

## Notice of meeting of

### Licensing & Regulatory Committee

**To:** Councillors Firth, Gillies (Chair), Horton, Looker and Moore (Vice-Chair)

**Date:** Friday, 6 March 2009

**Time:** 2.00 pm

**Venue:** Guildhall

## AGENDA

**1. Declarations of Interest**

At this point, Members are asked to declare any personal or prejudicial interests they may have in the business on this agenda.

**2. Minutes** (Pages 3 - 6)

To approve and sign the minutes of the meeting held on 9 January 2009.

**3. Public Participation**

At this point in the meeting, Members of the public who have registered their wish to speak regarding an item on the agenda or an issue within the Committee's remit can do so. The deadline for registering is 5pm on Thursday 5 March 2009.

**4. Application to Register Land East of (Pages 7 - 122)  
Fordlands Road and South of Germany  
Lane, York, as a Town or Village Green.**

The purpose of this report is to consider an application under Section 15(1) of the Commons Act 2006 (“the 2006 Act”) to register land to the east of Fordlands Road and South of Germany Lane, York, as a Town or Village Green.

**5. Any other business which the Chair decides is urgent under the Local Government Act 1972.**

Democracy Officer:

Name: Laura Bootland

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For more information about any of the following please contact the Democracy Officer responsible for servicing this meeting Laura Bootland Democracy Officer

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### **Scrutiny Committees**

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City of York Council

Committee Minutes

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MEETING	LICENSING & REGULATORY COMMITTEE
DATE	9 JANUARY 2009
PRESENT	COUNCILLORS FIRTH, GILLIES (CHAIR), HORTON, LOOKER AND MOORE (VICE-CHAIR)

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### 1. **DECLARATIONS OF INTEREST**

At this point Members were asked to declare any personal or prejudicial interests they had in the business on the agenda. There were none.

### 2. **MINUTES**

RESOLVED: That the minutes of the meeting held on 5<sup>th</sup> September 2008 be approved and signed as a correct record.

### 3. **PUBLIC PARTICIPATION**

It was reported that there had been two registrations to speak under the Council's Public Participation Scheme. Both speakers had registered to speak on the same item. The Chair agreed to hear comments from them, provided there was no repetition.

Mr. Stuart Robertson, the Deputy Chairman of York Taxi Association spoke in relation to agenda item 6. He urged Members to choose Option 1 as outlined in the Officers report. He expressed concern about further plates being issued as he felt the market is satisfied at present.

Mr. Alan Rowley, the Secretary of York Taxi Association spoke in relation to agenda item 6. He advised members that the taxi trade has been hit by the current economic climate and by the introduction of late night buses. He asked members to consider choosing Option 1 as outlined in the Officers report.

### 4. **REQUEST TO REVIEW TINTED WINDOWS CONDITION AS ATTACHED TO HACKNEY CARRIAGE AND PRIVATE HIRE VEHICLE LICENCES.**

Members considered a report which asked them to review the licence condition which limits the degree of tint permitted for licensed hackney carriage and private hire vehicle windows in respect of low emission, environmentally friendly vehicles.

Officers reminded members that a representation had been made by a private hire operator who wished to licence several hybrid vehicles which he will import from Japan. The factory fitted glass in the vehicles does not meet the standard criteria for tinted windows as set by the Council.

Members advised that they had no difficulty with the Officer recommendation, as all licensed vehicles are public service vehicles and should adhere to the standards set by the council.

**RESOLVED:** That Option 1 be approved and no changes are made to the existing licence condition for hackney carriage and private hire vehicles in respect of tinted windows.<sup>1</sup>

**REASON:** The safety considerations for the introduction of the condition is valid for all vehicles licensed by the council irrespective of engine emissions.

Action Required

1. Inform the individual concerned of Members decision. KS

**5. HACKNEY CARRIAGE VEHICLE LICENCE CONDITIONS**

This report asks members to consider a relaxation of the vehicle licence condition that requires all hackney carriages to be of the colour black. The relaxation is to apply in respect of vehicles that are temporarily licensed to cover the period when the original vehicle is off the road due to accident or mechanical damage.

Members queried how often a request to use a vehicle of another colour in these circumstances is received. Officers advised that it is a rare occurrence. Members also queried if six weeks was a reasonable amount of time for any such exemption to apply. Officers confirmed that the Taxi Association are happy with this figure.

**RESOLVED:** That Option 2 be approved and with respect to the standard hackney carriage vehicle licence conditions allow for an exemption to the standard livery condition for a temporary licensed vehicle for a period of 6 weeks when the original licensed vehicle is off the road for accident or mechanical repair.<sup>1</sup>

**REASON:** To reduce the potential financial impact on licensed drivers when their vehicle is off the road.

Action Required

1. Amend vehicle licence conditions in accordance with Option2 KS

**6. REVIEW OF ISSUE OF NEW HACKNEY CARRIAGE VEHICLE LICENCES.**

Members considered a report which asked them to decide whether to commission an interim demand survey for hackney carriages to inform a review of the policy of issuing new vehicle licences in light of the current economic climate.

In response to the comments made on this item under Public Participation, Officers reminded Members that there are still people who are on the waiting list for a taxi licence and any decision would need to be fair to all concerned.

Members queried the legal position on Option 1. Legal Officers in attendance advised that suspending the current policy for any period of time would require a separate report from Officers as there are many legal implications. Members were advised that Option 1 is something which could be considered but an actual decision to that effect would need to be deferred for a future meeting until an Officer report could be produced.

Members queried the cost involved in conducting a survey and if fees to taxi licence holders would increase. Officers confirmed that the cost of the survey would be met out of the taxi licensing account which is funded by licence fees.

Members commented that while they have sympathy with the predicament of existing taxi licence holders, they need to consider those on the waiting list. They felt that a survey would be useful to gain some accurate evidence as to what effect the economic crisis is having on the taxi trade. It was felt that if the current policy does need changing due to the economic situation, then a survey would support and inform those concerned in making any changes.

Members commented it would be useful for the survey to be conducted during the University term time to assess the impact of the late night buses on the taxi trade.

**RESOLVED:** That Option 3 be approved and an interim survey of unmet demand be carried out and a full consultation be undertaken with those currently on the waiting list prior to making a decision.<sup>1</sup>

**REASON:** This will enable members to have an objective assessment of demand in the taxi market and enable the views of those who wish to enter the trade to be heard.

Action Required

1. Add survey and consultation to work plan.

KS

Councillor Gillies, Chair

[The meeting started at 2.00 pm and finished at 2.30 pm].



**Agenda Item**

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***Licensing and Regulatory Committee*****DATE**

6 March 2009

Report of the Director of City Strategy

**APPLICATION TO REGISTER LAND EAST OF FORDLANDS ROAD AND SOUTH OF GERMANY LANE, YORK AS A TOWN OR VILLAGE GREEN****Summary**

1. The purpose of this report is to consider an application under Section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land to the east of Fordlands Road and south of Germany Lane, York as a town or village green. The extent of the application is illustrated on the plan attached to the application at Appendix 1. Copies of all the documents submitted in connection with the application are available for Members of the Committee and interested members of the public to view at 9 St Leonard's Place by prior appointment.

**Background**

2. If the application land comes within the statutory definition of a town or village green, the Commons Registration Authority must register the land as such in the register of town or village greens maintained by it in accordance with the 2006 Act.
3. The Council, acting as the Commons Registration Authority, must determine the application. This responsibility is a quasi-judicial function and is separate from all other functions the Authority carries out (for example, landowner, local planning authority). The responsibility is to decide whether or not the land subject to the application satisfies the statutory criteria for registration based on the evidence submitted. The Council's Constitution provides for the application to be determined by this Committee.
4. The procedure for submitting and determining the application is set out in the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the Regulations").
5. The application was made by Mr Alan Smith of 72 Fordlands Road, Fulford, acting on behalf of the Friends of Germany Beck, to register land to the east of Fordlands Road and south of Germany Lane, York ("the application land") as a town or village green. The application was dated 31<sup>st</sup> January 2008.
6. The applicant contended that the land became a village green on 31<sup>st</sup> January 2008. The application was supported by a statutory declaration in support by Mr

Smith dated 31<sup>st</sup> January 2008, supporting photographs and 87 statements of evidence of alleged use from supporters. There was also a plan showing the land subject to the application.

7. The appropriate procedures were followed by the applicant for making the application and by the Registration Authority for the notification of interested parties and advertising the application.
8. Statements of objection were received from Wakeford Properties Ltd and Fulford Land Ltd as freehold owners of the site. Objections were also received from Persimmon Homes (Yorkshire) Ltd, Hogg Builders (York) Ltd and Pilcher Homes Ltd who have an interest in the land expressed as an Option to Purchase.
9. The 2006 Act does not give any details of the procedure to be followed when determining an application. Instead the relevant procedure to be followed is largely set out in the Regulations. The Regulations provide that where the Registration Authority receives written objections, the applicant should be given the opportunity to respond to the objections and the application can then be determined.
10. There is no provision in the Regulations for an oral hearing, for compulsion of witnesses or the taking of evidence on oath. Many Registration Authorities have however adopted the procedure of appointing a Barrister at Law as an independent Inspector to hold a non-statutory public inquiry on behalf of the Registration Authority when an application is contested. This is an appropriate arena where oral evidence can be heard and after which the Inspector writes a report to the Authority assessing the evidence, applying it to the issues and making a recommendation as to how the application should be determined.
11. It was apparent, on preliminary consideration of the documentation, that there were conflicting assertions of fact and complex issues of law in respect of the application. Accordingly it was decided that an independent Inspector, Mr Alan Evans, should be appointed to preside over a non-statutory public inquiry and make a recommendation on the application. Mr Evans is a Barrister at Law experienced in this area of the law. He issued directions to the parties setting out the procedure to be followed prior to and during the inquiry. These included his requirements for the parties to exchange evidence before the inquiry.
12. The public inquiry was held over 9 days namely 21<sup>st</sup> to 24<sup>th</sup> October 2008 at The Guildhall and 15<sup>th</sup> to 19<sup>th</sup> December 2008 at Kings Manor, and heard the evidence of the applicant, supporters and objectors and other interested people. The Inspector also carried out a site inspection of the application land on 6<sup>th</sup> January 2009. The Inspector submitted his report on the application to the Registration Authority on 22 February 2009. Members are asked to consider the Inspector's report, which is attached as Appendix 2. This has been circulated to Members of the Committee and to the applicant and objectors.
13. It is for the applicant who seeks village green status to satisfy the Registration Authority (the Council) on the balance of probabilities that all the requirements of section 15(2) of the 2006 Act are satisfied. These are that the application land is land on which "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 they continue to do so at the time of the application”.

14. This can therefore be broken down into a number of elements:-

- 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
- They continue to do so at the time of the application.

15. It is imperative that **all** the above requirements are fulfilled and the burden of proof is upon the applicant. **Failure on a single point fails the whole application.**

### **Consultation**

15. The application was received on 31<sup>st</sup> January 2008 and validated on 1<sup>st</sup> February 2008 and given the unique identifying number NEW/CYC/VG/002. Public notices were erected at the main points of access to the site. A notice was published in the York Press on 20<sup>th</sup> February 2008 and also sent to all parties with an interest in the land. These were identified as Wakeford Properties Ltd and Fulford Land Ltd as freehold owners of the site, and Persimmon Homes (Yorkshire) Ltd, Hogg Builders (York) Ltd and Pilcher Homes Ltd who have an interest in the land.

16. Objections were requested to be delivered to the Head of Civic Democratic and Legal Services no later than 16<sup>th</sup> April 2008.

17. Following the receipt of objections, the Registration Authority arranged a non-statutory public inquiry for 21<sup>st</sup> October 2008 in order for an independent Inspector to hear the case of all the parties. A pre-inquiry meeting was held on 2<sup>nd</sup> September 2008 to discuss procedural matters. Notices were issued as before on 1<sup>st</sup> October 2008 to advise of the date and venue for the public inquiry.

18. The inquiry was duly held in October and December as explained in paragraph 12 above.

### **Options**

19. Option A - The Inspector has concluded that the criteria for registering land to the east of Fordlands Road and south of Germany Lane as a town or village green has not been met and, having considered the Inspector's report, the Inspector's report should be accepted and the application for this piece of land to be registered as a town or village green be refused.

20. Option B - Having considered the Inspector's report, Members are of the opinion that there are sound and cogent reasons to reject the content and reasoning of the Inspector's report and his recommendation.

### **Analysis**

21. A public inquiry into the application was considered to be the most appropriate means of enabling the evidence in this matter to be tested properly and for submissions in respect of legal matters to be properly addressed.
22. Both the applicant and the objectors have had the opportunity to present all the relevant evidence to the Inspector at the public inquiry and to submit their witnesses to cross-examination.
23. In the preparation of his report, the Inspector has taken into account all of the evidence which was been submitted and heard at the inquiry and has had regard to the relevant law. He makes a recommendation to the Registration Authority to reject the application.
24. Your officers accept the Inspector's findings of fact, his interpretation of the relevant law and the application of that law to those findings of fact and his conclusions and recommendations. Your officers recommend, therefore, that the Committee accept the Inspector's recommendations for the reasons set out in the Inspector's report.

### **Corporate Priorities**

25. The Council as Registration Authority, has an obligation to properly determine the claim that the land should be registered as a town or village green, regardless of the Council's corporate priorities.

### **26. Implications**

**Financial** Such matters should not form part of the Committee's consideration.

**Human Resources (HR)** None

**Equalities** None

**Legal** For an application to succeed, each of the elements required by section 15(2) of the 2006 Act must be established. The burden of proof lies firmly on the applicant, who must provide sufficient evidence to prove, on the balance of probabilities, that as a matter of fact, all of the elements required to establish that the application land has become a town or village green are properly and strictly proved.

The fact that the Registration Authority decided to hold a non-statutory public inquiry presided over by an independent Inspector is evidence of its thorough and reasonable approach to this case. The content and reasoning of the Inspector's report was brought about in the optimum circumstances of a non statutory public inquiry held over 9 days where both the applicant and objectors presented the case to the inquiry. The Inspector heard the evidence in person and this was tested by cross-examination by both sides.

The Inspector has applied the legal criteria referred to in paragraphs 13 and 14 above to the facts in this case. The Inspector's recommendations and conclusions are based on relevant legal principles and case law.

The ultimate decision as to whether the land should be added to the register of town and village green rests with the Registration Authority whose decisions are exercised by Members of the Licensing and Regulatory Committee. Whilst the Committee is not bound by the Inspector's recommendation, it would need to have clear and robust reasons for departing from his recommendation based on findings of fact and interpretation of the legal principles. The decision of the Committee is a legal decision and is not a matter of policy.

Under the 2006 Act there is no statutory right of appeal to the Secretary of State against the Council's decision and the only challenge to a decision made by this committee would be through the process of judicial review of the procedure and processes that have been applied to the determination.

- **Crime and Disorder** None
- **Information Technology (IT)** None
- **Property** None
- **Other** None

## **Risk Management**

27. Potential risks are those of judicial review of the procedure and processes that have been applied to the determination.

## **Recommendations**

28. The Committee accepts the conclusions and recommendations of the Inspector's report dated 22 February 2009 by Mr Alan Evans and resolves to reject the application to register the land as a town or village green for the reasons set out in the Inspector's report.

**Contact Details**

**Authors:**

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**Acting Commons**  
**Registration Officer**  
*Tel No.551671*

**Sandra Branigan**  
**Senior Assistant Solicitor**  
*Tel 551040*

**Chief Officer Responsible for the report:**  
**Michael Slater**  
**Assistant Director City Strategy (Planning**  
**and Sustainable Development)**

**Report Approved**  *Yes* **Date** *23/02/2009*

**Specialist Implications Officer(s)**

Legal  
Name: Sandra Branigan  
Title: Senior Assistant Solicitor  
Tel No: 55 1040

**Wards Affected:** *List wards or tick box to indicate all*

**All**

**For further information please contact the author of the report**

**Background Papers:**

Report of Mr Alan Evans, Barrister as Inspector dated 22 February 2009  
Application for registration and inquiry documents referred to in paragraph 1

**Annexes**

Annex 1 Plan showing the application land  
Annex 2 Report of Mr Alan Evans, Barrister at Law, as Inspector dated 22 February 2009

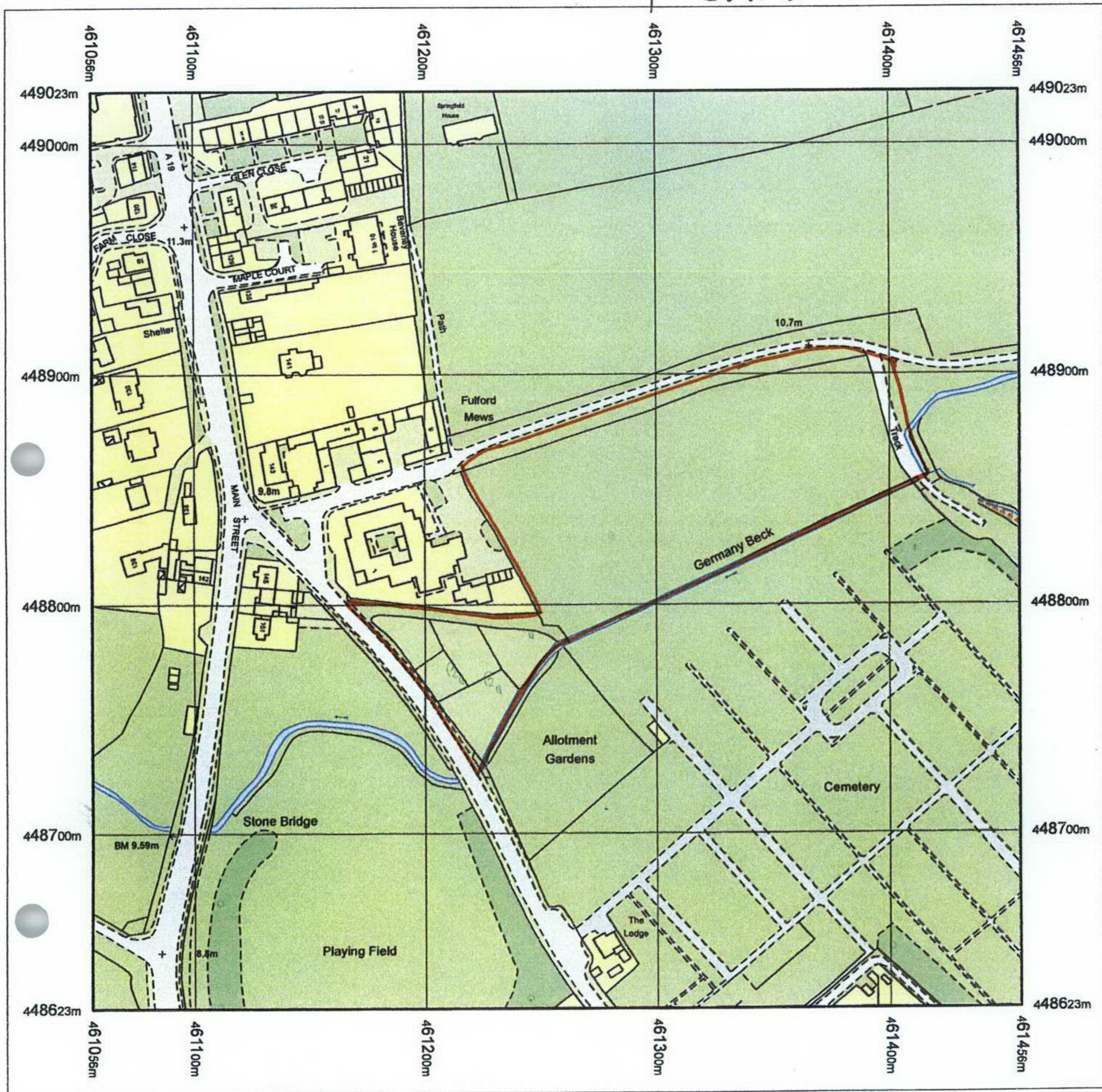


Michael Smith reference "Map 1"

31.01.08.



