use of the Main Paths by him and others for walking and experiencing wildlife. As an ecologist he would go off the Main Paths at times to observe wildlife (including reptiles and birds). Most use by others he observed was on the Main Paths. He was clear that the area to the west of Path PF and the north-west area was inaccessible until the works and he never ventured west of Path PF. As to the southern boundary just north of the statutory footpath, as an ecologist he confirmed my lay impression that the vegetation alongside the statutory footpath was too dense and present year-round to be generally capable of being crossed other than where paths led through this. The main such paths started at points D, E and F (although as Glanville Glover stated and as I could see on site) adventurous people could access the land at various other points from the statutory footpath. He did not see any notices and evidently considered that he had a right to trapse freely over the whole site.

Wayne Murray

126. Wayne Murray provided a UEF on the Application at [CB/2/434] and further evidence at [FE/80]. His further evidence refers only to walking on the Land. He has lived in Westbere since 1986 and is chair of WGSPL referred to above. Since 2012 he has used the Land predominantly for walking his dogs. He referred to the various footpaths meandering through all the Land but stated that he did not confine himself to the Main Path often having to leave the paths to retrieve the dogs "which can be quite an exercise". He states that the Bellway Land was significantly less

accessible post – the vegetation growth after the 2018 Works than before – urging me not to think what I saw on the ground now was representative of what was there previously. It was possible to access the Eastern Land north of path CD although he did not give details of the extent of the extent to which he or others did so. It was more difficult to leave path DG except at E and F. Unprompted he referred to other users of the Land and only referred to dog walkers *on the paths* and volunteered that he was not aware of other uses save for wildlife watching *from the paths*. In cross examination he accepted that his use and that of others witnesses by him was predominantly walking and related activities on the Main Paths with dogs off the lead venturing off the paths and sometimes having to be retrieved. That summary “encapsulated how the land has been used”. He does not recall the Bellway signs but noted that that was “probably explicable by the routes I took”.

127. I accept his evidence and do not need to elaborate.

Jane Jones

128. Jane Jones provided a UEF on the Application at [CB/1/348] and Further Evidence at [FE/75]. She has lived in Westbere since 1996 and is very familiar with the Land. She regularly uses two routes following the main paths regularly meeting other people on her recreational walks. She referred to a loop from G northwards nearly to the A28 and then to P but confirmed what I had seen on the site visit that it was now a dead end. She thought it had been erased before the 2018 works but was adamant that before that she used the route regularly. She accepted the Bellway Land west of P had been inaccessible since summer 2018 and that across the Bellway Land it was not now practicable for her to leave the Main Paths but explained in detail how previously it had been readily accessible in places and possible to go off the Main Paths. Her blackberry picking was from the Main Paths. She observes nature especially bird life as she is walking on those paths. She paints watercolours on the Land. She referred to her children using the Land including for occasional kite flying during the statutory period but “before the trees grew”. The bank to the north-west of the Bellway Land had been used by her children for tobogganing on the rare occasions when they were young on the rare occasions when there was snow. She was aware of the signs in 2018 and 2019 – and abided by them for a few days until she noticed that everyone was ignoring them and she reverted to the use she had been making for many years.

129. I accept her evidence and do not need to elaborate. The fact that she regularly used the Western Path but that that path is not readily discernible on most of the aerial photographs confirms the need to be cautious as to what one can and cannot see on the aerial photographs. I accept that there was a Western Path available for use for much of the statutory period.

Michael Wakefield

130. Michael Wakefield lives in Westbere and provided a UEF on the Application at [CB/2/558] and on the DMMO at [CB/2/754] and further evidence at [FE/83]. He has known the Land for 39 years. His children born in 1980 and 1986 used the Land extensively in their childhood and exercised their pet Shetland pony on the Eastern Land. The Eastern Land was becoming overgrown by 1999 but was still accessible including for use by the Shetland in the period 1997 – 2003. The family along with “lots of others” went blackberry and apple picking off the Main Paths in the southern part of the Eastern Land and picked sloes in the northern area of the Eastern Land “before the trees grew in that area”.

131. He had witnessed ponies perhaps from the local pony club using open spaces on the Bellway Land in the early 2000s when “it was much more open” than later – but then ceased when it was “no longer a field”. In cross examination he accepted this use may have been largely contained to the Main Paths although his recollection “is not very clear”.

132. In the past, he and his family explored the Land generally including the Bellway Land looking for plants, including orchids and birds and not limited to viewing from the Main Paths. He stated that “In the early years could stray all over the land” but accepted that latterly “maybe the majority would confine themselves to paths...”.

133. The predominant user he referred to was of dog walkers on the Main Path but with the dogs having to be retrieved on occasions off path.

134. He was aware of the signs.

135. I accept all his evidence and do not need to elaborate further.

Alison Grubb

136. Alison Grubb provided a UEF on the Application [CB/1/295] and on the DMMO [CB/2/689] and further evidence [FE/66]. She moved into Westbere in 1994 and her house overlooks the eastern field which was still being used for haymaking when she moved in. She considered the Land to be a “wonderful open space” and a “huge garden” for Westbere. She regularly used a choice of routes on the Main Paths – “easier to stay on the well trodden paths”. In around 2001, the Eastern Land was largely flat with limited vegetation but even then she accepted that “people would concentrate usage on the paths”. Whilst nature was “very quick to take over”, she would occasionally go for “adventures” exploring with her grandchildren predominantly in the Eastern Land.