*Proprietor*  
*Solicitor*



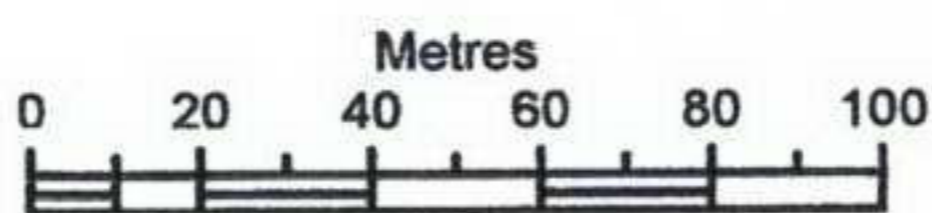
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**MAP 1**

**BOUNDARY OF CLAIMED  
LAND EDGED IN RED  
(INSIDE THE BOUNDARY)**

3



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APPLICATION TO REGISTER LAND TO THE EAST OF FORDLANDS ROAD AND  
SOUTH OF GERMANY LANE, FULFORD, YORK AS A VILLAGE GREEN

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**REPORT**

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By  
Alan Evans  
Kings Chambers  
36 Young Street  
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M3 3FT

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**REPORT**

**Recommendation: the application should be rejected.**

Introduction

1. I have been appointed by the registration authority, the City of York Council (“the Council”), in order to assist it in determining the application of Mr Alan Smith on behalf of the Friends of Germany Beck (“the Friends”) for the registration of land to the east of Fordlands Road and south of Germany Lane, Fulford, York as a village green.
2. My instructions were to hold a public inquiry to hear and consider the evidence and submissions both in support of the application and in objection thereto and, after holding the inquiry, to prepare a written report to the Council containing my recommendation for the determination of the application.
3. I held the inquiry at the Guildhall, York from 21<sup>st</sup> to 24<sup>th</sup> October 2008 and thereafter at the King’s Manor, York from 15<sup>th</sup> to 19<sup>th</sup> December 2008. I made an unaccompanied site inspection on 6<sup>th</sup> December 2008 and an accompanied site inspection on 6<sup>th</sup> January 2009.
4. The advocacy at the inquiry on behalf of the applicant/the Friends was conducted by Mrs Karin de Vries. Mr Charles George, QC, instructed by Walker Morris, Solicitors, of Kings Court, 12 King Street, Leeds represented Wakeford Properties Limited, Fulford Land Limited, Persimmon Homes (Yorkshire) Limited, Hogg Builders (York) Limited and Pilcher Homes Limited as objectors to the application. An objection to the application was also made to the Council by Mr RH Richardson of the Forge Bungalow, Wheldrake Lane, Crockey Hill, York in a letter dated 9<sup>th</sup> April 2008. Mr Richardson did not appear and was not represented at the inquiry but I have taken his letter into account.

5. I thank Mrs de Vries and Mr George for the assistance that they provided to me at the inquiry in putting forward their cases and pay particular tribute to Mrs de Vries who, as a non-professional advocate, discharged her task with conspicuous skill and thoroughness.
6. I also thank the Council, and particularly Ms Verlie Riley and Ms Anne Curtis, for their excellent administrative work in arranging and running the inquiry.
7. References in this report to page numbers in the inquiry document files are indicated by the use of bold numbers within square brackets.

#### The application

8. The application was made on form 44 on 31<sup>st</sup> January 2008 by Mr Alan Smith of 72 Fordlands Road, Fulford, York. The cover sheet to the application identifies that the application was made on behalf of the Friends who are listed as Verna Campbell, Julie Davies, Corey Derbyshire, Cheri Mussell, Alan Smith himself, Mary Urmston and Karin de Vries.
9. The land in respect of which the application was made, which I will refer to hereafter as “the Claimed Land”, is identified as “land to the east of Fordlands Road and south of Germany Lane, Fulford, York” on the application cover sheet and is said to be usually known as “Germany Beck Meadow” in answer to question 5 on the form. The Claimed Land is shown by a red line on the map number 1 produced by Mr Smith as part of his statutory declaration in support of the application. It includes a former allotments area as well as the “Germany Beck Meadow”. I describe the Claimed Land in more detail in the next section of this report.
10. The answer to question 6 of form 44 states that the application is made in respect of the neighbourhood consisting of the Fordlands Road estate lying within the

Parish of Fulford. The Fordlands Road estate is shown by a red line on map number 2 accompanying the application.

11. The application was made under section 15(1) of the Commons Act 2006 (“the 2006 Act”) on the basis that section 15(2) applied. The justification for the application was, in summary, given as usage of the Claimed Land by a significant number of local inhabitants as of right for well in excess of 20 years and continuing as at the date of the application.
12. When originally made the application was supported by a number of photographs and 87 completed evidence questionnaires.

#### The Claimed Land

13. In this section of the report I provide a description of the Claimed Land. The description which appears in this section of the report is of the Claimed Land as it was at the time of my site inspections. My findings as to the condition of the Claimed Land at other times are dealt with later in this report in connection with my findings of fact.
14. The claimed land can be divided into 2 broad areas. The first area consists of a roughly triangular area which adjoins Fordlands Road on its east. The second area is a larger, rectangular area which lies to the east of the first area and south of Germany Lane.
15. The first, triangular area is the site of former allotments. It is bounded to its south by Germany Beck and to its west by Fordlands Road and its footway. Included within the northern part of the triangular area is a track which formerly led from Fordlands Road around the north and east of the allotments before coming to a bridge, long since demolished, which crossed over Germany Beck and allowed access to the land to the south of the beck. It is convenient to call this track

Garden Lane, a label which was used at the inquiry and which derives from the statement of a former allotment holder, Mr Dennis Benson [1141]. To the north of Garden Lane is an old people's home. Garden Lane runs between hedges which separate it from the old people's home to its north and the former allotments to its south. At the time of my site visits Garden Lane was passable on foot from Fordlands Road to a point some distance along its length where further passage was blocked by a fallen tree. It was possible just before this point to divert to the right through a gap in the hedge which separates Garden Lane from the former allotments and thence to follow a way through a heavily overgrown area to emerge in the south west part of the larger, rectangular area. At the entrance to Garden Lane from Fordlands Road was a piece of remnant fencing. Garden Lane became progressively gloomier through the presence of overhanging vegetation the further east along it one went. A short distance along Garden Lane from Fordlands Road, before the diversion I have referred to above, it was possible to enter the former allotments to the right through a gap in the hedge. The terrain here was marked by relatively small but closely spaced trees which appeared to be self-set and the degree to which one could penetrate or move around was extremely limited.

16. The former allotments area is separated from Fordlands Road by a substantial and overgrown hedge through which no access to the former allotments area is possible. Just to the north of the Fordlands Road bridge over Germany Beck it was possible to descend into the southern part of the former allotments area alongside the beck down a slope which is marked by a trodden path. The slope, although relatively steep, was short and presents no difficulty to the able-bodied pedestrian. It was then possible to walk through the southern part of the former allotments area, broadly following the line of the beck, to emerge again in the south west corner of the larger, rectangular area. There were clear signs of foot passage along this route which was somewhat rough and uneven but passable without undue difficulty. The ability to penetrate northwards from this route into

the former allotments was area was severely curtailed by overgrown vegetation with only limited areas where gaps facilitated any further progress.

17. The body of the former allotments area as a whole was substantially overgrown. Where access to it was not totally impossible, it was unpleasant and unattractive.
  
18. The second area of the Claimed land, that is, the larger, rectangular area consists of a field which, as I have indicated, lies to the east of the former allotments area and to the south of Germany Lane. Germany Lane is a public right of way. The field bears the OS field number 3285 [485]. The field is bounded to its north by a hedge, with occasional hedgerow trees, which separates it from the verge of Germany Lane. There are gaps, of varying widths, in the hedge which allow easy access to the field in its north west corner and north east corner. The first, narrow gap which one comes to when proceeding east along Germany Lane is just after the old people's home and it has the appearance of an obvious worn path into the field. More or less opposite this point Germany Lane is joined on its north side by a footpath which leads south from School Lane. Just to the east of the gap I have described what would appear to be possibly an old wooden gate lies deep in the hedge and has the appearance of not having been used for a considerable period of time. Further east there are a few vestiges of barbed wire in the middle of the hedge. At the north east corner of the field, which is marked by a substantial gap on to Germany Lane, a footpath runs south from Germany Lane whilst Germany Lane itself continues to the east. The footpath to the south is also a public right of way (number 5 on the definitive map for the area [556]). It runs to the east of the field, crossing Germany Beck in the vicinity of the south east corner of the field by a small bridge and continuing south on a line to the east of Fulford Cemetery to join eventually with Cross Lane which runs east from the southern edge of the Fordlands Road estate. The footpath is separated from the field by a hedge. In the south east corner of the field in the vicinity of the small bridge there is a substantial gap in the hedge allowing easy access on to the field.

19. Continuing the sequence of description of the field boundaries in a clockwise manner, the southern boundary of the field is marked by Germany Beck, including its whole course within the Claimed Land [A18]. The western boundary of the field is formed by a hedge dividing the field from the old people's home.
  
20. As to the field itself, it slopes down from north to south, that is, from Germany Lane to the beck. Even to the untrained eye it is apparent that the vegetation in the field differs between the (somewhat larger) northern part and the (somewhat smaller) southern part. The northern part appeared as overgrown grassland whilst the southern part was overgrown with what appeared much taller and coarser vegetation. There appeared to be 2 trodden routes through the grass in the northern part of the field which led from the western boundary to the north east corner of the field and thence to Germany Lane. The first of these routes led from roughly the north west corner of the field to the north east corner following a line which was roughly parallel and to not very far from the hedge. The second of these routes followed a more southerly line from the north east corner of the field to the western boundary of the field, lying generally more towards the southern side of the overgrown grassland area. In the south west corner of the field it was possible to obtain access through to Fordlands Road as I have already described in connection with my description of the former allotments area. Along the western boundary of the field what appeared to be a trodden route led south from the gap in the north west corner of the field down to the beck. The southern margin of the field was in the nature of a track alongside the beck. The tall and coarse vegetation to the north of this margin was unattractive but beaten down in one or two patches via which it was possible to proceed to the northern, overgrown grassed part of the field. In the south east corner of the field were some low soil mounds close to the beck.
  
21. The Claimed Land also extends beyond the former allotments area and the field. First, it includes the southern verge of Germany Lane along that length of Germany Lane which lies to the north of the field. Secondly, it includes footpath 5



to the east of the field, including the bridge over Germany Beck. Thirdly, it includes a small, grassed strip to the east of footpath 5, which is physically undifferentiated from a wider grassed area which lies to the east of this footpath in the vicinity of its junction with Germany Lane. At the southern end of this strip the beck itself is also included to its far (east) bank where it runs north-south for a short distance north of the bridge [12, A17].

22. Whilst not a matter which relates to physical description of the Claimed Land, the planning proposals for the wider Germany Lane area are something which it is convenient to mention at this point. On 9<sup>th</sup> May 2007 the Secretary of State for Communities and Local Government granted planning permission on the application of Persimmon Homes (Yorkshire) Limited and Hogg Builders (York) Limited for a substantial new residential development in the Germany Lane area. The development is described in the Secretary of State's decision letter as comprising "approximately 700 dwellings, the creation of public open space and community facilities, including local shops, with associated footpaths, cycleways, roads and engineering works" [693]. The Claimed Land, both the former allotments area and the field, will be crossed by the access road for the development as illustrated on the development masterplan [705].

#### The evidence for the applicant and the Friends

23. In this section I provide a summary of the "live" evidence for the applicant/the Friends which I heard at the inquiry. Whilst the summary is a reasonably full one, it is only a summary and does not purport to be a verbatim account of the evidence. I naturally concentrate on those points which I consider to be of most relevance and significance.
24. **Mr Smith**, the applicant, lives at 72 Fordlands Road, Fulford, York. He explained that he moved to Fordlands Road in November 1992. He was co-opted to the Fulford Parish Council in 1999. The Friends were formed in 2007 after the result

of the planning inquiry became known. There was a very positive response to an initial survey in relation to the question of seeking to establish a village green and the application was then submitted by him in January 2008 on behalf of the Friends. His reason for submitting the application was that the Claimed Land was recreational and a valuable open space which deserved to be preserved. Since about 2002 he had, with his family, taken up walking their dog around Cross Lane, on to Germany Lane and over the Claimed Land on a more regular basis than previously. Before 2002 he had cycled. When doing so he had frequently seen numerous others on the Claimed Land engaged in such things as family activity, playing, paddling, watching birds and butterflies and walking dogs. The Claimed Land was lower lying than Germany Lane and because of high vegetation it was difficult to see what was going on at different parts of the field. He could recall that in 2002 (he thought) Garden Lane had been fenced off to stop travellers' vehicles using it.

25. Mr Smith agreed with the suggestion put to him in cross examination that since 1995 all in the area would have been aware of the planning proposals which affected the Claimed Land. He was happy to accept that Parish Council minutes for January 2003 [1585] recorded that a local councillor had confirmed that there was no public right of way along Garden Lane and that the Parish Council itself had not exercised any right to use it since the former bridge to which it led to over Germany Beck had been dismantled. He did not have any idea who had recently cut back vegetation to make access easier along Garden Lane or to achieve the same effect alongside Germany Beck to the south of the allotments.<sup>1</sup> He had gone through from Fordlands Road to the field a couple of times this year but could not really recall when. He had never thought of the construction of humps for bmx riding as being an illegal activity. He could not say why the public footpath on the east side of the Claimed Land had been included in the application. The verge of

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<sup>1</sup> Mr Shepherd later gave evidence of having seen a council maintenance team doing work in Garden Lane and Mr Wilkinson put in a statement to explain that he had cleared some vegetation in the former allotments area to allow Mrs Urmston easier access when taking some photographs [A393]. No point was ultimately pursued by Mr George that clearance had been done by or on behalf of the applicant/Friends to mislead the inquiry.

Germany Lane had been included because it was crossed by people to get to the field. He had never seen the remains of any fencing between the field and Germany Lane. He could not say who had decided, or why it had been decided, to include in the application areas outside the field and former allotments. He was aware that 2 old gentlemen used the allotments when he came to live in Fordlands Road. He was not aware of the fact that there had been archaeological trenching works on the claimed land in 1996 or at any time thereafter.

26. **Mr David Wilkinson** of 9 Atcherley Close, Fulford, York gave evidence of data analysis which he had carried out on the evidence questionnaires supporting the application and collected after its submission. He was experienced in the task of data analysis in his job as a government scientist. He analysed 114 out of 128 completed evidence questionnaires, having excluded 14 on the basis that the respondents were either not living in the Fordlands Road estate or not using the Claimed Land during the 20 year period relevant to the claim. The 114 forms analysed represented 125 users and 83 separate households. The analysis showed, amongst other things, the following:

- 83 out of 304 households in the Fordlands Road estate (27%) had used the Claimed Land
- these households were evenly spread over the Fordlands Road estate
- over 90% of users considered themselves to be local inhabitants in respect of the Claimed Land
- over 75% of users used the Claimed Land regularly
- 36 users had used the Claimed Land for all years of the relevant 20 year period
- numbers of users had steadily increased year on year
- of the activities carried out on the Claimed Land by users, the most often reported was dog walking, followed by walking and then blackberry picking

- of the activities seen being carried out on the Claimed Land by others, the most often seen were dog walking, followed by children's play and then walking or wandering.

27. When cross examined, Mr Wilkinson said that he had had no part to play in the selection of the area where the evidence questionnaires were distributed. He accepted that nothing in the evidence questionnaires was directed to the issue of which bits of the claimed land had been used. He said that his analysis had proceeded on the basis that, when respondents had answered the question on the form which asked between which years they had used it, he had assumed (and he thought it was a good assumption) that they had used it for each of the years in the period stated. In response to the point that it could not be known exactly what any respondent meant by saying that he used the land "occasionally" or "regularly", Mr Wilkinson commented that one would probably end up with a very poor form if more questions were asked.

28. **Mr Bud Young** of 26 Cross Street, Moretonhampstead, Devon, is an expert in the interpretation of aerial photography. He produced a written report dated 26<sup>th</sup> September 2008. The report provided a commentary on a series of aerial photographs of the Claimed Land from 1965 to 2007-2008. He had been asked to look only at the field and not the former allotments area. Overall, Mr Young's report was to the effect that there was no evidence from the aerial photographs that the field had been used for grazing cattle nor that the southern part of the field had been used for the taking of a hay crop. He could find only one instance where the aerial photographs showed that the northern part of the field had been used for arable cropping and that was in 1992 where the aerial photographs [1407] [1408] [1409] showed a cut cereal crop.

29. When cross examined in relation to aspects of aerial photographs which he had not been asked to examine Mr Young began by saying that he could not give a considered response. He agreed in relation to the allotments that the 1989 aerial

photographs [1404] [1442] showed 60% earth or relatively bare ground. He also agreed that on the 1992 aerial photograph [1407] an inverted “L” shape in the allotments looked to be cultivated. By 2002 the relevant aerial photograph [1412] showed the allotments as largely overgrown and the inverted “L” shape now had the appearance of a grassy open space surrounded by shrub growth. He accepted that, despite his not having seen fence posts on the aerial photographs he had studied and which he thought he would have been able to detect if they were there, fence posts were seen on former Parish Councillor Dinsdale’s photograph taken from Germany Lane in the 1990s<sup>2</sup> of a flood in the field [599]. Aerial photographs from the end of the 1980s and early 1990s did not show that the verge of Germany Lane between the track and the hedge had been taken over by brambles and the like. The first time that he noted a path appearing on the aerial photographs was in 1999 [1410] when a path appeared along the northern part of the field running from its north west to its north east and parallel to the hedge. If he had discerned a path on earlier photographs he would have referred to it. The 1991 aerial photograph [1401] showed a path on the western boundary of the southern part of the field but there was no sign of such a path in the northern part. None of the aerial photographs (over 20 in number) showed any person on the field but this might simply mean that use was not taking place at the very moment that the plane taking the photograph was flying over. There were no aerial photographs for 1986, 1987, 1988, 1990 and 1993. He thought that the aerial photograph which was not definitely dated [1405] was taken in 1991 rather than the other possible date of 1993 because, had it been 1993, the effect of what was known to be the taking of a cereal crop in 1992 would have appeared on the photograph. He found it difficult to see that, were the photograph taken in 1991, a cereal crop could have been taken from the field in the preceding year. He also thought that it showed grass developing rather than a wheat crop although acknowledged the difficulties of interpretation. He thought that it would be

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<sup>2</sup> The flood is probably the very severe 1991 flood – see the photograph of this flood submitted with the application [17]. Mr Donald Atkinson also referred to the very bad flood in 1991.

unreasonable for someone to have walked across the crop shown on the 1992 aerial photographs when that crop was growing.