137. Until the 2018 Works it was possible to access the Bellway Land off the Main Paths especially from the Statutory Footpath. It was “not like that now- it is mostly impenetrable to get from statutory footpath”. She does not recall seeing people off the Main Paths on the Bellway Land but has strong recollection of regularly seeing walkers on the “wonderful circular” paths. She regarded BSA/7/133 as “very misleading” because whilst it was overgrown with rough terrain there were some accessible areas and paths through the Bellway Land. Her blackberry picking on the Eastern Land was mainly from the paths or “stepping off” the paths but she recalls going into clearings 30 -40m off the paths in the eastern field.

138. She accepts that (despite inconsistencies in her evidence) she saw the notices on the Bellway Land.

139. I accept her evidence although I do not think BSA/7/133 is “very misleading”. I accept that there were some limited accessible areas and a number of Main Paths through the Bellway Land. I do not need to elaborate further.

Jean Boyce

140. Jean Boyce provided a UEF on the Application [CB/1/207] and on the DMMO [CB/2/630] and further evidence [FE/51]. She first came to Westbere as a visitor in 1968 and moved to Westbere on retirement in 1994. Her grandchildren would use the Land when visiting on holidays (her eldest

grandchild was about 10 in 1999 and her youngest is 12 now) including originally for football (although that is not possible any more) and other games (water rockets and similar). She has spent many happy hours picking blackberries and plums on the Land with the best spot for blackberries being a large open sunny area in the middle of the Bellway Land. Until the 2018 works, she would leave the path to “get behind the blackberry bush to get the best blackberries”. She regularly used the Main Paths for dog walking including with her daughter’s dog on her regular visits.

141. I accept her evidence and do not need to elaborate.

Linda Horner

142. Linda Horner provided a UEF on the Application [CB/1/322] and further evidence [FE/74]. Her “memories” were included in the Application at [CB/1/31]. She moved into Westbere in 2009 - as a keen runner she wanted somewhere safe to run and used a few regular circuits on the Main Paths on the Land. Seeing other people on the Main Paths made it feel safe. She “sometimes saw children playing on the Land and rummaging in the woods”. The Main Paths she used were always well maintained, well defined and not overgrown. She generally did not get off the Statutory Footpath between points D and G except at Points F and E although she said it was possible to get across the vegetation at various other points at the right time of year - “a bit marshy but could do it” “wearing wellies” and she did so once or twice. She had to “battle her way” through the vegetation to do so.

143. I found it difficult to understand why anyone would go through the “battle” of entering the Bellway Land from the Statutory Footpath other than at points G, E, F or D given the existence of clear paths into that land from the Statutory Footpath at those points. In any event, her evidence shows that any such access to the Bellway Land would be wholly exceptional, would involve battling through vegetation and would not be readily evident to the landowner as a user for lawful sports and pastimes.

144. Subject to that, I accept her evidence and do not need to elaborate.

John Wingfield

145. John Wingfield provided a UEF on the Application [CB/2/598] and further evidence [FE/88]. His “memories” were included with the Application at [CB/1/34]. He moved into Westbere in 2006 and has known and used the Land since. His children learnt to cycle there “mainly on the paths” (2008-2010¹³) and his two boys later engaged in mountain biking on occasions (“not a weekly occurrence” but “down there mostly every other day in the school holidays” from about ages 11 – 16.) again predominantly but not exclusively on the Main Paths and sometimes going off them on the Bellway Land over the rougher land. They would play in the woods particularly in the south east part of the Eastern Land making camps (2012 – 14), sometimes climbing a particularly good climbing tree (an oak) and playing with their remote controlled cars there (from 2010 about once a months and “they still do it” although less often). When older they would use the Land with friends.

146. The best blackberrying was just to east of EP on the Bellway Land up to 20m off the path.

¹³ I noted two different dates for this from Mr Wingfield’s evidence -

147. The vegetation has “got a lot more densely packed” and “accessibility got more difficult over time”. Since 2014 he has mainly used the Land for dog walking. On one occasion he tried to find a cuckoo in the woods. He saw the Bellway signs.

148. Mr Wingfield was challenged about alleged inconsistencies between the use of the Land claimed in his UEF and in his further evidence and oral evidence. I do not accept that there are any significant inconsistencies. When reading his evidence as a whole including with his “memories” a clear and largely consistent picture emerges of his and his family’s use of the Land. I accept his evidence and do not need to elaborate further. His evidence seems to me to be the clearest as to uses off the Main Paths. His children clearly used the Land generally as their “playground” and the family did not limit themselves to the Main Paths. In this they were the exception to the norm in terms of the way they used the Land and even for them the generalised user was for a short period which ceased many years ago.

Lady Elizabeth Laws

149. Lady Elizabeth Laws provided a UEF on the Application [CB/1/363], Further Evidence [FE/77] and was the lead author of the Application and its Justification. She was the secretary of the TFAG and until 2021 was responsible for pulling all the evidence from others together. She lived in Westbere from 2014 – 2021.

150. She used the Land at least weekly – predominantly at weekends whilst working. She got a dog in 2018 and from then did two walks a day. She would use the various Main Paths and “sometimes I would head off on the minor tracks”. She did not “stick to paths – criss-crossed the grounds; and visited areas to see what was growing”; “I would be on main paths and then wander off across the land”; “staying on paths is boring”; “I like to wander”; “the whole attraction of the area was that I was free to go where I liked”; “there were a lot of areas where it was suitable to walk off the paths”. She did not think the photographs at BSA/133 and following were representative of the central area of Bellway Land and did not think they showed the area in the photographs to be impenetrable – “maybe I would walk through there with a dog and wellies”. In this willingness and eagerness to get off the paths and walk through fairly dense vegetation she recognised that she was an exception - occasionally she would see people using the Land like her but most of the activity she witnessed was on the paths.

151. Her grandchildren live locally and loved a “bear hunt in the woods”, playing hide and seek, and climbing trees across both fields. Her blackberry picking was focussed next to the path FG; and a large area in the middle of the eastern field where there was a “big clump of blackberry bushes”.

152. She stated that “none of the areas were densely wooded – I could go off the main path and criss-cross the land. There were glades where trees were more spaced out” especially on the Eastern Land. The Bellway Land was more heavily wooded to the south, west and east but the central area was more spaced out with some glades where “activities were carried out”; “people could do whatever they want” – although no details were provided. People would criss-cross the land meandering off the Main Paths and there were narrow tracks not visible on an aerial photograph. The Main Paths were established and their broad routes did not change although when muddy they would widen. She regularly saw other people on the Land “not huge numbers at any one time” but regularly between 2 and 6 people using it - dog walkers, joggers, occasional

horse riding, children playing, foraging for blackberries and occasional picnics (with litter left behind). She would sometimes use the Main Paths to get to the Sturry.

153. She said it was “very easy” to get from the statutory footpath into the Bellway Land between points G – E with most of it being “fairly open” although the area between points F – G was more dense.

154. In cross-examination, Bellway robustly challenged the veracity of her evidence but ultimately suggesting that either her evidence as to meandering off the main paths was “embellished” or that her use was an exception to the norm. She accepted the latter although denied that she was unique in this regard and had seen other people using the Land in the way she did. Having studied the photographs at BSA/133 and following in considerable detail, I conclude that only the more (or probably the most) adventurous would choose to try to penetrate the vegetation there rather than stick to the Main Paths. I return to the minor paths criss-crossing the Land below.

155. I found Lady Laws evidence as to the usage off the Main Paths difficult to follow but ultimately it was clear that: (1) she regularly used the Land;(2) she used the Main Paths extensively but also wandered off them regularly including for blackberrying and for general roaming; and (3) as to that wandering off the Main Paths, the extent to which she wandered through the vegetation was unusual but not unique. Whilst some of what she said seemed to be inconsistent with what the photographs appear to me to show and with the evidence of others, I accept her evidence as demonstrating what I have summarised in points (1) - (3) above.

156. I do not accept that for the broad mass of users : (1) it was “very easy” to get from the Statutory Footpath into the Bellway Land along the boundary generally, (2) there were lots of areas where it was suitable to walk off the paths, (3) the area shown in BSA/133 would be regarded as penetrable or useable; (4) the Land generally or any specific part of it was capable of being criss-crossed; (5) the less densely vegetated areas would be regarded as realistically useable glades.

157. Her evidence, even taken at its highest, does not seem to me to be consistent with regular use of the Land generally by significant numbers of people (never mind significant numbers of inhabitants of the locality - no matter how locality is defined) off the Main Paths for sports and pastimes or to show that even for the period to which she can speak any (non-absentee) landowner would be put on notice of such qualifying user by any outward manifestations of it.

Paul Harlow

158. Paul Harlow provided a UEF on the Application [CB/1/300] and further evidence [FE/72]. He only had knowledge of the Land from 2019 when he moved into the Fairview Gardens area. His property backs onto the Land. The free access to the Land was a big attraction for him and his family. From the start they took regular walks including on the Western Path until, he said, the 2019 Works. Apart from that the family would walk a circuit – GFEPBCDEFG. They saw other people using the Western Path about once a week.

159. I accept his evidence and do not need to elaborate.

Amanda Gregory

160. Amanda Gregory provided a UEF on the DMMO application [CB/2/685] and further evidence [FE/56]. She has known the Land since 1986/7 and, outside the statutory period, she used the Land for horse riding until about 1994. She has lived in Westbere (again) from 2010 and uses the land mainly for dog walking with her “search and rescue” dogs which she is heavily involved in training including for competitions. The dogs are not official search and rescue dogs. Because of that training she regularly changes the Main Paths she uses and more importantly regularly gets the dogs to do searches off the path laying “tracks” for them to discover. She would deliberately get into the undergrowth. She has seen people (including children) off the Main Paths but referred to the clothing normally necessary off tracks to “protect against grazes and stingy nettles”.
161. She explained how the Land has changed over the years. She referred to the Land being “much more open” in the 1980s and 1990s and since 2010 it “has changed such a lot”. Before the 2018 Works there were some small paths off the Main Paths and grassy areas in some parts albeit with brambles and nettles. The Land was more accessible in winter.
162. I accept that she used the Land generally and that, for her, it was accessible but her evidence generally showed that her use would be exceptional. I accept that she found multiple routes through the vegetation but I do not think that they would have been regarded as “paths” by an observant landowner. All the evidence I have seen suggests that any such routes were very tightly confined, penetrable by the hardy but not regularly used. Indeed her evidence of the nature of the land off the Main Paths taken as a whole seemed to me to demonstrate that for most of the Land the idea of it being regularly accessed by a significant number of people is untenable.