30. **Mr Barry Potter** is a retired lecturer in horticulture familiar with the impact of different land management practices on grassland vegetation. He produced 2 statements for the benefit of the inquiry. His views were based on field observations assisted by looking at aerial photographs to increase his understanding. He stated that the field was divided into 2 areas along its west-east axis, a northern area and a southern area, that there were different vegetation types in the 2 areas and a clear boundary between them. The northern part of the field was grass-dominated. The southern part consisted of tall, rank vegetation. He thought that the condition of the northern part of the field was such that it had been cropped for hay or silage fairly often but not consistently. There was a dog rose in this part of the field, which had been cut back before the start of the 2008 growing season, but which had not been cut before that for 3-4 years. The grass-dominated vegetation was consistent with the past application of herbicide. The southern area had been cut in the past, but not regularly or for a number of years but rather at a level which was just sufficient to prevent the incursion of major scrub. The southern area of the field had definitely not been cut annually as evidenced by the presence of 2 willow saplings. He found some discontinuous short lengths of rusted barbed wire and some thin fence posts, both standing and fallen, in the hedge to the north of the field separating it from Germany Lane but in no other location. What he found appeared to correspond with what was shown on the photograph produced by former Parish Councillor, Mrs Dinsdale, dating to the early 1990s [599]. These fence remnants were on the centre line of the hedge rather than a yard from it. There was no evidence that the field had been stock proof in recent times. There was no evidence of grazing in the field. He felt that if the field had been arably cropped in 1992 it might just have been that once to establish a right to payment under the set aside scheme which was then coming in.

31. When cross examined, in relation to the willow saplings he had referred to, Mr Potter said that he could not really say whether the south-east corner of the field (where the saplings were) was wetter than the south west corner of the land. If there had been no woody species in the southern part of the field in 2000 he would have expected there to have been periodic cutting but he did not think annual cutting was necessary to prevent the establishment of such species. The southern part of the field could have been used for a hay crop if it had been cut annually but not if cut intermittently; there was too much coarse vegetation. It had not been cut frequently since 2000. He could make a case that what was shown on the 1992 aerial photographs was a grass crop rather than an arable crop but he had not visited the field in the 1990s and he was not an expert in aerial photography. He could not recall the Environmental Statement which referred to the field as a former arable field having been challenged in this respect but there was no reference in it to cereal crop stubble which Dr Gemmell referred to in his evidence to this inquiry as being present when he inspected the land in 2000. Dr Gemmell must have been using his recollection and not referring to a record. After 2000 Dr Gemmell's statement provided evidence of cutting of the northern part of the field in one year only, when the grass was left on the field and not taken as a hay crop. He thought that the set aside regulations required topping but did not allow the taking of a crop but was not sure whether the latter would be prohibited if it was taken for the farmer's own use. If an arable crop had been planted in 1992 before set aside came in, it would probably have been planted in the spring but could have been done in the previous winter. People should keep out of a growing crop and, although tramlines would allow walking through a growing crop, to do so was against the Countryside Code. He had no evidence that anyone had done that in this case. It would have been extremely uncomfortable to walk on ploughed land. There would have been a major discouragement to public access between the times when the field was ploughed and when it became stubble.

32. In re-examination he said that 1992 and 1999 aerial photographs [1408] [1411] showed significant amounts of coarse vegetation which did not look like it was regularly cropped for hay. He did not think that there was significance in the fact that the 1992 aerial photograph [1408] showed the field to the north of Germany Lane not cropped when the northern part of the application field was; the farmer had to start somewhere. He thought Dr Gemmell's view in paragraph 10 of his statement that the northern part of the field had been in arable cropping on a rotation basis could only be surmise given that the only reported fact was the recording of cereal crop stubble. On the 1992 aerial photograph [1408] the crop had been taken to the limit of a comfortable gradient. He thought that the northern part of the field might have been little used for arable cropping because it was an uneconomic field which was difficult to cultivate and it might only have been done once to qualify for set aside purposes.
33. **Mr Graham Cheyne** of Lynwood, Selby Road, Fulford, York said that he moved to Selby Road in 1989. In the years after he first moved there he used to take his 2 children on to the field to look for the wildlife there. In 1996 he bought a dog and would visit the field almost daily with his dog going over all over the place chasing sticks he had thrown. He would look for the wildlife. Bmx bikers had built humps in the corner of the field which had been there now for a few (possibly 3) years. He had seen kids there (about 5 or 6 in number) on their bikes, mainly in the evening. He had also seen other children on the land apart from the bmx bikers in the evening, mainly in the summertime. Garden Lane had been very difficult to get down and he did not know who had cut it back. He had also seen lots of dog walkers on the field over the years, on a path at the bottom of the field along the beck and also on a path along Germany Lane. The dogs ran all over the place and people did not stick rigidly to the paths. He would see people walking dogs early in the morning which was a time he used to go to the land before going to work. There would be the odd jogger as well. He had retired 2 years ago and now walked his dog at a later time and saw different people. There had always been a regular path alongside the beck. He had only ever seen grass on the field



and had never seen a farmer or tractor on the land. He could only remember once having seen cut grass on the land and did not think that the lower part of the field had ever been cut. Recently in September, on what he was sure must have been a weekend, he had seen at about 8 or 9 in the morning 2 men who he realised afterwards must have been surveying use of the land. They had parked a 4x4 where the travellers parked on Germany Lane (to the north of Germany Lane close to its junction with footpath 5). One man was sitting in the vehicle reading a newspaper and the other was standing outside the vehicle but looking into it. The men were not observing the field and there was not a clear view of the field from where the vehicle was parked. He himself had not been on to the field on that occasion but his dog had.

34. Mr Cheyne maintained under cross examination that the surveyors would not have had a view of the entire field. Others he had had conversations with said that the men were in the car. He had not seen anyone he knew from the Selby Road area on the field. It was possible that the bmx humps had been there for 2 years rather than 3. It had been very difficult to get along the beck this year because it was overgrown before it had been recently cut by the drainage board. There were lots of people who went along only the path in the field near the Germany Lane hedge or along Germany Lane.
35. **Mrs Sarah Bramley** of 37 Gordon Street, York said that she had lived at 12 Crossfield Crescent from when she was born in 1978 until 1999 and she still returned there regularly to visit her parents. She had used the Claimed Land many times over the last 20-25 years for recreational activities. She remembered picking berries there as a young child between the ages of maybe 6-11 and wading through the beck, particularly in the summer when she was 8 (1987). In more recent times, 1997-1998, she had stood with her partner, Darren Shaw, whilst he dug for bottles in the field. She had been walked through Garden Lane (which she called a cut through) as a child. Later it had become very difficult to get down as

Mr Cheyne had said, although she did go there later. She could not recall any cattle, fencing or any signs of agricultural activities on the land.

36. **Mr Richard Rymer** of 16 Fordlands Road, Fulford, York said that he lived in Fordlands Road from when he was born in 1964 until his family moved elsewhere in Fulford in 1982. After his marriage he moved back to the area, because it was where he wanted to live, first to Key Way in 1993 and then to his present address. He spent a lot of his childhood on the claimed land and still went there today with his children and to walk his dog. He was probably about 7 before he was allowed to go there on his own. His elder brother used to spend hours on the land digging with his spade and found bottles and old stuff. Mr Rymer would play on his bike on the land as a child with his friends. They had jumps on the land, over the hedge. He could not say whether there was barbed wire in the hedge alongside Germany Lane. He and his friends would go all over the land. In winter they would make snowballs and roll them into the beck. They also spent a lot of time in the beck. There were ways on to the land from various points which had always been there. He probably went to the land regularly until he was about 17 (in 1981) but his 2 brothers continued to go there until about 1986 even though the family had then moved to Fulford Park. Since moving back to the Fordlands Road area he had been to the land with his wife almost every day, except when on holiday, to exercise their dogs. He had picked the land as somewhere to go because it was somewhere where he could control his dogs. His daughters were born in 1994 and 1997 and they had used the claimed land, though mainly for dog walking. His wife's family also lived on Fordlands Road, had dogs and used the land on a regular basis.

37. **Mr Michael Vevers** of 47 Cherrywood Crescent, Fulford, York said that he moved to that address in 1965 and from that time his daughters would go on to the field almost every night. They gathered there and played games. They also took bikes and played there. It was a focal point for meeting and adventure. He and his wife used the meadow when they were in a keep-fit phase and jogged all over it.

The top part of the area was a broader track and was ideal for jogging. They also went brambling and took the kids bird-watching. This was between 1976 and 1989. He had always used the land since 1965. For the last 7 years they had been going to the land with their grandchildren. He tried to get them interested in natural history. He had never used the land for walking dogs because they did not have dogs. They would see other people walking or dog walking and kids cycling. The land could be accessed from anywhere and there were never any restrictions. He had never seen any cattle on the land and there could not have been cattle there because of the absence of fences. He had never seen crops on the land either. He knew Mr Atkinson, the farmer, had seen him around the area but not on the Claimed Land. Mr Vevers confirmed in cross examination that the track he had referred to as being ideal for jogging was Germany Lane. He could not say that he had ever seen crops on the land as shown on the 1992 aerial photograph [1407] but confirmed that if a crop had been there he would not have gone into it. His children had never mentioned a crop. He could not remember a time when there had been major excavations on the land.

38. **Mr Graheme Watson** of 11 Key Way, Fulford, York said that he had lived there for 43 years since 1965. He had always accessed the claimed land from the back lanes, sometimes taking a clockwise circuit and sometimes anti-clockwise. He and his wife had 2 children and started using the area to explore nature. He had used fishing nets with his children. They had now had 5 grandchildren and used the land with them for the same reason that they had used it with their children but not as much. The land was always accessible and never fenced off. There were 3 or 4 entrances even now. He could not remember the hedgerow having changed much and could never remember a gate. He had never seen any cattle on the land nor could he recall it being fenced. He had gone to the area even before he moved to Key Way, when he lived in a different area of Fulford (the Broadway area). He had not used the land as much from the mid-1980s to about 2002-2003 but had always used the lane regularly for walking on a complete circuit, using what he called the main track rather than the track at the back of the cemetery. He picked

some blackberries in the period of the mid-1980s to 2002 but very few and mainly went walking then with just his wife. He confirmed in cross examination that they walked only along Germany Lane in that period. He said that it had not occurred to him when he filled in his evidence form [412] that when he answered question 8 to say that he had used the land from 1965 to 2008 he should have left out the period from the mid-1980s to 2002. He read the question simply to refer to the first date and last date. In re-examination he said that he might have picked blackberries in the hedge from the Germany Lane verge in that period.

39. **Mrs Ann Fisher** of 18 Fordlands Crescent, Fulford, York said that she had lived there since 1954. She knew the field and the allotments triangle well and, over time, had walked her dogs over the whole place. She had had dogs since 1957-1958 and walked them twice a day. She did not go on the land every day and had not been on the land for the past couple of months. Sometimes she would walk through the field and alongside the beck. She also saw people she knew from the Fordlands Road estate, some she knew by name. She also saw lots of people with dogs who she knew by sight. When she was young it was their playground. As to the allotments, these were a gathering place for loads of people. She often went in to have a cup of tea with Cherry Atkinson and Sid Todd who liked to have people in to chat. Many people stopped to see them. They used to grow all sorts of things, including flowers, but were maybe not too serious about gardening and the activity was more recreational. She knew Mr Bean a long time ago. He used to have a business and would grow things and sell them. This was maybe in the 1970s. The allotments were not closed off and anyone could go in. At the start there was a home made gate on Fordlands Road but this fell down. It was never locked. The path beside the bridge had always been there and this is where the children often went in. She did not go into Mr Headley's allotment and he kept it more to himself. Children used to have a den when the allotments were overgrown. She had also known Don and Brian Atkinson for years but did not often see them on the field. She had never seen any cattle on the field and she could not remember any barbed wire fencing although she could not say that there

was not any. The land flooded a lot and they could not grow things on it but she could remember a corn crop (although not a very good one) being grown at the top end of the field quite a few years ago. The Atkinsons used to cut it every year from the beck up to the lane. The drainage board cut up the side of the beck. She could remember seeing a tractor in the field but only once. In the top corner of the field there were lots of mounds where children had played with bmx bikes. She had seen people digging on the land, just people who were interested in digging up bottles and things. She had also seen people in trenches and had not gone into the field when they were there but had kept to the track with the dogs. There were 4 to 6 gaps where you could get on to the field. There had once been a little gate in the top north west corner of the field past the old people's home. This could have been 20-25 years ago, maybe longer.

40. When cross examined, Mrs Fisher said that she used the route alongside the beck, having entered the land at its south east corner, and that she had not been on Garden Lane for a long time. Sometimes she crossed the field diagonally from the south east to the north west corner, sometimes she went via Germany Lane. She could not say whether it had been very difficult to get along the beck earlier this year (June-September) because she had not been in the field for 2-3 months. The Atkinsons used to cut the whole field except right down by the beck, where it was cleared by the drainage board. She had not seen them doing it but had seen that it had been done. She agreed that, for the last 5 years or so, the southern bit of the field had not been cut every single year. She thought that a crop had been grown in the northern part of the field for 2 years at least, not for very long. She would have waited until it was cut before going into the field and would have behaved in the same way when the archaeologists were there. In re-examination she said that she would not go into the field when digs were taking place because she tried to keep her dogs under control. The crop she saw was definitely a cereal crop but she could not say exactly which year it was and whether it was wheat, barley or corn she did not know, although it was not a very good crop. Most years the field was

grass but the crop, she thought, was there in 2 years and it could have been 3. People still walked through along the beck side but she did not.

41. **Mr Peter Shepherd** of 22 Cherrywood Crescent, Fulford, Yord said that his wife's family had lived in the Fordlands Road area since 1961 and that he and his wife had lived permanently in Cherrywood Crescent since 1975. Since then he had used the land for recreational walking, dog walking, bramble and elderberry picking (mainly in the Germany Lane hedgerow, on both sides of the hedge) and bird watching. He had accessed the land from several points dependent upon the direction of his walk. The land was a nice point to start or finish a walk. If leaving the land having come from the east, he would finish his walk by using Garden Lane. This path was fenced recently to stop unauthorised parking but the fence was not there now. If he accessed the land from the west, he sometimes went via a path near the bridge on Fordlands Road over Germany Beck, sometimes on Garden Lane and sometimes from Germany Lane past Fulford Mews. He had never walked across the allotments as such. He had never seen any "private keep out" signs and had never been stopped or challenged. He had a bad ankle now but did occasionally make the effort to get down there. He had gone for a walk 3 weeks ago using Garden Lane which was quite clear at that time although so far along there was a fallen tree. A council maintenance team had cut all the hedges along the boundary with the old people's home. Previously the hedgerow, especially on the left hand side, was overgrown. In the late 1980s and early 1990s he had looked after his sister's dog on a regular basis and 6-7 times a year he took the dog for a walk, starting on the land or coming off it at the end of a walk. He did not necessarily follow a set path and, when the dog was off the lead, it would not follow a set route but just run around. He occasionally walked along the beck side. He did that about 3 weeks ago. There were tracks visible where people had walked into the field. The land was often affected by flooding but, even in such conditions, there were high points on the land where access was available. The bottom areas could not be accessed when it was flooded. His wife and son also went on the land. His son used to go biking on the land with his friends and his

wife and son used to go fishing with nets in Germany Beck near the small bridge close to the back of the cemetery. His wife and son also found old bottles near the corner of Germany Lane where they must have been dumped at some time. He did not remember ever seeing cattle on the land nor any barbed wire. He also did not remember ever seeing any crops on the land and had not seen the land ploughed at all. He had not seen a tractor on the land. He had picked clover on the land in the past in the late 1970s. The land was now overgrown with various paths visible where people have been walking across it. He could once remember that the grass had been cut although he did not see the actual cutting. He remembered the allotments and would go down to talk to the people he knew. Mr Bean, Cherry Atkinson and Brian Benson had plots. Dennis Benson (Brian's brother) had a van which he used as a mobile vegetable shop. The people on the allotments grew flowers and vegetables and there were some fruit trees as well as raspberries and strawberries. Mr Bean grew runner beans and sweet peas. There was a shed on the allotments which Cherry and the others used. People used to stop and have a chat with them and it was a regular meeting place. He could not remember all 5 allotment plots but knew 3, possibly 4. He was recalling a time which was possibly the late 1980s or maybe the early 1990s. Towards the latter part of that time all the plots were not in use.

42. When cross examined, Mr Shepherd said that it accorded with his recollection that the sheds on the allotments were on the boundary between the allotment plots A and D (as shown on the plan attached to Mr Benson's statement [1143]). Mr Bean had plot B but he could not remember Mr Headley in connection with plot C. There was access to the allotments off Fordlands Road by a gate between plots A and B but there was also a steep, sloping access immediately adjacent to the beck. He would not class Garden Lane as the main entrance to the allotments. When he had recently walked along the beck he had got through without a problem. He would not say it was difficult to get through before that. He had attempted to go down there in June but was not sure how far he got. Earlier in the year he had got

through. He did not think access along there was seasonal and had seen a track which was obviously walked at all times of year.

43. **Mrs Sara Siwiak** of 56 Fordlands Road, Fulford, York said that her family went to the land for walks and looking at nature and had done so since 2001. Her children were excited by the beck. The field changed a lot, the grass could be very high and it was adventurous for little children to go into it. She submitted some photographs taken in 2005, 2006 and 2007 showing her family in Germany Lane and on the field. Her eldest boy fired twigs from a bow on the field and the children also used fishing rods there and played with swords. It was great fun exploring the water's edge. Sometimes they just went and sat there and had a snack or a small picnic. The field had always been a great stopping off place as part of a walk. They usually went in the school holidays and on Sundays. They always went on to and left the land from the gap opposite the footpath to School Lane. After coming through the gap, they would go down to the beck. The children would play in the field. They would lie in the grass when it was warm enough. They had never really explored the whole field, more the western part closest to the care home. She did not think that the grass was ever cut. Because there was a path, they thought it was ok to go in. There were definite paths on the land. She had seen: boys in their teens making a den near the beck in the middle of the field; children playing in the field; boys playing at fishing; someone picking elderberries; and people watching the floods (which her family also liked to do). She had never been into the wooded bit herself nor down the worn path next to the bridge as it seemed too steep but she had seen others going down it.