Evidence for Bellway

163. Mr Stacey provided a pack of contemporaneous material which I have drawn on and referred to above.
164. That includes a statement from the former landowner Mr Remasi [BSA/16/92] which referred to: (1) the Bellway Land being densely overgrown; (2) the use of the few paths being sporadic; and (3) the use of the Eastern Land was more intense as the paths were more passable. He has not attended the inquiry but the claim that the use of the paths on the Bellway Land was “sporadic” is inconsistent with the mass of physical, contemporaneous and/or witness evidence I have and I do not accept that characterisation. For that reason I do not place much weight on the rest of his evidence. His description of the Bellway Land being generally overgrown is, however, consistent with the contemporaneous photographs and much of the evidence I have read and heard.
165. I have no reason to doubt the accuracy of the observations recorded in the Agricultural Classification report [BSA/7/127], the Howard Hutton Strategic Housing and Availability Assessment at [BSA/7], the Canterbury Council worksheet at [BSA/9], the Terence O’Rourke Initial Ecological Assessment at [BSA/10] or Bellway’s Pre-Application Statement at [BSA/11] or that they are anything other than representative of the condition of the Bellway Land at the time those documents were produced. What is said in all those reports appears consistent with the contemporaneous photographs and the overwhelming weight of the UEFs on the Application and the further evidence I have heard. I note in particular the degree to which the Bellway Land was overgrown and yet the reference to it being “currently heavily trespassed” at [BSA/7/127]. I find

that that “trespass” was overwhelmingly on the Main Paths and not attributable to the use of the Land as a TVG.

166. The correspondence in 2019 appears to confirm that Bellway was aware of extensive use of its Land by others. I return to this when considering the efficacy of the Notices below.

167. Mr Stacey provided a comprehensive witness statement and gave oral evidence. He visited the Bellway Land on two occasions – in spring 2017 and in early 2018. He walked the Main Paths shown on Plan 1 but surprisingly did not find the Western Footpath when it left the back garden fences – I say surprisingly because it was clear, obvious and well defined on my site visits. He said that he “could not roam freely over Bellway’s Land because of the extent of the trees and brambles which prevented access” and the vegetation either side of the Main Paths made it “very difficult” to walk off the paths in most places – making it “not inviting or possible to use” in general. There were some open spaces off the Main Paths but not large or open enough “in my view to walk into and through”. He describes a natural barrier between the statutory footpath and the Bellway Land along Path DG with the only obvious gaps being at Points E, F and G. He describes the 2018 and 2019 Works in detail and provides relevant supporting documents and contemporaneous photographs. I accept his evidence on that which is consistent with all the other evidence I have. He describes the signs erected in 2018 and 2019 – I accept his evidence on that which is backed up by photograph evidence and invoices and which is accepted by most if not all of the witnesses for the TFAG.

168. When on his site visits, in his written evidence he recalls seeing “a small number of dog walkers” on the statutory footpath and on the Main Paths in the Bellway Land on each visit with the dogs sometimes foraging in the undergrowth but the walkers sticking to the paths. Given that he was only on the Land for a short period each time I consider that his written evidence supports the mass of other evidence I have that there was regular and not “sporadic” use of the Bellway Land for those activities. His visits were on weekday mornings and so his observations do not assist on what uses occurred at weekends and during holidays especially in summer. He claimed that any foraging for blackberries would have been limited to bushes alongside the Main Paths but he was not on the Land at the relevant time of year and I do not accept that he can infer from the amount of vegetation that there was no blackberrying off the paths.

169. Mr Iwan Jones gave written evidence but did not attend the inquiry. He describes visiting the site for a short visit on 25th May 2018. It was his first visit and that may explain why he found it difficult to access the Land. I had no such difficulty on my unaccompanied site visits. He describes the land as “not an inviting piece of Land and not easily penetrable” because of the extensive vegetation. He had the impression which is consistent with the rest of the evidence that the former owner had not maintained the land for many years and had left it to grow naturally. He undertook three further visits with potential purchasers of the Bellway Land but says that he did not see anyone on the land but infers that if they were on the land it was for walking only. He refers to seeing a “private land” sign in 2016 but there is no evidence from which I can infer to what land it was referring or to whom it might have been visible. Nobody else appears to have seen or referred to any such sign.

170. Mr Richard Curteis of Aspen Tree Services who carried out the 2018 and 2019 works gave written evidence but did not attend the inquiry. He accurately describes the chronology of his involvement backed up by contemporaneous documents. He exhibits an email from his company

of 25th February 2017 [RC/2/6] in which he describes the site as “like a forest” but noted lots of “regularly used footpaths running through it”. On his first visit to the site on that date the “site was thick with brambles up to 2 meters high. There were large areas of dense scrub....There were also some clearer areas of rough grass which was [sic] very uneven to walk on, [sic] which had patches of nettles and brambles in it.” He says “it was very difficult to survey the extent of the site due to the height of the vegetation and the thickness of the scrub. He exhibits a photo of the 2018 works which show the scale of the operations and the vegetation being cleared [RC/7/20]. He explains the works in 2018 and 2019 and the erection of signs - all of which evidence is consistent with the preponderance of the other evidence I have. I find this evidence consistent with everything else I have seen. His description of what he saw is consistent with the scale of the clearance works he was engaged to undertake and with all the surrounding evidence.

Evidence of Mr Mavaddat

171. Mr Mavaddat first wrote in August 2019 [CB/1/121] objecting to the DMMO on the basis that Mr Mahallati’s land was private and he had maintained it. He says that he has told people on the land that it is private and that the land had a boundary of a hedge and gate but does not show where these features were. His solicitor’s objection to the Application is at [CB/1/111]. It confirms that if there was to be an inquiry, Mr Mavaddat would provide “the necessary written evidence to support this representation”. This was not done. The representation analyses the UEFs. It goes on to describe Mr Mavaddat’s regular visits to the land to “ensure that it has not fallen victim to unauthorised encampments or fly-tipping” and describes the confusion as to the status of the land in 2019 leading to the erection of post and wire mesh fencing in early 2020 – outside the relevant statutory period. He recognised and accepted the use of the Statutory Footpath and kept that open (see appendix 6 [CB/1/138]) but he also refers to public rights of way (plural) and I infer that that is a reference to the other Main Paths which are obvious through Mr Mahallati’s land. There is no reference to any signs or fencing being erected on Mr Mahallati’s land at any time during the statutory period.

172. As to his land, it is notable that the only contemporaneous photographs at ground level of this land does not show anything like the degree of understorey and scrub vegetation evident on the Bellway Land and the TFAG photographs at CB/1/166 show areas which were open and potentially accessible. I find that that parts of this land were physically capable of being accessed at times during the statutory period. Whilst Mr Mavaddat is silent on the point, I find from the totality of the evidence that children did, at times, play in the areas off the Main Paths (“bear hunt”; hide and seek and similar) - indeed I saw evidence of one tree being used for climbing/camp building on my site visit; and that some people were able to leave the Main Paths on his land for blackberrying and other activities.

173. I have addressed Mr Mavaddat’s late correspondence above.

Site Visits

174. I carried out three site visits unannounced and unaccompanied. The parties agreed that this was appropriate and nobody asked for an accompanied site visit. Each visit lasted between 1 and 1.5 hours, I walked all the Main Paths, the Western Path and attempted other routes as set out below.

175. One visit was on a weekend during the early afternoon in late spring before the inquiry, one very early in the morning in early June and one during the early afternoon in mid-July. From the

first two visits, I became familiar with the Land and was thus able to understand which areas each witness was talking about at the Inquiry.

176. What I saw and experienced on the Site Visits has to be treated with a significant degree of caution mainly because it is not necessarily representative of the Land during the statutory period:
- a. the whole of the Land has changed very substantially since 1999 with what was originally large open, grassed fields becoming increasingly heavily treed and vegetated over the years;
 - b. the 2018 and 2018 Works substantially changing the Bellway Land and in particular allowing increasingly dense vegetation to have grown in the central part of it since;
 - c. the changes in vegetation over time having inevitable implications for the use to which the Land could be put such that the uses in 2023 will not be representative of the uses in 1999 which, in turn, may not be representative of other uses which may have been undertaken during parts of the statutory period.
177. On the other hand, there is no evidence that the Eastern Land has changed substantially since the latter part of the statutory period and what I saw there is likely to be similar to that which was present in the last few years of the statutory period. Further, what I saw in the central and northern area of the Bellway Land does not appear significantly different from what is shown in the range of ground level photographs in the period from about 2008.
178. On each visit I saw multiple people on various parts of the Land. All were on the defined Main Paths (except for a further path in the south western corner) although I saw two dogs off the lead and in the undergrowth.
179. The northern side of the path GF was extremely heavily overgrown even on the first visit and even more so on later visits with just one small gap where it would have been possible for an adventurous individual to get through into the Bellway Land. I tried to do so but soon had to give up. There were no such gaps in the dense vegetation between points F and E and D and the openings at point F and especially point D were visible but not obviously (to me at least) the entry points to long paths through the Land. There were no indications of any other paths into the Bellway Land and no manifestation on the ground of any use of land off the path. The northern side of the path from points D – H was also very heavily overgrown and impenetrable for most of the length but with two areas under tree canopies where it was possible to get off the Main Path. Even in those two locations there was no indication of any paths through and it was not possible for me to penetrate more than about 20m off the path. It is not conceivable that any of that land would be used other than perhaps the two small areas referred to above. On the whole path from point G to H the overwhelming impression was of being on a path through dense vegetation.
180. Between points H and C the vegetation was less dense on the north western side of the path but only adventurous individuals would attempt to veer off the path and there was no manifestation of any such use. It was not possible to penetrate into the central part of the eastern land except in one location where I was able to climb over branches, bend under branches, and force my way through some vegetation to get to what I take to be the central blackberry bush to which some witnesses referred. There was no physical manifestation of any

use of this “route”. There was one tree that was just off the path and clearly good for young children to climb to which I have referred above.