44. **Mrs Tracey Johnson** of 24 Crossfield Crescent, Fulford, York said that she had used the field with her children to walk their dog from late summer 1996. Once they got the dog they went to the field most days. They used to go on the field from Germany Lane because there was a gap in the hedge right next to the nursing home. They would kick a ball around and play with the dog. Usually they would go in the morning. When she had a buggy she would go along the beck by the



bridge in the south east corner. There was a little path along the stream that you could do with a buggy. If it was muddy or tricky she would turn around. Otherwise they would come up along the nursing home. She had followed Garden Lane maybe twice but at one stage they did some deep boreholes and when these grew over you would not know where to walk. She also used the north east entrance quite a lot but a few years back someone made ridges in the top end and then it was more difficult to get on to the land with small children. This could not be more than 2 or 3 years ago. All her 5 children had used the land. She did not stick to a certain route and went whichever way she felt like really. She could not remember clearly the archaeological digs. She could not remember the grass ever being cut and, whilst the hedges must have been cut, she had never seen anyone doing this. She could remember the foot and mouth closure which lasted for several months. She could remember seeing the bmx humps for quite a long time and seeing boys on bicycles on them in the south east corner of the field. She could remember her son Kieran on them. The humps were probably smaller then than they were now. Her eldest daughter, Natasha, also remembered the humps and she had moved to Manchester 3 years ago. She had clear memories of going to the field recently with her 2 youngest children. There were big humps this year and she had seen kids digging them. When she was with her youngest 2 children they would walk the dog, kick things around and paddle in the beck. The kids would also paddle in the beck through the bridge. She stopped walking with her youngest child, Ryan, last Christmas because she started working more regularly from January 2008. Also, Ryan had started going to pre-school more and had become less keen on walking since September 2007 whilst their dog had died this summer so dog walking had stopped altogether. Mrs Johnson said in cross examination that she thought it would have been 2003-2004 when Kieran was 9 or 10 that he had used the humps. She had accessed the field with a buggy at its north west corner, its north east corner and its south east corner. There was a bit of a ditch as you got into the field at its north east corner.

45. **Mr Mark Waters** of 9 Yew Tree Mews, Osbaldwick, York stated that he used to live at 32 Cherrywood Crescent. He knew Mr Atkinson because his 2 sons went to school with him. He knew that Mr Atkinson farmed quite a lot of land but did not realise that the Claimed Land was part of his holdings. He started using the land in 1971 when he was 7. All children had freedom then and the area all around the lanes was a wide open playground. The particular field in question had a particular concentration of children, however. When he got a bit older he used the land for walking the family dog until 1991. The field was useful for letting the dog off. He had never seen Mr Atkinson on the land. When he was a child he could remember the field being regularly flooded but he could not ever recall any crops nor did he ever see the land ploughed. He could not remember any cattle on the land or any barbed wire, although this was not something he had looked for. He could remember that there was a wide open entry into the field by the bridge to the back of the cemetery and the entry at the corner off Germany Lane nearest the old people's home was also always wide open. There were numerous points to enter the land. He could not recall a tractor on the land and could not remember hay being cut there. He now lived about 4 miles away and did not use the land.
46. **Mr David Nicklin** of 5 West Moor Flats, Fulford, York said that he had used the land since April 2002 when he moved to that address. When he first moved he could walk with his dog along Garden Lane and walked through there every day. One day a fence suddenly appeared and you could not walk that way anymore. The fence did not last very long, say 3 weeks. One day in the summer he was sitting on a seat near the bus stop when he saw a girl who was driving a red and white single decker bus (which he assumed she lived in) reverse into the fence and break it. He did not think that she meant to do this but that she was just trying to get the bus off the road. After that she went and parked by Germany Lane and stayed there for quite a few weeks. This was in 2002 he thought. He walked his dog twice a day and 3 times a day at weekends. The land was somewhere that dogs could be let off the lead. He walked along the beck and followed the tracks made by the public but the dogs used the rest of the field. He did not consider that

it was ever so overgrown that it was not possible to get through along the beck. He had seen kids, 5 or 6 in number, building ramps for mountain bikes on the land. They had a barrow and shovels. There were 2 humps and later 3. This was over the last 3-4 years. He had seen children building a den in the triangle area and knew some of the boys who were in there. He had seen people picking brambles, had done so himself and there were loads of them down beside the old people's home. He had seen children fishing for sticklebacks in the beck and people with metal detectors looking for things in the triangle area, on the field and in the beck. He saw other dog walkers most days. He had seen grass cutting but was not able to say when. He had not seen a tractor on the field. When cross examined he said that he disagreed with the suggestion that the fence he had referred to was erected at the end of 2002, notwithstanding being shown the parish council minute for 9<sup>th</sup> December 2002 [1582] which referred to the erection of the fence and being told that the person who had had it erected said that it was done in November 2002. He maintained that the fence was there in the summer of 2002.

47. **Mrs J Buckle** of 36 Fordlands Road, Fulford, York said that she moved to Fulford in 1958 and since then had been regularly using the field beside Germany Lane. She usually went on to the land via Garden Lane or from Germany Lane, round the corner. Sometimes she walked home on the footpath leading to Cross Lane. She had walked several different dogs over the years and they all enjoyed running around the field. Everybody walked their dogs down there and had done for years. Dogs could be let off the lead there to run around. She often met friends or neighbours with their dogs. There was no problem getting on to the land. She brought her 2 girls to the field regularly and would sit around whilst they played about. They liked to ride their bikes from Fordlands Road and her youngest daughter would also ride her horse over the field to exercise it. She was about 9 or 10 years old when she got the horse. The land was a place where all children used to meet. She and her daughters often picked blackberries along the hedges. She remembered when there was a farm next to the allotments before the old people's

home was built. She never remembered cows or any other animals being kept on the field. She did not know that the land was used by a farmer and did not remember seeing any crops but only rough grass. She did not remember fences at all except for a bit of a fence which was put up at Garden Lane. She thought that the council had put this up to stop a traveller's van parking there but did not think it was to keep people off the land because you could still walk round and get on to the land from Germany Lane. The field had a hedge around it but there were lots of gaps with footpaths leading through. She remembered the allotments being worked and Mr Bean use to sell his flowers. She could not remember when they stopped using the allotments but it was a few years ago and it was a bit overgrown now. During the last few years she had walked down there less often as she had a bad hip but her daughters still walked their dogs there when they visited. Mrs Buckle said in cross examination that the period when her youngest daughter was riding her horse on the land would have been from about the late 1960s to about the early 1970s.

48. **Mrs Worrall** of 73 Cherrywood Crescent, Fulford York said that after her husband died in 1991 she had her son's dog for 4-5 years and she would go with it on to the Claimed Land on average once a day. This would be in the mid-1990s. It could possibly not have been until autumn 1992 that she started walking her son's dog. She saw other dog walkers when she walked her son's dog. In high summer the weeds would be shoulder high down on the beck side so she would walk along the top end at that time. She would also walk that way when the ground was very wet. That was also where the elderberries were which she picked. She would come on to the land at the north west, north east or south east corner. She had seen children on the land near the bridge playing with bicycles but could not remember when that was. Boys on bicycles rode on the humps. She had seen people walking on the land. She did not walk a dog anymore. She now went to the land occasionally, once every week or once every 2 weeks. The top part was always accessible. In summer the bottom was sometimes harder to get through. When the weeds died down she went along the bottom. She either cut into the field or went

around the top part or down along the beck and out by the bridge. It was a trodden path. She did not know who the farmer was and had never seen a tractor on the land but had seen the grass laid when it had been cut. This was during the time when she had the dog. She had never seen anyone farming the land, seen it ploughed or seen it with a wheat crop. She was absolutely certain of the last point.

49. **Mr Luke Smith** of 107 Byland Avenue, York said that he was 28 years old and used to live quite close to the claimed land at 11 School Lane. He used to play in the field regularly from approximately 1986 until 1991 with friends from the Fordlands Road estate and School Lane. In 1991 he turned 11 and stopped doing that kind of thing although he would still pass the field regularly after that date. They used to fish in the beck, run around in the field playing various games, jump bmx bikes over little humps or mounds all over the field and make dens in the long grass and weeds that grew there in the summer, sometimes along the top next to Germany Lane and also alongside the beck. There were many points where the hedge along Germany Lane, which was not a very good one, was broken allowing access on to the field. He mostly got on to the land from the entrance near Fulford Mews having come down from School Lane. He also got on to the field at its north east, south east and south west corners. He could not remember any fencing apart from a broken bit of fence in the hedge near the old people's home. He had never seen cattle on the land and had no memory of crops ever being grown on any part of the field. His memory was of the field being grassed. When cross examined, Mr Smith said that a mixed group of children played on the land: there was the School Lane crowd, some from the Fordlands Road estate and some from the A19. It was used by those who lived within walking distance. His parents would not have been happy to let him play on the land if there had been barbed wire there. He had used Garden Lane but not very often. It was quite overgrown and that may have been a factor in that route not having often been used by him. His memory was that the mounds of mud he had referred to were all over the field. He had no recollection of the field having been ploughed.

50. **Mrs Corey Derbyshire** of 12 Key Way, Fulford, York said that she had lived there for 11 years. From moving to that address until 2004 her family had had a dog. As a routine part of walking in the area they would explore the field with their dog. She would throw a ball or a stick and would follow the dog. It was not very overgrown down by the beck at this time. They would leave the field by one of 3 ways: along the path behind the cemetery, by the main lane or up the side of the bridge on to Fordlands Road. When out walking the dog they would see many other residents doing the same or jogging. She had had 2 daughters between 1998 and 2001 and, as she did not work during this time, they spent many hours walking with the dog and exploring. Her parents in law also had a dog at the time and they would take both dogs out for Sunday walks together, taking them into the field. Her favourite season was late summer and early autumn as there was an abundance of blackberries in the hedges along the lanes and in the field. When walking along Fordlands Road she had seen many children, boys in particular, running down by the side of the bridge to play hide and seek or explore on their way to and from pre-school or school. She had seen a family who were nature enthusiasts exploring the field. When her family went in the field now there were often dens and bmx humps built by local children. She had seen them running around the field and accessing it on their bikes. Her husband had used the land since 1985.

51. When she was cross examined Mrs Derbyshire said that Danum Road, which was the address her husband had given in his statement [1151] as the one at which he had lived when he had used the land from 1986-1990, was to the north of this area. (It was clarified in re-examination as being between Heslington Lane and Broadway). Her use of the land was now occasional but had been 2-3 times a week when the family had the dog. When their route brought them to the field the dog would be let off the lead to have a good run around. When children were on the way back from school they would just run down to the bottom of the slope by the bridge on Fordlands Road and then come back up but what they did at the weekend was different. In re-examination she offered the clarification that, at

times other than when children were coming back from school, she had seen more general children's activity or play, including den building. Probably the last time she had walked through to the field from the route down by the side of the bridge on Fordlands road was in June; it was not blocked off then. Children used this route to get on to the field to play. The state of the vegetation along the beck in the summer depended on the weather. It had been quite high for the last 2 years.

52. **Mrs Mary Urmston** of the Coach House, Fulford Park, York said that she was a member of the Friends and had been a member of the Fulford Parish Council since 2005. She had lived in Fulford for 30 year, first at Heslington Lane and now at Fulford Park, which was about half a mile from the Claimed Land. She had received information about the possibility of registering land at Germany Beck as a village green in July 2007 and thereafter the Friends held their first meeting in either late September or early October 2007. Mrs Urmston gave evidence in relation to a number of topics. As to her own usage of the land, Mrs Urmston said that she had not been a regular user of the land although she did take her children on to the land when they were young and could remember walking on the field and along the beck in the 1980s, her first child having been born in 1979. She had mainly used the Germany Lane route and had no particular knowledge of the field in the past. She had, however, visited the land on many occasions during the last 3-4 years and had known it well over this period. She submitted various photographs [1452-1471] she had taken during this time and described a number of them, going back to the end of 2005, in some detail in the course of her oral evidence. The photographs show, amongst other things: a bare, worn path coming into the field from Germany Lane in its north west corner; a worn path in the grass leading south from that point along the western boundary of the field with the old people's home towards Germany Beck; 2 apparently worn paths along the top part of the field, trending in a roughly west-east direction and roughly parallel to Germany Lane before turning to the north east corner of the field; a path along the beck in a passable state in June 2006; a track leading down from the side of the bridge on Fordlands Road; signs of a path leading into the former allotments

area from the south west corner of the field; gypsies on the verge of Germany Lane (in the vicinity of the north east corner of the Claimed Land) in July 2006; mounds of soil in the south east corner of the field in June 2006 and mounds in the same position with bikes resting against them in September 2006 [22] (a photograph submitted with the application); evidence of activity in the allotment area (in, she said, plot D) in October 2008 in the form of worn ground, a parting of vegetation and a small pile of wood [23] (a photograph submitted with the application); a tyre hanging down into the field from a branch of one of the Germany Lane hedgerow trees in December 2001 [21] (a photograph submitted with the application). Mrs Urmston said that, whilst conditions varied according to the time of year, there was nothing to stop you getting down by the side of the bridge on Fordlands Road although you might have to move some vegetation, apart from this year (2008) when it was much more difficult. She had never known any barrier between the south east corner of the field and the allotments. She said that there was always a way through along the beck, sometimes with stuff being needed to be pushed out of the way, although when it was wet you did have to turn back. She had seen children on the humps in the south east corner of the field.

53. Mrs Urmston also gave evidence in relation to the former allotments on the triangle of land adjacent to Fordlands Road. She described the individual allotments by reference to the lettered plots found on the plan [1143] accompanying the evidence of Mr Dennis Benson, a former allotment holder. Mrs Urmston said that the 5 allotment plots had always been divided by hedges. There were gaps in the hedges forming connecting ways between the plots. There was also at least one gate to Garden Lane and another in Fordlands Road. Witness statements had been obtained which indicated that the gates were not locked, at least one was in disrepair and eventually both of them fell down. In addition, there was an open entrance leading steeply from the side of the bridge on Fordlands Road. The allotments did not provide good growing conditions because of regular flooding. As to plots A and D, these were held by Mr Benson until he terminated



his tenancy in 1996. Mr Benson himself had given up using his allotments in the late 1980s because of arthritis and, although he continued to pay the rent, he was content for his plots to be used by his brother in law, Cherry Atkinson and Mr Atkinson's friend, Sid Todd. Mr Atkinson and Mr Todd spent their time on the allotments where they were often visited by friends and neighbours, who would call round to chat, drink tea, sit around, pass the time and the like. A Mr Bean had had plot B. The last reference to him in the allotments file held by Stephenson's (the land agents) was in 1985 [1523]. It was uncertain what the position was in 1985 but no-one was then paying rent. Plots C and E were not in allotment use in 1988 and had been vacant for some time. Plot E had already become overgrown by 1989 as shown on the aerial photograph for that date [1442]. Mrs Urmston said that the Friends had considered excluding part of the allotments from the application but had eventually decided that they would like the matter to be tested at the inquiry.

54. Mrs Urmston said that she strongly disagreed with the statement made by Mr Courcier in paragraph 3.5.8 of his evidence to the inquiry on behalf of the objectors that, in response to consultation by the Council on the revised planning application, there "were many representations from local residents and groups but none claimed that the proposal would conflict with any usage of the claimed land for recreation purposes" [682]. Mrs Urmston said that she had opposed the proposals for development at Germany Beck and appeared at a personal capacity at the public inquiry in July 2006. Her evidence statement, which she had read out at the inquiry in Mr Courcier's presence, said at paragraph 11.2 that the access road for the proposals "intersects the informal pathways around and through the south west meadow ... and creates a total blockage to the route. (Photos 43-50)" [A63]. Mrs Urmston produced the 2 photographs which had been numbered 45 and 46 which showed a path along the beck and one in the north west corner of the field at the entrance from Germany Lane at that point [A67]. Mrs Urmston also made the point that the letters of objection in relation to the planning proposals which were available online demonstrated that many residents did

object to the loss of recreational open space. Mrs Urmston produced a number of letters which she said illustrated this point [A69-A97].

55. When cross examined, Mrs Urmston said that when her children were small she had gone through fields in the Germany Beck area other than the one subject to the present application, sticking to informal paths. She believed she might also have gone into the claimed field but, if she had done so, it would only have been on 1 or 2 occasions. She was not claiming to have been a regular user. After this time it was 2005 before she next went on to the Claimed Land. She had taken an interest in the planning proposals when she had found out where the access road was to go. She could not dispute, as she had not had access to the relevant letters, that, when the application was being considered by the Council (before being called-in), no-one referred to use of the Claimed Land for walking or recreation. She said that she could not have been expected to have said in her evidence to the planning inquiry that the Claimed Land was used generally for recreation or children's play given that she did not live there. If no-one else had mentioned those things, that had to be taken in the context of the scale of the development proposals and all their other impacts. It was a huge planning application and there was no reason why people would specifically have in mind the particular area of the Claimed Land. Again, because she did not have access to the letters, she could not dispute Mr Courcier's evidence that, apart from reference to path users, he was unaware of any suggestion that the planning proposals would affect play or recreation on the Claimed Land. It was unlikely that the Parish Council's planning consultant would have picked out one field.

56. In relation to the allotments, Mrs Urmston said that she had first visited them in 2005. Cherry Atkinson's daughter and others had told her that the landowners did not look after the allotments. People had also told her that the allotments did not provide good conditions for growing. She could not explain why she had not referred to Mrs Key in relation to plot E given that Stephenson's allotments file showed that Mrs Key had rented this allotment in 1985 [1521-1523]. Pressed on

the inclusion/retention of the allotments, particularly plots A, B and D, in the application, Mrs Urmston said that she thought that it was not an open and shut case. Garden Lane was in the application because it was natural to include it, being a track beside the allotments.

57. In relation to the photographs, Mrs Urmston said that she did not remember seeing any children in the area at the bottom of the track down beside the Fordlands Road bridge as shown on her May 2006 photograph [1453]. This area had got extremely overgrown this year and last year. She did not think that the track that her photograph showed in the northern part of the field in December 2005 [1456] was the one shown in the 1999 aerial photograph [1410] because it was not as straight. She did not know whether the swing shown on the December 2005 aerial photograph [21] had been put up by gypsies or who had put it up. She could not tell from the June 2006 photograph taken alongside the beck [1457] whether the track became increasingly indistinct; she imagined it went on to the end. She had not seen drainage board operations. She thought that her May 2006 photograph of the western side of the field next to the boundary with the old people's home [1459] clearly showed a pathway. Her April 2006 photograph of flooding in the field [1460] showed what looked like wire in the foreground.<sup>3</sup> She did not think that her photograph, which could have been in December 2005, looking east along the northern part of the field [1461] showed a tractor wheel mark. She had not seen anyone play in the area of the old allotment plot E shown on her 2006 photograph [1462]. The map evidence [1487 et seq] suggested that there was a boundary between Garden Lane and allotment E and on the other side of Garden Lane. There was some chicken wire in the allotments but not at the point between the former allotment plot E and the field. She thought that Garden Lane would probably have been used more to get to Fordlands Road before it became overgrown but there was a clearly defined path down from the bridge on Fordlands Road. With reference to the photograph of the gypsies in July 2006

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<sup>3</sup> Subsequently clarified not to be the case by the submission of a part of the photograph with enlarged detail [A264].

[1470] she said that use of the field was a good way of avoiding them. She believed the gypsies had been there for many years. The October 2007 photograph taken in the allotment area [23] showed part of a den. She did not remember seeing a fence across Garden Lane stopping one getting through. She first went there in 2005 and certainly 2006 and had got through in 2006 when it had been a bit overgrown but one could get through all right. On the occasion when she had been to look at the wire fence and take some more photographs Mr Wilkinson had done some cutting with secateurs so that they could get through.

58. In re-examination Mrs Urmston said that the aerial photographs taken in 1989 [1442,1443] showed that the former allotment plot E was overgrown with shrubs and trees and was certainly not in allotment use. There had been a lady with 2 children present when she took the September 2007 aerial photograph of the bikes resting against a mound in the south east corner of the claimed land [22] who she had asked to move out of the way while she took the photograph. The October 2007 photograph which showed activity in the allotments area [23] showed part of the den which was referred to in the evidence statement of Martin West [1159]. She had first noticed it last year and it was still there now. She had not herself seen anyone using it. With respect to the photograph of the western part of the field next to the boundary with the old people's home taken in May 2006 [1459] it was more likely that one would see a trodden path closer to the photographer and the photograph had not been taken as one of a path. She thought that continuous lines on maps did not mean that there was a continuous boundary feature on the ground. She said of her photograph taken from near the Fordlands Road bridge in April 2004 [1464] that the wooden structure was there for safety purposes to make sure that you did not go into the beck and presumed that it could be used to help negotiate the slope. With respect to the gypsies, she had helped take the statement of Mr Smith [1164] who said that he had been coming to Germany Lane for years, although she was not convinced that he went there every year.

59. After the conclusion of her evidence Mrs Urmston submitted further photographs primarily to demonstrate that she had photographs with people on them (which she had avoided submitting in the first place for fear that it was inappropriate to do so). The photographs show one or two people on the periphery of the field and in the area of the mounds.
60. **Miss Kim Oldfield** of 18 Crossfield Crescent, Fulford, York said that she moved to that address in February 2000 and had used the Claimed Land for many different recreational purposes since that time. When she first moved she used the Claimed Land primarily as an alternative route to her house from School Lane, walking across the area and taking the opportunity to observe the wildlife and generally unwind on her way home. She had often used the Claimed Land as a playground for her child's friend when she came to visit, which had happened regularly, at least once or twice a year. In January 2001 her father came to live with her, as he was no longer able to care for himself, and she gave up her job and became his full time carer. She was able to escape to the Claimed Land twice a day to exercise the dog and enjoy the open space. When the weather was fine she would be able to take her father out in his wheelchair and wheel him along the top lane. In cross examination Miss Oldfield said that her use had started in 1999 as stated on her evidence questionnaire. She was then renting in Fulford Road and Heslington Lane and she moved in 2000. She was a regular user of the Claimed Land to 2002 when her dog died and, although still a regular user, did not now visit it on a daily or twice daily basis but 3 times a month on average.
61. **Mr Michael Wright** of 3 Main Street, Copmanthorpe, York said that he was a member of the York Metal Detecting Club. Several years ago he was involved in metal detecting activities in and around Fulford. His activities centred on the area around Germany Beck between the cemetery and a field that he was told by the Friends was the subject of an application for village green status. He detected various items including soft drink and beer cans and cemetery vases in the beck. He also noticed numerous items of detritus which included crisp bags and sweet

wrappers which led him to believe that the field adjacent to the beck was possibly being used by teenagers and young people as a place to congregate. He also observed dog walkers and was approached by several people curious to know what he was doing. He produced a photograph of the metal detecting survey team taken in 2003 [A186]. He had been to the claimed land only on the one occasion in 2003.

62. **Mr Tom Rhodes** of 3 Fulford Court, Naburn Lane, Fulford, York said that until 2001 he and his wife lived at 56 Fordlands Road and had lived in Fordlands Road since 1975. They had had a golden retriever and twice a day, every day for years and years, they used to go on to the Claimed Land. He started walking a dog in 1986 and had used the land for dog-training. He had even walked on the Claimed Land in the dark. It was a pleasant walk along the beck. A lot of people used the field. He recalled that a lot of people used to go on to it for dog walking during the last major foot and mouth outbreak. His lads had played in the field but this was more than 20 years ago. There also used to be local people who dug for bottles on the land. He could not remember any cattle on the land nor any barbed wire. Access to the land was never restricted. He had never seen Don Atkinson on the field. He could remember the field having been ploughed at some point in time but that was a long time ago and he could not remember it properly. It would not have stopped his going on to the field. The grass on the field used to be tall and grew naturally. His dog used to go through it. It could have been a stretch 30-40 feet wide that he walked through. He could remember the archaeology dig on the field but could not remember when this would have been. The main holes were to the north of the track and he remembered that he jumped into one with his dog. He remembered only 2 trenches in the field to the south of Germany Lane. They were not big and were not major engineering works. He would have said that they were about 5 feet square. He never stopped walking on the field because of them. He could remember a fence along Fordlands Road. Cherry Atkinson and his mate who sat with him (but whose name he could not remember) were the last people on the allotments. He was able to identify Mr Atkinson on the sepia tinted

photograph taken in 1991 by Mr Hagyard [A243] which was shown to him. The allotments declined over a long period and just became empty land. When the last 3 people died, nobody took them over. After 1988 you could walk through. Children had made camps in the hedge along Germany Lane.

63. In cross examination it was established that the fence Mr Rhodes had referred to had been across Garden Lane. The camps in the hedge along Germany Lane had been in the 1990s. He thought that the ploughing he had referred to had been before 1986. He would not have walked through anybody's crops. The trench he had got into was north of Germany Lane. In re-examination he said that thought that the fence had stopped a legal right to go through. He could not remember any crop on the field. There had been an opening straight off Fordlands Road into the allotments.

64. **Mr Brian Hagyard** of 20 Fordlands Road, Fulford, York said that he had played on the field as a boy from about the age of 7 with other boys from the Fordlands Road estate. He had never known cows in the field, there were many holes in the hedgerow and he could not remember it being fenced off. Later he had had dogs for 12 years from 1994 to 2006 and used the field every day and walked all over it. He thought that the bmx jumps had been built 5 years ago. He had used Garden Lane. It had been well used but became overgrown when people stopped using the allotments. It had recently been fenced off to stop parking there. There had been digs going on in the late 1990s. There were one or two smaller holes in the field compared with the bigger holes in the fields on the other side of the track. The digs did not stop him going on to the field. He spoke to the people doing the digs. At a later point there were some other shallow digs and metal detecting went on at the same time. The lower part of the field now seemed lower than it used to be and it had got a lot marshier and rougher. He had seen the drainage board digging out the beck regularly over the years but had never seen a tractor on the land. There were always plenty of people walking about, not sticking to the edges but wandering all about. When he was walking the dog, there was a track to the

bottom, a track along the top edge, a track that went along the middle of the field and one going up to the Fulford Mews side. The field may have been cut but, if it was, it was infrequently. He had seen children on the land on their own or with their parents and lots of people walking dogs there. He still jogged along the lane and sometimes in the field, more so in the winter when the grass was shorter. He took the sepia tinted photograph of the allotments in 1991 [A243]. It showed Cherry Atkinson and Sid Todd sitting down. By this time there was no cultivation. People just came to sit out in the open and have a chat. The plot shown was the first plot on the right after crossing Germany Beck. The canes shown in the photograph would have been Mr Bean's. The sheds which were on the photograph were those on the 1989 aerial photograph [1442]. The lines which he had marked on the form marked "Form A" and which he had signed on 12<sup>th</sup> December 2008 [A433] were intended to show that he had walked all over the field.

65. When cross examined, Mr Hagyard said that he was born in 1960 and he had started to use the claimed land about 1967. He lived then at his present address. He had used the land sporadically in the 1980s when he was in his twenties. He could not remember any arable crops on the land but, had there been one, he might have gone on the land then but would not have damaged the crop and could always have walked down the side. The markings he had put on Form A [A433] were not intended to show lines he had walked but that he went all over the field. He remembered that a fence had twice been put up across Garden Lane. He could remember a time when a fence went up there in the late 1990s and got broken down. At different times it had been used as a car park. In respect of his 1991 photograph [A243] he was not able to say whether the grass in front of the sheds had been cut, whether there was some rhubarb growing or whether there were runner beans on Mr Bean's plot.

66. **Mr Ed Mountain** of 32 Collingwood Avenue, Holgate, York said that he was a member of the York and District Metal Detecting Club and he could remember that he and a number of other members helped to carry out a metal detecting



survey with MAP a few years ago. He was present during the 2 full days that the metal detecting was carried out. He remembered that first they were taken to do metal detecting on the west side of Fordlands Road, then to the triangle that used to be the allotments. Later they were taken on to the sloping field down by the beck. They were only allowed to detect metal in the shallow pits that were dug by the MAP employees. There were people walking on the land all the time. There were dog walkers coming across to talk to them. He remembered people walking without dogs on the field as well. He also saw children on the field. He found it hard to believe that the archaeologists employed by MAP would not have seen these people. During the survey he remembered finding all sorts of debris that people usually leave behind such as lemonade bottle tops and pull-rings of cans. In cross examination, Mr Mountain said that, if it was recorded in a document [A437] that it was November 2002 that they had been there, that would be right. He could not remember whether the trenches they had investigated corresponded with those shown on the plan produced by Paula Ware [604].

67. **Mr Paul Roberts** of 18 Hawthorn Drive, Barlby, Selby stated that he was a committee member and past chairman of the York and District Metal Detecting Club. He could remember that he and a number of members helped carry out a metal detecting survey with MAP on the claimed land. He remembered attending at short notice in November 2002 when surveying took place in the allotments and on the opposite side of Fordlands Road. No metal detecting was done on this occasion. Some time later in March 2006 there was a 2 day survey done on the field. It was just pretty rough land. He saw people on the field at this time and it would have been clear to anyone that dog walkers used it because of the dog excrement that they came across periodically. There were also tracks across the land where it was clear that people walked. During the survey he could remember finds of coins, a lipstick case and a piece of jewellery. Squashed tin cans, tin foil, sweet wrappers, bonfire rubbish, hinges, screws and other items were also found. In cross examination he said that the allotments were very overgrown when he

went there in 2002 and there were trenches and a JCB there. There were no trenches in the field when the 2006 survey was done.

68. **Mr Martin West** of 9 Fordlands Crescent, Fulford, York said that he was 19 years old His father had taken him metal detecting on the upper part of the field when he was about 5 or 6 years old in 1995 or 1996. He had also been into the allotments where there was a shed and a greenhouse. Sometimes they would take a route through the Claimed Land on the way to school, coming down by the bridge on Fordlands Road and going out by the gap in the hedge on to Germany Lane next to the old people's home. The allotments area was never so overgrown that you could not get through. He built ramps on the land with his friends from the area when he was about 11-14 years old. They dug a pit and then piled up what they had dug. After flooding they used another location for the ramps which is where they presently stand (in the south east corner of the field as shown on various photographs [1471, 1484]). He also made dens on the land between the beck and the old people's home. The main one was built about 5 years ago and it stood for 3 years. He used it until he was 17. The den was on the side of a chicken wire fence which was used as the back wall of the den. The den also used bits of wood. There were usually 30 people down there. They chatted and socialised there, listened to music, had barbecues and sometimes camped out. Mrs Urmston's October 2007 photograph taken in the allotment area [23] related to the den. In one area the chicken wire looked like it appeared on one of the photographs produced by Mr Beck [521] in that in the far corner there was always a bit which was pushed down because people used a path there. It had been like that as long as he could remember. He and his friends did not just remain in the allotments area. They also walked all over the field. There were dog walkers on it a lot; they would see 3 or 4 a day.

69. In cross examination, Mr West confirmed that the first ramps he had mentioned were in the south west corner of the land by the beck. The spoil did not come from the beck. They had permission to build them from the farmer who they had

seen on the track and who had said that he did not mind. These ramps were washed away by a flood and had been there about 7-8 months. They then moved to the other end of the field, which would have been about 2002. The photograph exhibited to Paula Ware's statement taken in March 2006 which was annotated to the effect that there were no spoil heaps [618] was not of the spot where the jumps were. He gave up bmx riding when he was 17. He agreed that there was wire between the allotments area and the field which had been broken down. A bit of smoking went on in the den but beer drinking did not take place there. In re-examination Mr West identified that the chicken wire had been stapled to a tree which appeared in a September 2007 photograph of Mrs Urmston [A277] (which seems to show an area within the former allotments rather than on the boundary between them and the field). He also thought that the mounds in the south east corner appeared in an April 2006 photograph of Mrs Urmston [A267], standing above a flood in the field. The farmer had not given permission for the second set of mounds but he knew what they were doing. He saw them on the field.

70. **Mrs Mahala Rochfort Hyde** of 18 Fulford Park, York said that she moved into 3 Fulford Mews in 1977 and lived there for 3 years till 1980 with her 2 children. She regularly walked along Germany Lane and on to the field and she enjoyed going to the beck and walking beside it. Her son, who was born in 1965, often played there with his friends. They liked to take their bikes on the land. Her son went to a school which was not local and his friends always liked to come to them because of the freedom and space afforded by the Claimed Land. There were no fences there, no cattle and it was not cultivated. She re-married in 1980 and moved to Crockey Hill in 1981 but regularly returned to walk dogs and visit former neighbours. They moved to Fulford Park in 2001 and continued to go to the Claimed Land to walk the dog and wander. They trained their dogs there.

71. **Ms Becky Lingwood** of 2 Westmoor Flats, Fulford, York said that when she was about 12 or a teenager, around 1986-1987, the allotments were a bit of a social area. About 5 or 6 men sat around a shed, not ever seeming to be working but

always having a chat. This continued for a good few years. At this time, she went on to the allotments freely and never felt that she could not go on to them. In 2005 Ms Lingwood had a bohemian friend who stayed in a caravan along Germany Lane. She stayed there for 2 autumns. Ms Lingwood's daughter played with her friend's daughter on the land. In approximately 2000 another woman called Zoe was living there. She also thought that Zoe's boyfriend had parked a vehicle on Garden Lane and that a fence was erected after he left. Ms Lingwood had indicated by marking an aerial photograph where she had made use of the land and its surrounds [A426] – which showed the north east corner of the field, an area to the north of Germany Lane, the public footpath to the east of the land and land to its east, Garden Lane and a strip at the south of the allotments leading from the bridge on Fordlands Road to the field. She also referred to a letter which she had written to the Council in March 2005 [A228] which stated, amongst other things, that she and her daughter regularly walked around the fields backing on to Fordlands Road. To her it was a natural area which had been a very special area for play as a child and which ought to be preserved.

72. In cross examination Ms Lingwood said that she had moved to Westmoor Flats in 2000 when she had her daughter. Before that she had lived in Cherrywood Crescent. She said that the St Oswald's mini-marathon which she had referred to in her evidence questionnaire [146] did not go on to the field or the Claimed Land. She had included hatched areas on the aerial photograph [A426] which were outside the Claimed Land because she was marking where her daughter had played.

73. **Mrs Karin de Vries** of 7 School Lane, Fulford, York said that she was a member of the Friends which was formed in the summer of 2007 to investigate whether a significant number of residents had used the Claimed Land for informal recreation. Since 2005 she had been a councillor on Fulford Parish Council. She appeared at the planning inquiry into the Germany Beck development in a personal capacity in opposition to the development. In her evidence to the present

inquiry Mrs de Vries submitted a considerable body of historical material. She said that she considered that the land had been waste land of the manor. This was consistent with the lack of local knowledge of ownership of the land. She also said that it was her view that Garden Lane must have been one which was regarded as carrying public rights because the right of way which had been given to the Parish Council by the conveyance of 31<sup>st</sup> March 1936 [A244] to access its former allotments south of Germany Beck was limited to a small strip near the beck.

74. Mrs de Vries explained that she had been responsible for the distribution of forms for the application. Initially, in the middle of November 2007, some 400 forms were delivered to addresses mainly in the Fordlands Road estate asking about use of the Claimed Land for informal recreation. After considering the response from this exercise, the Friends devised a customised evidence questionnaire, based on the one provided by the Open Spaces Society, and this was distributed on 9<sup>th</sup> and 10<sup>th</sup> December 2007 to the approximately 90 people whose responses to the first exercise had been positive. The 87 completed questionnaires which were subsequently received from the Fordlands Road estate neighbourhood were then submitted with the application. In the middle of March 2008 the Friends distributed approximately 320 copies of a slightly amended evidence questionnaire door to door in the Fordlands Road estate. The neighbourhood relied on was marked on the map attached to this questionnaire. 40<sup>4</sup> additional completed questionnaires were received. Mrs de Vries stressed the care which had gone into the preparation and analysis of the questionnaires. She also said that the questionnaires would have under-reported use of the land because statements of use had been obtained from various people who had not completed evidence questionnaires and whose evidence did not therefore form part of the quantitative analysis. There were also numerous users who were recorded only as having been seen on the land by others. Mrs de Vries also explained that the Forms A submitted to the inquiry [A398-A435] to illustrate users' access to the land and

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<sup>4</sup> The correct number is actually 41.

their spread of use over it had been prepared originally to facilitate the recollection of potential witnesses and assist recording when interviews were conducted in connection with the preparation of statements for the inquiry. The forms were from those people the Friends had managed to contact about attendance at the inquiry and who had said, when contacted, that they would be able to attend. Those people were then interviewed. There were not forms from all of that group because a number of interviews were conducted over the telephone, so no such form had been filled in, and the forms were not used for people from outside the claimed neighbourhood. Forms A dated after October 2008 were from those from whom statements had been obtained.

75. As to her own use of the Claimed Land, Mrs de Vries said that this did not start until after the summer of 2006. Since then she had started to use it with her 3 boys and also took friends with children there. Ever since, she had seen many local residents on the land, including teenagers on the bmx humps. She walked through crops on the fields near her house trying to keep to the tramlines, and had seen others do the same. She had seen the men carrying out the survey referred to in Emma Bingham's statement [628] and said that they were not paying close attention to the land. More generally, she did not believe that anyone on Germany Lane would, in the summer in particular, be able to see from any given point the full extent of what went on on the whole of the field, given the hedgerow on Germany Lane and the tall vegetation on the south part of the field. She illustrated her point by reference to 2 photographs [A455]. Mrs de Vries also submitted a number of other photographs. She said in relation to these that, amongst other things, there were clear paths made by feet visible on January 2007 photographs [1473, 1474] and there were people (2 teenagers) visible on another [1475].

76. When cross examined, Mrs de Vries said it might have been possible to find out ownership of the claimed land but no-one really knew. When put to her that the allotments could not possibly be waste land as they were not open, uncultivated land, she said they started off as open land. The Germany Beck development was

acceptable to her so far as concerned the impact on her own house and she was not opposed to the building of houses around her house. She was opposed to the loss of the historic shape of the village, to building on the site of the Battle of Fulford and to loss of ecology. When put to her that her evidence to the planning inquiry had not said anything about the playing of games or recreation on the Claimed Land, she said that she had not said anywhere that she had made such a submission. She had not visited the Claimed Land at that stage. There had not been awareness of the village green legislation when the planning application was being considered. The landowners should have been put on notice of the assertion of a right to engage in recreation by looking at the signs on the land, the footpaths, the dog excrement and the bmx mounds.

77. Apart from the live evidence which I have heard on behalf of the applicant/Friends I have also been provided with large amount of further material. This includes (and I do not attempt to provide a definitive list): 41 extra evidence questionnaires which, in addition to the 87 originally submitted with the application, were taken into account in Mr Wilkinson's analysis; additional user forms; Forms D relating to cattle and fencing; Forms A relating to access and spread of use; statements of recreational use; witness statements; maps; photographs; minutes of the Fulford Parish Council; and various documents generated during the planning process.