181. To the south east of the path CH the land was more open and there a distinct path running south and then east to near H which I saw being used on two occasions. The land to each side of that informal path was more open and it is possible that some people on walks may have played under the tree canopied open areas near to that path although there was no physical manifestation of any such use.

182. From points C to B, there were some paths running at right angles linking directly to Westbere Lane but save for that the path was largely hemmed in by dense treed vegetation on each side. It was physically possible to access in some areas to the south of the path but there were no informal paths and no physical manifestation of any such use. I tried to walk into the central area at several “promising” points but each time had to give up after a relatively short distance even on the occasion I had come dressed specifically for that purpose. I find that only the most adventurous would have sought to leave the main Path.

183. The vegetation and trees opened up noticeably when approaching point B and there two minor but just discernible paths down each side of the Drove towards point D. I could not access the Drove itself either from points B or D. Save for the minor paths it would have been physically possible to access land to the south of point B by climbing over branches and similar but there was no manifestation of such use, no routes through and no apparent reason why anyone would do so. There were some small areas where games such as bear hunt or hide and seek could have been played. The area either side of the path BPA was almost entirely impenetrable off the path. There was no evidence of any glades (except a very small one half way between points A and P just to the east of the path and at most about 10m deep) and no evidence of any paths or routes through the vegetation and no reason why anyone would seek to penetrate the area. The path BPA was very heavily hemmed in. The same is true for almost the entire length of paths PE and PF. The Western Route was clear and obvious but ended in a dead end when it emerged from the woods. Under the woods in the south east corner of the Bellway Land (which had not been affected by any works) it was possible (with varying degrees of difficulty) to leave this path because there was limited undergrowth but no reason to do so and no sign of any such use.

184. The overwhelming impression on the site visits was of the clearly defined Main Paths heavily hemmed in by vegetation and running through largely inaccessible, heavily vegetated areas with no physical manifestation of any “off path” usage, no apparent reason to veer off the Main Paths and in many cases no physical ability to do so.

Criss-Crossing Paths including latest aerial photograph

185. There is some aerial evidence of some lines through the vegetation at various points in time other than the Main Paths which may be, and in some cases, probably were, identifiable informal routes through the vegetation. On the site visits some such possible routes off the Main Paths were visible (although all the ones I came across - except those specifically referred to above - rapidly ran out and were unidentifiable within a maximum of a few metres of the Main Paths). As referred to above, some witnesses talked of paths criss-crossing the Land. Several witnesses talked of being able to roam off the Main Paths on identifiable routes. The main off-path Blackberry picking areas were accessed by such informal routes.

E: Findings of Fact

186. In the light of all the written, documentary, photographic and witness evidence I reach the following conclusions.

The Statutory Period and evidence from outside that period.

187. The statutory period runs from 9th November 1999 to 8th November 2019. Usage, notices, fences and activities outside of this period are of background interest and are not of direct relevance to the issues I have to decide save that they may serve to support evidence as to those matters during the statutory period.

The Locality

188. Westbere Parish is a relevant locality. The Fairview Gardens area (comprising the network of roads comprising the residential estate) comprise a neighbourhood within Sturry Parish. The two areas together do not comprise a single locality or neighbourhood. I have already concluded that the reference to the two “localities” in the Application does not invalidate the Application. I find that there is no evidence of prejudice by reason of any mistake in the application form – none is claimed. There is no requirement for the use to be *predominantly* by inhabitants of any particular locality. If the other requirements of s.15(2) had been met, there would be no basis for rejecting the Application on the basis of the description of the “locality”. However, whichever locality/localities are considered and even if both localities were considered together, my conclusions on user below apply.

Significant Number

189. If, but only if, one includes the user of the Main Paths for walking, dog walking, nature rambles (and associated activities such as nature watching and blackberry picking), jogging, cycling and horse riding it is clear that a significant number of inhabitants of Westbere Parish regularly used the Land as did a significant number of the inhabitants of Fairview Gardens neighbourhood throughout the 20 year period. I reject the claim that the use was sporadic. The usage occurred throughout the day (from early morning to evening), on weekdays and more intensively at weekends and during school holidays; throughout the year. It would have been obvious to any landowner visiting the site that there was extensive user of each title comprised in the Land and the user was in fact known to at least those landowners who visited the Land in the statutory period. Even if there were occasional challenges to user (which I do not think there were), the overwhelming weight of the evidence is that people were not challenged.

190. Even taking into account the obvious fact that many of the UEFs are submitted by residents who have not used the Land for the full statutory period, I find that:

- a. a significant number of the residents of Westbere Parish used the Land in some way for the full 20 years; and
- b. a significant number of the residents of the residents of Fairview Gardens neighbourhood used the Land in some way for the full 20 years.

191. There can be no real doubt about that especially given the relatively low populations of the two areas, the number of UEFs and the density of the red dots on the UEF Location Plan.