#### The evidence of Mr Jones

78. **Mr Charles Jones** of 39 Valentia Close, Blettingdon, Oxfordshire gave evidence to the inquiry independently as an interested third party. He said that he had had an interest in the Claimed Land for over 2 decades in connection with its being the possible site of the Battle of Fulford. Over this time he had visited the land regularly. He had moved to the Fulford area in 1982 and had visited the land with his family to walk and play, including games of hide and seek in the tall plants. He had never seen cattle on the land and there had never been any hindrance to

his access. He started to take a closer interest in the land from the mid-1990s when he developed an interest in the Battle of Fulford and had visited the land and undertaken survey work on it in that connection. He said that the land had been used extensively by dog walkers and young people for as long as he had known it. He had seen young people building the bmx course on the land. The undergrowth at the western end was a popular site for dens and he had encountered the remains of food and drink together with improvised seats in this area. Apart from some grass cutting and ditch maintenance by the drainage board, he had not seen any agricultural activity on the land. When cross examined, Mr Jones said that he moved to Bletington 2-3 years ago. When he first lived in York it was at the University and he had moved to Fulford Road in 1982. It never occurred to him that only people from the Fordlands Road estate went there. The bmx course had been in the south east corner of the land from the late 1990s. He could remember some trenches being dug in the peat around 2002 which were quickly backfilled.

The evidence for the objectors

79. Again, I provide a summary of the “live” evidence for the objectors which I heard at the inquiry. As with the summary I provided above of the evidence for the applicant/the Friends, the summary I provide here, whilst reasonably full, does not purport to be a verbatim account. Again I concentrate on those points which seem to me to be of most relevance and significance.

80. **Mr Michael Courcier**, a planning consultant with Barton Willmore, 3360 The Pentagon, Century Way, Thorpe Park, Leeds said that he had knowledge of the site of the Germany Beck development for nearly 20 years. He had been instructed by Persimmon Homes to pursue the development through the planning system since around 1997. He had had detailed involvement in progressing the planning application which included contact with the local community. He had reviewed all relevant planning documentation in respect of the Germany Beck development for the purpose of his evidence. Further, his son had moved to the



Fulford area in January 2008 and he had visited the area on at least a once a month basis at weekends since then. It was normal for him to walk past the Claimed Land on these visits when exercising his dog. He had never seen anyone using the Claimed Land for lawful recreational purposes other than walking on the public rights of way.

81. When he visited the site in 2000 for the purpose of making the planning application and undertaking environmental assessment, the allotment gardens were becoming overgrown. There was no sign of recreational activity there. The allotments had become more overgrown since and it was difficult to move around them easily. Some tracks had been forced through and there was some indication in the form of beer cans that youths were using the area for drinking unseen. The only discernible path in this area was Garden Lane which was heavily overgrown and virtually impassable at its eastern end because of overhanging branches and a fallen tree. His experience of the field was that the grass would grow too long to walk comfortably through before it was cut, especially when the grass was wet. The field was overgrown with coarse grass and weeds. There was a trodden path by Germany Beck but he thought that what was marked as a footpath on the 1995 JSM Designs Limited survey plan [A225] as a footpath was the line where vehicles had passed along to clear Germany Beck. There were less trodden paths around the perimeter and across the centre. The earliest aerial photograph which could show a track was that in 1999 [1410]. There was little evidence of significant beating down of vegetation within most of the field. He had never seen any member of the public on the path along the beck or within the field using it for recreational or other purposes. The bmx mounds in the south east corner of the field were probably no more than 2 years old. On his last visit before writing his evidence, which was on 24<sup>th</sup> September 2008, there were clear signs that recent cutting had taken place in the allotments area. Some further and more extensive cutting appeared to have taken place, this time down by the beck, on a visit he made in December before the resumed inquiry sitting that month. Most users of Germany Lane appeared to be people who had come from areas to the north. The

Fordlands Road estate was a group of some 300 dwellings with a potential population of around 690 people, based on the average household size in the Fulford Ward of 2.28 persons. Most of the population within 10 minutes walk of the Claimed Land lived to its north. He thought that, if and to the extent that the Claimed Land was used, most users would come from areas to the north in common with his observations of where users of Germany Lane mainly came from.

82. The Germany Beck development had had a lengthy and controversial planning history. The public had had many opportunities to make comments about the use and value of the Claimed Land for recreational purposes but had not done so. Extensive surveys, in connection with such matters as landscape, ecology and archaeology, had not revealed recreational usage of the Claimed Land.
83. As to his personal experience of the Claimed Land, Mr Courcier did not, owing to the passage of time and the relative infrequency of his earlier visits, claim to be able to give reliable evidence of what happened before 1999. However, since 2000 he had regularly visited the Claimed Land on about 30 occasions. His visits had been during the day, in the early evening, on weekdays and occasionally at weekends. He had never seen a member of the public on the field on any of his visits despite having good views of it on those visits. His knowledge of the allotments area was less comprehensive but he had walked through there on at least 5 occasions during the last 8 years. He had never seen any member of the public within this area apart from on one occasion in or around early May 2006 when he met a group of youths (about 6 in number and between 13 and 16 years of age) hiding in the undergrowth smoking and drinking. He had regularly seen members of the public on the public rights of way.
84. Looking at some of the material contained in the environmental assessments for the planning application, Mr Courcier said that: the concerns reported by the Atkinsons were in relation to urban fringe conflicts when farm tracks were also

rights of way rather than in relation to any use of fields (paragraph 12.3.21 of the April 2001 Environmental Statement) [A171]; the field part of the claimed land was shown in the April 2001 ES as best and most versatile agricultural land, grade 3a [A174]; photographs in the Environmental Assessment Supplement 2 of May 2006 showed tractor marks or the marks after the internal drainage board's clearance operations rather than walked paths [A223, A224]. He thought that that last point was also true of the photograph which Mrs Urmston had introduced as one of those which had accompanied the evidence she had given at the planning inquiry [A67] but accepted that on the other of those photographs [A67] the worn track coming into the north west corner of the field through a gap in the hedge could not have been caused by a tractor.

85. In the course of extensive cross examination in relation to the planning history of the site, including the planning application and the public inquiry, Mr Courcier maintained that no-one had raised the issue that the Claimed Land was used, or had value, for recreational purposes. Mr Courcier did not agree with suggestions that various items of material produced by the developers in the course of the planning application had recognised public use of the Claimed Land. The applicant could argue that there was such use but it could not be argued that the developers knew of it. When shown recent photographs (taken in February 2008 and September 2007) suggesting a way through at the southern edge of the allotments alongside the beck from Fordlands Road to the field [A236, A277] Mr Courcier said that the nature of the path here had substantially altered in the last 12 months and that it was now much easier to walk through. With reference to Mrs Urmston's May 2006 photographs taken in this area [1453, 1454], he had found great difficulty in getting through in about May 2006 in the run up to the planning inquiry, questioned whether the photographs were actually taken in May and said that the dense area was further along. He thought use of the area by teenagers would have been to hide so that they could smoke and drink. As to the field, he had not seen cutting but had seen the results of it. He thought that the track along the beck had principally been formed by machinery used by the

internal drainage board but accepted that there was some foot use which kept it from grassing over. He accepted that recreational users walked around the perimeter of the field in the last 2-3 years. What was shown on Mrs Urmston's February 2008 photograph of the northern field looking east taken from near the Germany Lane hedge [A276] was probably a footpath. The same went for the May 2006 photograph in the same location [1455]. The December 2005 photograph looking west across the field [1457] could show that people had walked along tracks made by vehicles. The March and June 2006 photographs along the beck [1457, 1458] showed markings made by machinery but he accepted that there had been some recent use by people. The photograph of the western boundary of the field with the old people's home taken in May 2006 [1459] could show a path or compaction by machinery. The April 2006 photograph taken along the same boundary [A275] could show the result of trampling but could also show something which had been caused by agricultural machinery. He was able to see into the field from Germany Lane apart from at one or two points where the field may have been hidden from view. He was certain he would have seen some people on the land if there had been significant usage of it. His own personal view was that the Fordlands Road estate was a neighbourhood.

86. **Mrs Christine Anne Dinsdale** of Latrigg, 81 Fordlands Road, Fulford, York said that she had lived at that address from 1947-1957 and again from 1984 to the present date. She had been a councillor on Fulford Parish Council from 14<sup>th</sup> June 2001 until 23<sup>rd</sup> October 2002 and from 2<sup>nd</sup> June 2003 to 12<sup>th</sup> September 2005. She had a good knowledge of the Claimed Land not only from her role as a parish councillor but also because she walked up and down Fordlands Road about twice a day, usually with her dogs. As to the allotments, there had been 5 plots which were used for growing vegetables. Some were accessed from Garden Lane and some from a gate on Fordlands Road. She recalled the gate being locked with only the allotment holders having keys. After the last allotment ceased, in or about 1996, to be used the gate fell into disrepair and the hedges were left to grow over

it. A shed was left on the land which was used by youths for illegal activities before it was demolished. When the land was used for allotments she remembered seeing a few people walk down Garden Lane and across the field next to the beck but not anywhere else on the Claimed Land. Since a fence had been erected across the lane to stop parking, she had not, for about the last 10 years, seen anyone walking or carrying out any other recreational activity on the allotments. The fencing fell into disrepair over time and was not intact at the time of the planning inspector's site visit on 4<sup>th</sup> August 2007.<sup>5</sup> The allotments had become very overgrown since they stopped being used. As to the field, she could recall that at one point in the late 1980s 3 sides of the field (excluding the southern part next to the beck) were fenced with post and barbed wire. She produced a photograph from the 1990s<sup>6</sup> showing fence posts and barbed wire [599]. Around about 1985 she had asked Donald Atkinson if she could place some removable posts in the field in connection with training her dogs. Mr Atkinson refused. She walked her dog along Germany Lane on average 3 times a week and would therefore regularly see the field. For the last 10 years she had not seen anyone walking on the field or using it for any other recreational activity. The Claimed Land flooded regularly and it was impossible to use it for any recreational activity at such times. There was already a village green in Fulford next to the River Ouse down Landing Lane.

87. When cross examined, Mrs Dinsdale said that the photograph which showed the fencing [599] had been taken by Pat Woodley. It was taken along Germany Lane but she could not pinpoint where. The fencing went all along Germany Lane. The posts were near the hedge. Gypsies could have taken the fencing. There had been a gate near the old people's home. Garden Lane was open to the field. She could not remember what the gates to the allotments were like. The evidence form she had completed in March 2008 [A443] did not refer to fencing; she must have missed the relevant reference. She had told Mrs de Vries when speaking to her

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<sup>5</sup> The planning inquiry was actually in 2006 as Mrs Dinsdale said during cross examination.

<sup>6</sup> Probably 1991 – see fn 2.

previously that there were no obstructions because they had then been taken down. She could not recall saying that she could not remember the allotments and would not have said that. She was not able to say when Mr Hagyard's sepia tinted photograph of the allotments might have been taken [A243]. She would have said that the gate into the allotments from Fordlands Road went into Mr Bean's allotment. She could not remember when the gate was there apart from it being the time when her husband got sweet peas from Mr Bean's allotment. She could not recall when the shed was demolished. She thought that she had rung Persimmon to get this done although Mr Reynolds had stated that he got Pilcher to do it [569]. She could not say from memory when the allotments were last used. She did not know who the people were who she had referred to as going on to the field to walk along the beck but there was nothing to stop them getting there. She thought that the year in which the planning inquiry had taken place was 2006. She could not remember cattle in the field in 1985; she would not have asked Mr Atkinson if she could train her dogs there if there had been cattle in the field. The fencing would probably have been such then that it did not stop one getting on to the field. The fence across Garden Lane which she had referred to had not been up that long. It was not possible to walk through that fence when it was there. It was also too overgrown to walk down there. She had not been on the allotments. She did not offer an explanation why she had said in her evidence form [A443] that she had seen others on the claimed land. The bmx mounds would have been able to have been seen if there when she went on to the site with the planning inspector but she did not think that they were there then.

88. **Dr Raymond Paul Gemmell**, consultant ecologist and principal partner of Environmental Research and Advisory Partnership, said that he had carried out ecological surveys of Germany Beck and associated land, including the Claimed Land. He and his colleagues had inspected the Claimed Land at various times in 2000 and 2001 and since then in 2005 and 2006. In 2000 he personally inspected the northern part of the field and recorded it as developing coarse grassland. He said that there was clear cut evidence that the northern part of the field was

formerly arable land because there were the remains of cereal crop stubble amongst the common couch grass and there were associated weeds of spear thistle, creeping buttercup and broad leaved dock. Common couch grass was usually the first grass species to develop following the cessation of farming. The cereal crop stubble indicated that the northern part of the field had been used for arable cropping in previous years, probably on a crop rotation basis in the last 10 years. His inspection of the northern part of the field in September 2005 showed that the grassland had been cut and the cut grass had been left on the land. In 2000 the southern part of the field was “wetland” as described in the 2001 Environmental Statement. The combination of plant species present was indicative of seasonally wet ground with localised wet areas. It was also indicative of regular cutting when the ground was sufficiently dry for a tractor to operate efficiently without serious rutting. The absence of woody species indicated that cutting was at least annual. The presence of perennial rye grass was further evidence that the vegetation had been cut when soil moisture conditions permitted. His subsequent inspection of the southern part of the field in September 2005 showed that it was uncut at that time but the absence of woody vegetation indicated that it had probably been occasionally or infrequently cut because there was no mention in his field notes of scrub or sapling invasion. Whilst surveying, neither he nor his colleagues had seen anyone walking their dogs in the field or carrying out other recreational activity. In relation to Mr Potter’s inference as to the regularity of cutting in the northern part of the field because of the presence of a dog rose, Dr Gemmell said that it could grow along the ground and escape cutting. If the land had been ploughed up after the last cereal crop and put down to grass, that would be consistent with the conclusions he had expressed. In relation to the aerial photograph which was either taken in 1991 or 1993 [1405] he thought that the difference between the appearance of the cropped land to the north of Germany Lane and the northern part of the field in the Claimed Land could just have been caused by topography and shading and could not say with certainty that there was any difference.

89. In cross examination, Dr Gemmell accepted that he described the southern part of the field within the Claimed Land as “uncut” in paragraph 3.1.2 of the appendices to his proof of evidence for the 2006 planning inquiry [A368] as opposed to his description of regular cutting in his statement to this inquiry. The evidence was that there had been cutting. Paragraph 3.1.2 was correct at the time of survey. The tree which was shown on various photographs in the south east corner of the land [651,1478] looked like a willow or a sallow, a typical stream side woody species, and it was quite possible that areas which were very wet and close to the stream were not cut. He had seen a path along the stream bank which was associated with the stream and outside the managed area of the field. There was no inconsistency, when other factors were looked at, in stating that common couch grass was usually the first grass species to develop following the cessation of arable farming and the fact that couch grass was found in the SINC, which had not been arably farmed. He had established that there had been cereal stubble in the northern part of the field on the first time that he visited it but had not brought documentary evidence of that to the inquiry although he thought that it was mentioned somewhere. Stubble could still be there after the time which had elapsed from the cessation of cropping. If there had been arable cropping, it was a reasonable assumption to make that there would have been crop rotation. If a grass crop had been taken it would be expected that this would lead to a species poor outcome. The Environmental Statement would have referred in paragraph 4.3.4 to “increased” recreational activity along the north bank of Germany Beck [A374] because any ecologist would make the assumption that there would already be some activity alongside a stream. He did not think that it was comparing like with like to look at aerial photographs which combined the SINC and the southern part of the field [494, 495, 1397] to make judgments about the cutting regime applied to the southern part of the field. He had already accounted for any difference between the appearance (and he thought the appearance was very similar) of the field north of Germany Lane and the northern part of the claimed field on the 1991/1993 aerial photograph [1405] as being caused by differences in topography



and shading. Beyond that it was speculative as to what the photograph showed in the northern part of the field.

90. **Ms Paula Ware**, director of MAP Archaeological Consultancy Ltd, said that MAP was instructed by Persimmon and Hogg to undertake an archaeological evaluation of the land proposed for the Germany Beck development, including the Claimed Land. Work was carried out by MAP during the period from April to September 1996, November 2002, October 2003 and from the end of February until March 2006. During these periods an employee from MAP was on the development site every day between 8am and 4pm except Sundays. In 1996 the allotments area had regeneration on it and there were remnants of the previous use in the form of sheds and fencing in disrepair. The allotments were mainly accessed from a former footpath to their north. Work was carried out by MAP in the former allotments from the end of May to late June in 1996 and again from 4<sup>th</sup> to 8<sup>th</sup> November 2002. Several trenches of 0.45 to 0.6m depth were dug in the allotments in 1996 and were open for 2 to 3 weeks. In November 2002 the work was only able to be carried out in one trench as the rest of the area was covered in natural regeneration and was inaccessible. This trench was about 0.4m deep and was open for 5 days. Because the allotments were so overgrown a second trench, 0.5m deep, was opened just into the field and remained for 5 days. Local metal detectorists came in November 2002. Two of her colleagues had been at the allotments daily when work was carried out there and they had confirmed to her that they had not seen anyone walking their dogs on the allotments or carrying out any other recreational activity there. She herself had personally worked on the allotments or within sight of them at least twice a week during the periods in which the archaeological evaluation was carried out and her experience accorded with that of her colleagues.

91. As to the field, work was carried out here from the end of May to mid August in 1996, 4<sup>th</sup> to 8<sup>th</sup> November 2002, 22<sup>nd</sup> October 2003 and from 6<sup>th</sup> to 10<sup>th</sup> March 2006 when a metal detecting survey was carried out. The area was also checked

daily in the period between 24<sup>th</sup> October to 6<sup>th</sup> November 2003. Several trenches of 2m depth were dug in the north west corner of the field, where there had been a tip, in May 1996, some being open overnight, some for at least a week. Several shallower trenches (0.3 to 0.6m) were dug in the southern part of the field together with one in the north east corner of the field in July/August 1996. These trenches were open 2 to 3 weeks. They were shown on the July 1996 aerial photograph [1403]. If a footpath had been seen in 1996 they would have moved the trench to avoid disturbing it. A trench was also dug in the north east part of the field in November 2002. It was 0.5m in depth and was open about 5 days. Metal detection took place at this time. In 2003 another trench was dug in this area, slightly south of the last trench. It was quite deep and was open for 3 days. Two of her colleagues had worked in the field daily for the periods when work was going on there and they had confirmed to her that when work was carried out there they had not seen anyone walking their dogs on the field or carrying out any other recreational activity there. She herself had personally been on the field or within sight of it at least twice a week during the periods in which the archaeological evaluation was carried out and her experience accorded with that of her colleagues with the exception that she saw one man over the period of the work in March 2006. At the same time each day this man would enter the field from Germany Lane, walk along its western boundary, then along the beck and exit on to the public footpath to the east of the field. She exhibited a photograph which she said showed that there were no mounds of soil in the south east corner of the field in March 2006 [618].

92. When cross examined, Ms Ware explained that the plan of the trenches which she had produced [604] was a specification document prepared prior to excavation and the other trench plan which had been submitted to the inquiry by the applicant/the Friends [A214] was of work actually undertaken. Ms Ware said that she did not claim that she was on the Claimed Land for 8 hours every day but she did go every time there was any intervention. She used Germany Lane every day. Every trench was examined on a daily basis. It was an unusual event to see

anybody and she would have remembered it. In regard to Mr Hagyard's evidence that he spoke to people doing the digs [A176], she said that no-one came up to them and that was the remarkable thing about the site. She could not speak for Mr Mountain who had said that people had come on to the land when MAP were there [A436] and said in relation to Mr Roberts's evidence to the same effect [A184] that everybody in MAP had said no-one had come on to the Claimed Land. She did not know Mr Wright [A185]. MAP's report of the March 2006 metal detecting survey had stated in paragraph 6.10.2 that modern refuse (such as bottle tops and cans) had been found distributed evenly across the field and reflected past recreational use [1546] but the finds could have been ones of items left by the gypsies or brought in as rubbish when the land flooded. The material could have been spread by ploughing. There was a denser pattern in the north east corner. When the report described the finds of coins being confined to the north eastern part of the field which was "one of the main entrance zones to the area" [1545], it meant by this getting access to the field. That part of the field (the southern part) which was marked as scrub on the plan to the report [1550] had not been surveyed. It was difficult to see into the field from the allotments in 2002 but easier in 1996. There was a gap because they had had to break through. She would not say that there was a clear view and the field would not be seen at all from someone in a trench. Where there were open trenches, they looked out for people. She did not have an opinion whether photographs put to her, e.g., [1461], showed tracks walked by people. She was not sure that the bmx mounds had been there in March 2006 (but Mr George intervened to say that it was conceded that they were there in the spring of 2006).

93. **Mr Peter Denis Hill**, technical director of Hogg Builders (York) Limited, said that Hogg Builders, Persimmon Homes (Yorkshire) Limited and Pilcher Homes Limited had options to purchase the Claimed Land from the freehold owners, Wakeford Properties Limited and Fulford Land Limited. On 18<sup>th</sup> November 2002 he received a letter from Stephenson's Estate Agents, who were the managing agents for the Claimed Land. The letter stated that, as a result of complaints from

the Parish Council about the state of the hedges, Stephenson's had instructed Lewis Landscapes to cut the hedges which are on the western part of the Claimed Land directly abutting Fordlands Road. Further, Stephenson's had instructed Lewis Landscapes to erect a fence along the western part of the Claimed Land directly abutting Fordlands Road. As Hogg Builders had an interest in the Claimed Land, Mr Hill authorised payment of Lewis Landscapes' invoice for the work. On one of his visits to the Claimed Land around December 2007 he noticed that the fence had been taken down. He thought that the fence had been up for approximately 10 years. In cross examination Mr Hill said that he visited the Claimed Land fairly infrequently, once every 6 months, and had been about a dozen times. The visits were on a "drive by" basis and a walk around if there was something specific. Sometimes he just drove down Germany Lane. The landowners' agent had arranged for the fencing in 2002 to stop the parking of a caravan and illegal trespass on the land. Hogg Builders agreed to pay the invoice for the work as a gesture.

94. **Mr Donald William Atkinson** of Poplar House Farm, Fulford, York, said that, together with his brother, Frederick Brian Atkinson, he entered into an agricultural tenancy with William Wormald on 17<sup>th</sup> September 1990 in relation to Lodge Farm. The tenancy commenced on 6<sup>th</sup> April 1969. The field between Germany Lane and the beck which forms part of the Claimed Land was part of the tenancy. The field comprised 3.22 acres. The field could be broken down into 2 areas: the northern part consisting of 2 acres; and the southern part between those 2 acres and the beck. At the start of the tenancy until some time later the whole of the field was used for grazing cattle and, as such, it was necessary for the whole of the field to be fenced. Mr Atkinson had originally [497] given the date at which cattle ceased to be kept in the field as 1988 but in his second statement he said, having had the opportunity to search for old files and documents, that the date was 1986 [557]. When asked in examination in chief what the approximate date was when cattle were last put in the field he said that he did not know. The fencing consisted of barbed wire and posts around 3 sides of the field, the side nearest the

beck not being fenced. The fencing was set within one yard of the hedges on the inside of the field. In the spring of each year around 3 to 4 cattle would be put to graze in the field. Before the cattle were put in the field he and Brian would check the fencing and carry out any necessary repairs and maintenance. General maintenance would also be carried out at regular intervals during the year. The cattle herd was sold in 1986 when it became no longer economically viable to keep cattle. After he and Brian stopped using the field for grazing cattle the fencing was left in place but it was not maintained and fell into disrepair. When there were cattle in the field they got in through a little gate at the Fulford Mews end. There were no other gates then.

95. From approximately 1986 to 1994 the northern part of the field was used to grow corn crops and sugar beet in rotation. He referred to a May 1992 aerial photograph showing such use [502]. The farming procedure was similar each year. Around September or October it would begin with spraying weedkiller from a sprayer attached to the tractor. Then, at some point between November and March, the northern part of the field would be ploughed. Before it was ploughed the hedges would be cut back on the inside and outside of the field. Around March to April the northern part of the field would be harrowed with the tractor. On the same day it would be seeded and then fertilised. When the wheat or grass (depending on what was being grown) had grown to around 4 to 5 inches he and Brian would go back into the field with the tractor and spray a selective weedkiller. They would return on a further 2 to 3 occasions to treat mildew and wild oats. In or around August they would harvest or combine the northern part of the field which would involve cutting the grass or wheat. They would then bale it, turn it or chop it. Whether baling took place would depend on the value of the straw or hay each year. Once the hay or straw was baled, the bales were immediately taken away. If straw had been grown, stubble would have been left in the northern part of the field. If the value of straw was low, they would chop the wheat and then use it as a fertiliser, re-ploughing the straw into the ground. From 1994 the northern part of the field was put into permanent set aside which lasted until he and Brian

terminated the tenancy in October 2007. Whilst the land was in set aside grass and weeds grew on it until it was cut each year between 15<sup>th</sup> July and 15<sup>th</sup> August. Until the grass was cut the length of it would have prevented anyone from using or walking on this part of the field. When the grass was cut, they would also cut the hedges from both the inside and outside of the field. The document in his brother's handwriting which recorded crops on the farm in June 1992 referred to the area he had been talking about as "Near Muise Beck" [A141].

96. The southern part of the field was too wet to be put into permanent cultivation and on several occasions farming machinery became stuck here. From around 1986 to October 2007 the southern part of the field was used as grassland and hay was taken annually. The southern part of the field (and also the allotments) flooded most winters, especially in January and February, varying in severity from year to year. There had been very bad flooding in 1991. The internal drainage board maintained the beck and cut the grass on its banks annually. The internal drainage board had the right to spread the material taken from the beck on to the land within 6 feet of the beck. Around the summer of 2007 he noticed a pile of soil on the field next to the beck. He believed that this had been left by the internal drainage board and did not investigate the matter. He never saw local residents playing on the pile of soil. During the whole of the tenancy he never saw any local residents on the field, despite his continuation of farming operations nearby and being on the lookout for trespassers owing to problems with gypsies on Germany Lane. He thought that the tyre suspended from the tree shown on Mrs Urmston's December 2005 photograph [21] had been put there by gypsies. He and his brother cut it down and they never saw anyone using it. The only local residents he saw were those walking or dog walking on Germany Lane or on the right of way to the east of the field.

97. When cross examined Mr Atkinson said that he was certain that they kept cattle in the field but he was unable to say when because it was a long time since. His brother kept the records. When the cattle were in the field the post and wire

fencing was maintained. There was a line in the hedge itself and one on the inside (i.e., field side) of it. The fence posts would have rotted away now. The barbed wire would have got in the hedge cutter and been pulled out. He could remember getting barbed wire fast in the hedge cutter when cutting the hedge but could not remember when this was. There might have been a fence along the side of the beck but the cattle did not in fact get out of the field. He could not remember when the field went into set aside but, when set aside came out, it went into set aside straight away. It was a requirement of set aside to cut each year, and leave the cut grass there, between 15<sup>th</sup> July and 15<sup>th</sup> August and the field was so cut each year. Years were definitely not missed out. The cutting was not meant to go right down to the ground. The southern part of the field had been cut years ago but he did not know when. It might have been 10 years since it was last cut properly. Hay had been taken off there but not for a long time. It had not been done annually. He could remember getting stuck with the tractor. If dry, they would try to cut it. After being taken through Mr Young's aerial photograph analysis Mr Atkinson agreed that the southern part of the field would not have been cut for hay for the last 10 years. The northern part of the field was an arable field. They had had mainly spring barley in the field and might have had sugar beet in one or two years. It was difficult to remember but overall it was set aside in 1993 and then cut between the 15<sup>th</sup> July and 15<sup>th</sup> August, before then it had been arable and before that it had been grass and cattle. After being taken to some of the aerial photographs Mr Atkinson maintained that there was a corn crop in the northern field for each year before it was set aside. He thought that he had first seen the heaps of soil in the south east corner of the site in 2007; he did not think that they had been there for some years before that. When the field was in set aside, they only went to it when they did the cutting between 15<sup>th</sup> July and 15<sup>th</sup> August. They never saw any footpath or anybody walking on the field. They had not seen any youngsters on the land but had told them to get off the lane when there on motor bikes.

98. In re-examination Mr Atkinson said that he thought that the lengths of wire which were reported as finds in the metal detecting survey [1542] would have been barbed wire from the fence. The crops grown in the period up to set aside were mainly spring barley and there may have been one or two crops of sugar beet. Grass had not been grown at this time. He said hay had not been cut in the bit right down by the beck for 20 years but then said that they had taken hay off the southern part of the field in the past but he did not know when it was. Sometimes they tended to cut a bit more when cutting the set aside land when it was dry enough to do so.
99. **Mr Frederick Brian Atkinson** of 3 Birch Tree Court, North Lane, Haxby, York said that there had definitely been cattle on the field at some stage. He would say that they ceased putting cattle into the field in 1975. Documents showed that they had in the past bought cattle from the York Cattle Centre but there were no records after that. There was just one gate to get into the field near what is now the nursing home, a 9 foot gate, an old type of wooden gate. There were no other gates into the field at that stage. As to the northern part of the field, Mr Atkinson first referred to a document, headed "June Return 1986 Spring Barley" which he had written in 1986 [A159c] and which he had stapled to the agricultural return for June 1986. The northern part of the field was referred to on that document as "Near Hardi's [sic] Stack yard" and shown as 2.00 acres. The land would have been ploughed up to start with and then fertilised. The handwritten document showed that spring barley had been grown. There was a similar handwritten document of his which had been stapled to the June 1991 return [A148]. The same 2 acre field was referred to on it as "Near Muisse" [sic]. That was just how he had written it down. It was without doubt the same field. He had no reason to think that there was anything else on the field than the spring barley which was referred to on the document. There also a similar handwritten document of his for 1990, showing spring barley on "Near Muisse" [A158] and there was no reason to think that this document was wrong. The same applied to his handwritten document of June 1992 showing 2 acres of spring barley "Near Muisse Beck". Asked about the



information which the Rural Payments Agency (“RPA”) had supplied showing that field 3285 (the relevant field) was recorded as 0.85ha of arable barley in 1993 [A357], Mr Atkinson said that he had no reason to suppose that a false return had been provided to the RPA. It was Mr Tasker of Stephensons who had submitted the returns after Mr Atkinson had given him the papers. Mr Atkinson said that he had no documents for 1987, 1988 and 1989. There was no need for them to keep records then and he had not expected to find what he had found. He believed that there was a good chance that in one of the years 1987, 1988 and 1989 there had been sugar beet on the northern part of the field and, in the other two, it could have been barley. There was no year between 1986 and 1993 when nothing was grown. He did not think that there would have been a grass lay in that time. The southern part of the field was cut down on a yearly basis as far as they could safely go without getting bogged down. It depended on the conditions.

100. When cross examined, Mr Atkinson said that the 1975 date he had given as the last time cattle were on the field came from having looked at papers but he could remember that there had been cattle on the field, having known it since 1943. When cattle were there the fence had been maintained and checked every year in the spring but, once the cattle had gone, the fence would deteriorate quickly and allow plenty of access points to the field. The grass on the northern part of the field was cut once a year, according to the rules and regulations, after it went into set aside. They would have come in at the gap in the north east corner with a topper. His brother’s statement (which he had agreed with) was wrong in saying in paragraphs 14 and 15 that wheat had been grown [558, 559]. The grass referred to was, he would say, that growing in the crop. The reference in paragraph 18 of his brother’s statement to chopping the wheat meant chopping the straw. It was 1994 when the northern part of the field went into set aside. There was a crop there in 1993 and, having read the old documents, he was in no doubt that there was an arable crop there in 1990 and 1991. He had returns which would show when the northern part of the field went into set aside.

101. The documents last referred to were produced the next day (19<sup>th</sup> December 2008) and take the form of field data sheets or printouts for 1993 and 1994. The 1993 data sheet shows that 0.85ha of the relevant field (number 3285) was cropped for spring barley in 1993 [A465]. The 1994 field data printout shows that the same 0.85ha was in set aside in 1994 but confirms that it had been in arable use in 1993 [A470]. The 1993 data sheet also threw up an unexpected reference to 1991 in that it shows that the use of field 3285 made it eligible for arable area payments in 1991 but records the use of the field on 31<sup>st</sup> December 1991 as being “fallow” above which are written in brackets the words “spr bar”. Mr George offered the explanation that spring barley had been sewn but not harvested because of the particularly bad flooding which had occurred that year as shown on Mrs Dinsdale’s photograph [599]. It is unfortunate that this matter was not able to be ventilated during the evidence of Mr Brian Atkinson but I regard the explanation as plausible.

102. **Mr Richard Tofield Tasker**, partner of Stephenson and Son of York Auction Centre, Murton, York said that from approximately 1980 he was instructed by the Trustees of the Land of Fulford, formerly William Wormald, to manage Lodge Farm of which the Claimed Land forms part. The triangular piece of land adjoining Fordlands Road also formed part of the Trust land and was rented out as allotments. Mr Tasker’s duties as managing agent required him, amongst other things, to collect rent, deal with tenancy agreements and rent reviews and to manage the repairs and maintenance of the farm house and buildings. The tenants of Lodge Farm were Donald William Atkinson and Frederick Brian Atkinson under a tenancy dated 17<sup>th</sup> September 1970. From 1980 when he became the managing agent of Lodge Farm, Mr Tasker visited the Atkinsons twice a year, in April and October. He would also visit Lodge Farm on other ad hoc occasions when there were problems with repair or maintenance of the farm buildings. He believed that up until about 1993 the Atkinsons used the northern part of the field within the claimed land as arable land. He referred to the May 1992 aerial photograph [494] as evidence of this use. He was in due course

employed by the Atkinsons to deal with the submission of the forms required in connection with the administration of the set aside scheme. It was his recollection that from around 1993 to 1994 the Atkinsons put the northern part of the field into set aside and that it remained in set aside until the Atkinsons terminated their agricultural tenancy in October 2007. He referred to a September 1994 aerial photograph which he said illustrated the change in the use of the land from arable to set aside [A489]. He had supplied the information to the Rural Payments Agency (“RPA”) which was recorded in their e-mail of 26<sup>th</sup> November 2008 and which showed that a crop of barley had been grown in 1993 [A357]. Once in set aside, the obligation was to maintain a green cover throughout the set aside period and to top it once between 15<sup>th</sup> July and 15<sup>th</sup> August. After the termination of the Atkinsons’ tenancy, the 2008 payment claim was made and paid under the name of the trustees.

103. Mr Tasker said that the southern part of the field was too wet to cultivate and was therefore used as grassland throughout the period that he had any dealings with the farm. He understood that this was managed and topped in the late summer every year. It was shown on the RPA’s list of the land use history of field 3285 from 2005 onwards (as permanent pasture) [A357] because there had been a review at that time which had introduced a new single payment scheme. Mr Tasker said that the allotments also fell within the land which he managed on behalf of the Trustees of the Land of Fulford. There were 5 allotment gardens which were used for growing vegetables and other produce for the personal use of the allotment tenant. As far as he was aware, some of the allotments were accessed from Garden Lane and some directly from Fordlands Road. Mrs Little only terminated her tenancy on 31<sup>st</sup> October 1990 as shown by her letter which Mr Tasker exhibited [491]. Mr Benson did not terminate his tenancy over his 2 allotments until 6<sup>th</sup> April 1996 as shown by the letter from Mr Benson of April 1995 which Mr Tasker also exhibited [493]. Overall, Mr Tasker never had any reason to suppose that anyone was using any part of the Claimed Land for any recreation purpose.

104. In cross examination, Mr Tasker said he was able to say that the northern part of the field was put into set aside in about 1993 to 1994 from his own knowledge. Field 3285 was described as grass in the 1985 schedule to the tenancy agreement [483] but he thought that this would just have been copied from the previous schedule to the tenancy agreement (which, as the original schedule, showed field 3285 as pasture [478]). Consent would have been given under the tenancy agreement (in accordance with clause 17 [474]) to break up or convert the grass into arable land. His belief that the northern part of the field was used for arable land up to 1993 was based on his own recollection and inspection of the farm and discussions with the Atkinsons. The Atkinsons were arable farmers and all land which was capable of being arably farmed, including some small bits, was arably farmed. He had not seen the Atkinsons plough the claimed land. When he met them, it was generally at the homestead. He had no record of how regularly he would have visited the claimed field but he would always go round the farm and prepare a report for the landlords and, on every occasion he did this, he would see the field. There had been no cattle on the farm since he had been involved with it. He could not say what the condition of the fences or the hedges around the field was when he took up his responsibilities in 1980. He had seen people on the allotments over the years but had little particular knowledge of Mr Benson. Mrs Little rented an allotment, paid her rent and he would see her there on the allotments. The documents identified that Mrs Little took over Mr Headley's allotment [1520]. He could not recollect any dens.

105. **Mr Ian Ernest Reynolds**, managing partner of Stephenson's Estate Agents of 10 Colliergate, York said that he joined Stephenson's in 1976 and from that time was involved in the management of the Fulford Estate of which land at Germany Beck was part. He was principally appointed to examine the development potential of the Estate and since 1990 had been actively engaged in promoting the land at Germany Beck for residential development. Since that time he had regularly inspected the land and liaised with potential developers, the landowners and the agricultural surveyors of Stephenson's at Murton. He would

regularly pass the Claimed Land when inspecting the area being promoted for development. From around 1965 the freehold owner of the land of which the Claimed Land formed part was William Wormald. Around 1980 William Wormald transferred the land he owned to the Wormald Trust of which he was one of the trustees. In November 2007 Hogg Builders (York) Limited and Fulford Land Limited purchased the land, Hogg Builders through their nominee, Wakeford Properties Limited.

106. The last allotment tenant, Mr Benson, terminated his tenancy in April 1996. When the land was used as allotments access to the allotments was mainly by Garden Lane. The allotments were separated from Garden Lane by a thorn hedge and the allotments were accessed through gaps in that hedge. There was also a gate about half way down Fordlands Road which also provided access to some of the allotments. Mr Reynolds referred to letters which he exhibited and said related to complaints from the Parish Council in 1997 that the allotments were overgrown [573-578]. Mr Reynolds said that he also understood that at this point local youths were using the old hutments as an illegal meeting place. Therefore he arranged for the hedges along Fordlands Road to be cut back at the expense of Persimmon and he also arranged with Robert Pilcher of Pilcher Homes Limited to have the hutments demolished and for a fence to be erected across the access point north of the allotments next to the old people's home. He thought that the demolition took place in early 1999 and the fencing was erected at the same time. The purpose of the fencing was to prevent unauthorised access to the allotments and, in particular, to prevent the unauthorised parking of a caravan which he believed was owned by the occupiers of 151 Fulford Road. He also allowed the hedge on the north side of the allotments to grow across the access point and meet the hedge on the side next to the old people's home. Again, the purpose was to prevent unauthorised access. He recalled on 19<sup>th</sup> August 1997 visiting the site with William Wormald and Nick Humble, a trustee of the Wormald Trust, and at this stage the hedge on the north side of the allotments had grown across the access point and therefore they were not able to walk down

Garden Lane. Over a period of time the fencing was damaged and destroyed. However, the fencing was replaced around November 2002 at Mr Reynolds's request but at the expense of Hogg Builders (York) Limited. Mr Reynolds produced a copy of his letter to Hogg Builders dated 18<sup>th</sup> November 2002 asking them to pay for the work [584]. Mr Reynolds said that he realised that some trespass must have been taking place on the allotments owing to the fact that the fencing was damaged and destroyed but, as far as he was aware, this was nothing other than local youths. He confirmed that he had never actually seen anyone walking or carrying out any other recreational activity on the allotments.