User

192. This is, in my view, the central question on this Application. The evidence as a whole permits of only one answer as to the nature of the user. It overwhelmingly demonstrates that throughout the statutory period and even more so in the latter half of it, a vast majority of the use made of the Land was by walkers, dog walkers, ramblers, joggers, cyclists and horse riders whose use was overwhelmingly confined to the Main Paths. Those Main Paths were, for the most part, heavily hemmed in by dense vegetation and it was not practical or in many situations physically possible for people other than a few more adventurous individuals to access a substantial majority of the Land for most of the statutory period. Very few people chose to leave the Main Paths for lawful sports and pastimes and there was no clear outward manifestation from 2008 at the latest of any significant such use of the Land generally or any significant part of it. The use of the Land would have appeared to a reasonable landowner as being the user of public rights of way and other Main Paths as such for recreational (normally circular) walks through otherwise inaccessible and unused land.
193. Intermittently, a relatively small number of people did meander off the Main Paths and roam across the Land more generally but: (1) such user was not, in respect of any part of the Land, by a significant number of inhabitants of either "locality" (or of both localities combined); (2) even the routes of the most adventurous off the Main Paths were generally heavily constrained from at least 2008 across almost all of the Land; and (3) there was extremely limited scope for lawful sports and pastimes off the Main Paths except in some very small areas adjacent to the Main Paths. I accept that some individuals did leave the Main Paths to access blackberry picking some distance off them; that some adventurous individuals positively chose to walk through the heavily vegetated areas to explore, train dogs and search for wildlife and that children and families sometimes played in the wooded areas although the latter was predominantly in the early years of the period but fundamentally, the use of the Land from 2008 at the latest would have appeared to the landowner as confined to use of the Main Paths as paths principally for walking and ancillary activities and there was nothing to indicate a general wider user by a significant proportion of the inhabitants of any locality or at all.
194. I agree with Bellway that any suggestion that a significant number of inhabitants would choose to use the Land in the way which Lady Laws and Miss Gregory did is inherently implausible. I further agree that for the most part straying off the Main Paths (to retrieve dogs, children playing, blackberrying) was a natural attribute of the use of such paths and not indicative of the use of the Land generally for lawful sports and pastimes. Off path use was the relatively rare exception.
195. As to the criss-crossing routes:
- (1) save for the Main Paths and the further paths specifically referred to above, to the extent that there were routes through the vegetation off the Main Paths: (1) they were not well-defined; (2) they were self-evidently much less established and well-used than the Main Paths; (3) to the extent that they were visible on the ground, they will have indicated to a conscientious landowner, at most, occasional roaming off the Main Paths and not any general roaming across the Land by a significant number of inhabitants.

- (2) As the weight of the evidence shows, any use of such routes was occasional and only by a few individuals. I find that such routes do not thus evidence the requisite user for TVG purposes.

196. Applying the legal principles, including from *Laing and Oxfordshire*:

- a. the user for walking and associated activities on the Main Paths would have appeared as use of the paths as such and not as any manifestation of a use of the wider whole for lawful sports and pastimes;
- b. There is very limited evidence of either walking or other activities off the Main Paths;
- c. It cannot therefore be said that the Land as a whole has been used by a significant number of inhabitants of any locality or a significant number of people at all.

197. I consider that all the evidence points in the same direction. The overwhelming preponderance of the UEFs are focussed on walking and associated activities and all the physical, documentary and photographic evidence supports the view that this would have been overwhelmingly focussed on the Main Paths. There is very limited evidence of other user and even those engaged in it recognised that they were the exception. Even looking at individual periods within the 20 year period, there is no period where the requisite user has been established on the evidence. A conscientious landowner viewing the Land at any time during the statutory period would not have understood that there was any significant wider usage of the Land beyond the use of the Main Paths as such and would not have been aware of anything other than “occasional use by individuals...” (*Alfred McAlpine*) off those Main Paths.

The Nature of the Land

198. I consider that the nature of the Land over time supports the above conclusion and is inconsistent with any claim of use of the whole for lawful sports and pastimes.

199. As to the Eastern Land:

- a. at the outset, it was largely grassed and open with limited vegetation except on some of the boundaries and in some localised areas. At times of year it would have been readily accessible throughout although by 2001-3 the grasses were generally very tall in summer;
- b. vegetation and trees gradually spread across the area – whilst the aerial photographs suggest large areas of “open” land up to 2019, at ground level the practical reality by around 2008 was that these areas were generally heavily overgrown with scrub, were practically inaccessible except for a few adventurous individuals, were uninviting and were not realistically capable of being used for lawful sports and pastimes. There were no large open glades for picnicking or other sports or pastimes;
- c. there were some areas under the trees which it would have been physically possible to access and in respect of which it is easy to accept the evidence of children playing hide and seek in the woods alongside the Main Paths. However such areas were limited, were not readily accessible for any depth and there was no reason to access them generally or manifestation of any use of them;
- d. whilst there is no application for registration of any particular separate parts of the whole, I have considered whether there were any exceptions to the overall position summarised in the previous sub-paragraph. There are three that I consider– namely the central blackberrying area, the south eastern corner and the northern boundary.

In the central area, there was (and is) a large central blackberry bush area that it was possible to get to by traversing dense vegetation but there were no clear paths to it, the use of the area was by a limited number of people over a small part of the year, no other uses could be practically carried out in this area and there was no outward manifestation to the landowner of any such user. The south eastern corner had additional paths through it with the most opportunity to leave the paths and forage or play. However, even there, the scope for such off path activities was limited, the land off the paths was not inviting and there was no outward manifestation of any significant off path use. In the northern area, several routes were established through to Westbere Lane but these were on clear and defined paths leading to path BC. I cannot therefore identify any sub-area of the Eastern Land which meets the statutory tests; and

- e. there were well established, well trodden paths on the main desire lines – paths BC; BP, CH and DH;
- f. there was some evidence of some minor routes off the Main Paths. Many petered out after a short distance. Any user of the minor routes was by only a few individuals – I conclude that the totality of the routes through the vegetation give no indication of any use for lawful sports and pastimes by a significant number of people of the Land; and
- g. the western area closest to the Drove was much more heavily treed and less accessible especially by 2019.

200. As to the Bellway Land, by 2008 at the latest, a significant majority of the central and northern open area was significantly overgrown and for all practical purposes inaccessible and unusable other than by adventurous individuals. In the treed areas, the trees were relatively sparse in places and with limited undergrowth such that it would have been physically possible to access those areas but those areas were generally uninviting and there was no outward manifestation of any significant use of them. It was not practically possible for any but the most adventurous to access the Bellway Land from the Statutory Footpath except via the paths at points D, E, F and G. Those paths were heavily hemmed in from well before the 2018 Works. There were no significant open and usable glades from 2008 at the latest. I agree with Bellway that the vegetation on the land either side of the Main Paths was well established for prolonged periods during the statutory period such as to make its use unattractive and not practical or conducive to recreational use. Any landowner would have so understood the situation.

201. I broadly accept Bellway's characterisation of the Land in closing – "Here there are [a number] of separate and defined routes with very extensive areas of unused and largely inaccessible land, unattractive for recreational use, in between" and that there has been no use of the whole of lawful sports and pastimes in "any meaningful way".

Conclusion on User

202. Overall I consider that there is insufficient evidence - indeed a stark paucity of evidence – to demonstrate the requisite user.

203. I further consider that the lack of any picnics, sports, games or other activities on any of the Land from any residents for the vast majority of the period is significant. Even those witnesses who spoke to generalised user of the Land were clear as to the limited extent of such user both by them and by others.

204. I therefore conclude that the Application for all the Land must fail on the basis the evidence does not demonstrate the requisite user. Even if there was widespread general TVG user in 1999-2000 (which I do not have the evidence necessary to find) it is clear that there was not and cannot have been such user at any time thereafter.

205. This is not a marginal conclusion. All the evidence seems to me to tell broadly the same story.

As of Right – the Signs

206. I find no evidence that there were any signs or fences/gates such as to prevent access on the Eastern Land at any time during the statutory period. On the evidence available the signs and fencing erected was in 2020.

207. As to the Bellway Land, I find that signs in the terms set out above were erected at points A, B and C in 2018 and 2019 and that they would have been seen by all (or at least the substantial majority) of those using accessing the Bellway Land and that they were in fact so seen by most of those who provided a UEF. They were at the main entrances to the Bellway Land from the north (A) and north west (B) and from the statutory footpath. The path into the Bellway Land at point D (if it in fact went into the Bellway Land) was not a main path being the least accessible or defined of the paths from points D, E and F. There were no other practical routes into the Bellway Land except on the Western Path. I find that the signs were and would have been understood to be directed at the Bellway Land generally – so effectively all the land to the west of the Drove.

208. The wording is not ambiguous. The land covered was “Private Property” and the reference to “any” access is not to be understood as limited to the “routes” but to the land generally. The fact that the signs were only in situ for a short period does not undermine their efficacy.

209. The Bellway correspondence in 2019 at around the time the signs were re-erected is confused and confusing and seems to indicate the opposite of what the signs say. However, this was not the case in 2018 and my principal finding is that the 2018 signs were effective to mean any user thereafter was not “as of right”.

210. For the Bellway Land therefore I would have found that any user which met the statutory tests was, from 2018, not as of right and therefore the statutory period was interrupted before 20 years had expired. This would have meant that the Application in respect of the Bellway Land would fail on this ground even if I had found that there had been the requisite user up to the point when the signs were placed.

F: Other Matters

211. There is an application that I consider whether the requirements of s.15(3) are met so as to avoid the impact of the signs on the Bellway Land. I proceed on the basis that the Council can consider such an application. However, on my findings of fact, doing so would make no difference. There is still not the requisite user in the relevant period for s.15(3) purposes. In any event, the Application was not made within a year of the first placing of the signs.

212. I have considered all the other matters raised in the legal submissions, closing speeches, the Application and exchanges of representations on the Application but none of them can impact the clear conclusions I have reached.

G: The Result

213. The result is that I recommend that the Council refuse the Application. I can see no possible basis on which it could lawfully be granted on the evidence available to the inquiry.

David Forsdick KC

Landmark Chambers

15th September 2023