107. When cross examined, Mr Reynolds said that he had passed the Claimed Land in the car or had gone on foot quite a number of times a year. He had been on to the claimed field, although not very often, entering when he did from the right immediately after the old people's home. His inspections had principally been from Germany Lane. He had not seen footpaths on the field. He had seen the mounds but had not seen youths on them. There had been beer cans and that sort of thing in the hutments, which were obviously being used. He had never seen that use but a complaint about it had been registered with him. He had not seen dens in the allotments. He could remember the caravan parked in Garden Lane. He probably visited the development land adjoining Germany Lane about twice a year with the trustees. The hedge across the entrance to Garden Lane had had a fairly good attempt at reaching right across but it had not blocked it totally. He thought that the Parish Council's complaints about overgrown hedges had been in relation to the A19 as well as the hedge on the Fordlands Road boundary of the allotments and referred to the invoice from Lewis Tree Surgery of 11<sup>th</sup> November 2002 which referred to both hedges. He did not think that illegal beer drinking and glue sniffing were acceptable activities which was why the hutments were knocked down. Nor did he consider that men chatting on the allotments was a recreational activity. He said that in 2002, when the land was registered, he had inspected it thoroughly, walking every boundary, and he saw no evidence of any footpath then. There was nothing from his inspection that he felt he needed to

point out and no sign of mass trespass. He did not then see mounds on the land but he had seen mounds in 2007 in the south east corner of the wetland. There had been recent cutting in Garden Lane but it had not been the landowners who had done this by way of maintenance and he was not aware of it having been done by Council workers.

108. The objectors also relied on written statements by Mr Andrew Beck (2 in number) and Miss Emma Bingham of Walker Morris, Solicitors. Mr Beck's statements exhibited photographs and spoke of what he had observed on visits to the Claimed Land. Miss Bingham's statement dealt with her research into the Parish Council minutes and exhibited the results of a usage survey carried out in September 2008.

#### The submissions

109. I provide in this section only the briefest of summaries of the submissions which were made. I have taken all of the submissions into account in coming to my findings of fact and providing my assessment. My findings of fact and my assessment will in themselves explain in large measure to the parties how I have dealt with the submissions made to me. Where I feel that it is necessary in those later sections of this report to refer to specific submissions, I do so.
110. Mr George made 5 general submissions. These were that the applicant/Friends had failed to prove 5 critical matters:
- (a) that the use relied upon was predominantly by the inhabitants of the Fordlands Road area;
  - (b) that there had been continuity of use throughout, and in each year of, the 20 year period, and throughout that period by a significant number of local inhabitants rather than by individuals;

- (c) that such use excluded use which was more readily attributable to mere walking on defined paths, or to the retrieval of dogs which had run from the path;
- (d) that such use could sensibly be said to extend to the entirety of the land, and not merely to recognisable parts of it, albeit that the use need not have extended to every square foot of the land;
- (e) that the use was “as of right”.

111. Mr George also made more detailed submissions in relation to various parts of the Claimed Land.

112. Mrs de Vries made a wide ranging submission which was to the effect that all elements of the statutory definition were satisfied. Her submissions concentrated on the field rather than the allotments. She submitted that much of the evidence called on behalf of the objectors was unreliable. She also argued that, even if the northern part of the field was used for an arable crop in 1992, this should not defeat the claim to registration.

#### The law

113. I have already mentioned that the application is made under section 15(1) of the 2006 Act on the basis that section 15(2) applies.

114. Section 15(2) provides that it applies where –

- (a) a significant number of the inhabitant of any locality, or of any neighbourhood within a locality, have indulged 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.

115. The relevant period is ostensibly from 31<sup>st</sup> January 1988 to 31<sup>st</sup> January 2008. There is some evidence (Johnson [A123]) that there was a foot and mouth



closure for several months within this period although it is not clear to what extent the Claimed Land was affected or whether it was all affected, there being some evidence that the field was used during the outbreak (Rhodes [178]). To the extent that there was such a closure, the statutory disregard of the closure period which is provided for by section 15(6) would push the start of the relevant period back to some time in the later part of 1987. Nothing turns on this in my view.

### Findings of fact

116. I turn now to my findings of fact. Before dealing with each part of the Claimed Land in turn, I deal with the planning process.

#### *The planning process*

117. On the evidence I have seen I find Mrs Urmston's evidence statement to the planning inquiry to be the only clear reference by a local objector in the planning process to the matter of informal recreation specifically in the field which is the subject of the present inquiry. The reference is only to informal pathways [A63], and these are shown on photographs submitted by Mrs Urmston at the time to be the path into the northern part of the field from the narrow gap in the hedge just past the old people's home and the track along the beck [A67].

118. The applicant/Friends have also sought, in the course of seeking to demonstrate the requisite recreational use of the Claimed Land, to rely on documentary material produced by those promoting the Germany Beck development and those acting on their behalf. In this context I find that: a 1995 site survey prepared for Persimmon Homes (Yorkshire) Ltd showed a footpath marked by parallel dotted lines along the beck in the southern part of the field [A225]; there was a reference to increased recreational activity (with a potential inference that such activity existed already) being likely along the north bank of Germany Beck in paragraph 4.3.4 of the Environmental Statement [A374]; and

that there was a reference in the MAP Archaeological Consultancy Ltd report of the March 2006 metal detecting survey to the type of finds reflecting past recreational use of the site [1546]. I have not generally derived a great deal of assistance from the material referred to in this paragraph but have taken it into account. I think, for example, that it would be unwise to place too much emphasis on the finds of a metal detecting survey in coming to the kind of judgments which I am required to make as to whether lawful sports and pastimes have been carried out as of right by a significant number of inhabitants for 20 years.

*The former allotments area*

119. I find that the former allotments consisted of 5 plots as shown on the plan annexed to Mr Benson's statement [1143]. I adopt the lettering on that plan to refer to the plots. I deal with the lettered plots not in alphabetical order but in a sequence which relates broadly to the times at which the plots fell into disuse. I find that the easternmost plot, E, was rented by a Mrs Key in 1985 [1521-1523] but that it was thereafter taken over by a Mrs Little who had, by 1989, taken over plot C, the northernmost plot instead [1519-1520] with no replacement tenant having been found for plot E. I find that by this time plot E had fallen out of use as an allotment and was starting to become overgrown as apparent from the 1989 aerial photographs [1442-1445]. I infer from this and so find that it would therefore have fallen out of use some time before 1989 and probably by 1987, which is consistent with Mr Benson's statement [1142]. I find that plot E thereafter became more and more overgrown and was already fairly heavily overgrown by 1992 as shown on the aerial photograph for that year [1407]. I find no evidence of any lawful sports and pastimes in plot E save for some "x" marks on Mr Stuart's Form A [A401] intended to represent areas used by him for informal recreation and/or sports. I find also that a narrow strip along its southernmost extent next to the beck will have been used for many years as part of a route through from the bridge in Fordlands Road to the field and that there may have very occasionally and in recent times only been some use of the very

northern part of the plot as a diversionary route off Garden Lane to avoid the obstacle posed by the fallen tree and get to the field as I have described in the section of this report headed "The Claimed Land".

120. I find in respect of plot C, the northernmost plot, that Mrs Little terminated her tenancy of it on 31<sup>st</sup> December 1990 [1518] and that this plot was not tenanted thereafter. Neither the 1989 aerial photographs [1442-1445] nor the 1992 aerial photograph [1407] appear to me to show any bare earth or other obvious signs of cultivation of this plot. I find that plot C had fallen out of use as an allotment by the end of 1990 when the tenancy was terminated. I find that plot C thereafter became progressively more overgrown and was already significantly overgrown by 1995 as shown on the aerial photograph for that year [1401]. I find no evidence of any lawful sports and pastimes in this plot.
121. I find that plot B was tenanted by a Mr Bean who is recorded as paying rent in 1985 and whose name appears on a plan of the allotments which was being used in 1989 [1520]. The 1989 aerial photographs [1442-1445] appear to show bare earth in Mr Bean's plot at that date and Mr Hagyard's sepia tinted photograph of 1991 [A243] shows bean poles in Mr Bean's allotments. I regard the 1992 aerial photograph [1407] as equivocal in showing signs of cultivation whereas by 1995 the relevant aerial photograph [1401] appears to be showing signs of overgrowth in plot B. I find that plot B was used for the purpose of an allotment in the early years of the relevant period by Mr Bean but ceased to be so used at some point thereafter in the early 1990s and that by 1995 it had started to become overgrown. Thereafter it became progressively more overgrown. I find no evidence of any lawful sports and pastimes carried on as of right in plot B and no use after it had become overgrown.
122. I find that Mr Dennis Benson held plots A and D until, by a letter of April 1995, he terminated the tenancies of these plots with effect from 6<sup>th</sup> April 1996 [1517]. I find, in accordance with Mr Benson's statement [1141], that from

approximately the late 1980s Mr Benson did not use plots A and D himself because of his bad arthritis, but that he allowed his brother-in-law, Cherry Atkinson, together with the latter's friend, Sid Todd, to use plots A and D instead. I find that Mr Atkinson and Mr Todd used plots A and D for some years until some point in the early to mid 1990s. Mr Benson states that he cancelled the tenancies in April 1995 because the allotments were not used any more and were falling into disrepair [1141]. From the oral evidence I have heard and the written statements I have considered, I find that Mr Atkinson and Mr Todd grew some flowers, fruit and vegetables, that they would often be visited by locals when they would pass the time by chatting and drinking tea and that, when the weather permitted, they would frequently sit outside the sheds (located on the boundary between plots A and D) as seen on Mr Hagyard's sepia tinted 1991 photograph [A243]. I find that, after Mr Atkinson and Mr Todd stopped using plots A and D, these plots fell into disrepair and that they became progressively more overgrown over the course of the years. I find, from a combination of the evidence of Mrs Dinsdale and Mr Reynolds that the sheds (or hutments as Mr Reynolds called them) were demolished in 1999 after they became the focus for anti-social behaviour by youths. After that I find that at some point after 2000 there was some den building activity somewhere in these plots (see Mr West's evidence) and that the periphery of plot A at the bottom of the slope down from the Fordlands Road bridge has been used on occasions for children's play in the form of hide and seek and the like after 1997 (as described by Mrs Derbyshire).

123. As to access to the allotments, I find that this was originally taken from Garden Lane to the north, from Fordlands Road, where there had been a gate, and down the slope by the bridge over Germany Beck on Fordlands Road. I find that the gate fell into disrepair after the allotments ceased to be used and that the entrance which it had provided became overgrown. I find that the access to the allotments down the slope by the bridge also came to be used as the first part of a route alongside the beck to access the field, a route which has been available for many years (but which probably involved at some point the breaking down of an

internal chicken wire fence in the allotments) and has had over the years some degree of use. When it first was used cannot be dated with any certainty on the evidence. Its use was more difficult at times in the last couple of years because of overgrown vegetation.

124. As to Garden Lane, I find that this was originally used to access both the former allotments which are the subject of this application and, via a bridge across Germany Beck which was demolished a long time ago, former Parish Council allotments south of the beck. I find that once the allotments fell into disuse it became progressively more difficult, though not impossible, to get down Garden Lane, not least because of the decision of Mr Reynolds to allow the hedge to grow across. I find that fencing was erected in 1999 across the entrance to Garden Lane, Mr Reynolds's account in this respect being corroborated by Mr Hagyard's evidence. Rather surprisingly there does not appear to be any record of this in the Parish Council minutes although this may be explicable on the basis that, as I also find, the fencing did not last very long having been broken down. I find that fencing was re-erected in November 2002, as Mr Reynolds records in his evidence and as is confirmed by his letter to Hogg Builders of 18<sup>th</sup> November 2002 [584], the invoice to Hogg Builders of 11<sup>th</sup> November 2002 [585] and the Parish Council minutes for 9<sup>th</sup> December 2002 [1582]. I find that this fence also did not endure and had gone by 2007 as the photograph of 7<sup>th</sup> October 2007 [A271] shows. I find on balance that the demise of this later fence was, at least in part, attributable to vehicle impact as described by Mr Nicklin although he was in my view mistaken as to the precise chronology. The photograph I have referred to confirms that, even when not fenced, Garden Lane was considerably overgrown as I so find the position to have been for several years. Whilst Garden Lane will have been more regularly used in the past in the first half or so of the relevant period, particularly whilst the allotments were in use, I find that its use for several years past will have been no more than occasional.

125. I find that work was carried out by MAP in the former allotments from the end of May to late June in 1996 and again from 4<sup>th</sup> to 8<sup>th</sup> November 2002. Several trenches of 0.45 to 0.6m depth were dug in the allotments in 1996 and were open for 2 to 3 weeks. In November 2002 the work was carried out in one trench which was about 0.4m deep and was open for 5 days.

*The field*

126. I find that there were no cattle kept on the field which forms part of the Claimed Land for any part of the relevant 20 year period. By the time of the inquiry no point was being taken by the objectors that they were. As to the issue of whether cattle were ever kept on the field at all by the Atkinsons, I find on balance that a few were kept on the field at some time. I found the evidence of the Atkinsons reliable in this regard and consider it most unlikely that they would each be mistaken as to the fact of cattle ever having been kept on the field. I prefer this evidence to evidence of local residents who say that cattle were never kept on the field at any stage. I also regard as more reliable in founding a conclusion on this point the evidence of the Atkinsons than the evidence provided by Mr Young's interpretation of aerial photographs. Mr Young was also in fact only able to consider 2 aerial photographs [1381] between the start of the Atkinsons' tenancy in 1970 and 1975, the significance of the latter date appearing below. The few vestiges of barbed wire found in the Germany Lane hedge and the apparent presence of a few fence posts on Mrs Dinsdale's photograph of flood conditions in the field in the early 1990s [599] are also consistent with cattle having been kept on the land, suggestive as they are of former stock proofing measures. Nevertheless, my finding that cattle were once kept on the land is of little substantive significance for the purposes of evaluating the application because I also find that cattle had ceased to be kept on land after 1975, long before the relevant 20 year period began. I derived no assistance from the evidence of Donald Atkinson in relation to the question of when cattle ceased to be kept on the land because his memory did not allow him to answer this question

with any clarity. This is not to make any criticism of Mr Donald Atkinson in this regard but simply to record his struggle to cast his mind back with any accuracy over such a long period. Mr Brian Atkinson seemed to me to have a somewhat better recall, both on this particular issue and generally, although he was reliant to a good extent on documents and was weaker in his recollection when he could not rely on them. I accept his evidence, assisted as it was by his having considered documents which revealed when cattle had last been purchased for the farm, that cattle were last kept on the field in 1975. This finding is consistent with much of the evidence on behalf of the applicant/the Friends in relation to the absence of cattle on the land. Many of the applicant's/Friends' witnesses were naturally specifically directing their minds to later dates than 1975 when speaking of there being no cattle on the field, not surprisingly given that Mr Donald Atkinson's first statement had said, somewhat unsatisfactorily, that cattle were kept there until 1988.<sup>7</sup>

127. If, as I have found, cattle were kept on the field by the Atkinsons to 1975, it would naturally have been necessary to make the field stock proof during the time that cattle were kept there. I accept the evidence of the Atkinsons that the field was made stock proof by post and barbed wire fencing during the time that they kept cattle there. I prefer their evidence in this respect to those local residents who say that the field was never fenced and also consider that their ability to speak from direct personal experience provides a more reliable basis for arriving at conclusions than the evidence provided by Mr Young based on interpretation of aerial photographs. The evidence of the Atkinsons that the field was fenced when they kept cattle there is also borne out by the presence of the fence posts on Mrs Dinsdale's early 1990s photograph of the field in flooded conditions [599] and the few vestiges of barbed wire that remain today. The statement of Mr McCabe provided by the applicant/Friends also mentions a small amount of fencing along Germany Lane which he describes as a few posts with circular wire entwined in

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<sup>7</sup> For example, the "Forms D" which were submitted by the applicant/Friends and which deal with the issue of cattle and fencing on the field [1172-1191] relate to the period 1987-1988 (save for 2 such forms which relate to the period 1985-1988).

the hedge, the remnants of a fence [1149]. Again, however, my finding as to past fencing is of little substantive significance for the purposes of evaluation of the application. This is because I also find that there would have been no need to maintain and repair the fencing once the field had stopped being used for cattle and that, in the absence of such maintenance and repair, the fencing would have quickly deteriorated. I accept Mr Brian Atkinson's candid evidence to this effect. I also find that barbed wire would have been removed in hedge cutting activities as described by Mr Donald Atkinson. On balance, I find that access to the field by local residents would not have been impeded by fencing at the start of the relevant 20 year period and that entry to the field would then have been possible in places, as it has remained thereafter. Mrs Dinsdale appeared to me to accept in cross examination that fencing would not have stopped access to the field at the start of the relevant period.

128. I find next that there was arable cropping in the northern part of the field in the years 1986, 1990, 1991, 1992 and 1993. In coming to this finding, I have first looked at the contemporaneous documentary material as I believe that, in principle, such material is more reliable than the vagaries of recollection unassisted by a written record made at the time. I find that Mr Brian Atkinson's handwritten documents record that spring barley was grown on the 2 acres consisting of the northern part of the field in 1986 [A159(c)]. I also find that those records record that spring barley was grown on the northern part of the field in 1990 [A158], 1991 [A148], and 1992 [A141]. I regard these documents as a reliable record and do not consider that Mrs de Vries was able to demonstrate otherwise either in cross examination or submission. The land use history of field 3285 (the relevant field) provided by the RPA on the basis of information they had received shows that 0.85ha (that is, 2.1 acres) of the field was given over to arable barley in 1993 [A357] and this is confirmed by the information which was in fact provided and which is shown on the field data sheet for that year which records a crop of spring barley then [A465]. I also regard this record as reliable. There were no handwritten records for 1987, 1988 and 1989 and, in the absence



of this important source of corroboration, I am unable to find that arable cropping took place in these years notwithstanding that the Atkinsons' evidence was that arable cropping took place in each of the years in the overall period for which records had been found going back to 1986. Having heard the Atkinsons' evidence, I feel unable to rely on the Atkinsons' memories alone in this regard.

129. In relation to the period from the mid-late 1980s to the early 1990s aerial photographs are available for 1989, 1991 and 1992. On behalf of the applicant/Friends Mr Young's evidence was that the 1992 aerial photographs [1397, 1398, 1407] showed agricultural use and the taking of a cereal crop [1381]. To that extent my finding that an arable crop was grown in 1992 is not a matter which was in real dispute. Mr Young's view was that the aerial photograph which he dated as 1991 [1405], a dating which I accept, was not consistent with the taking of a cereal crop in 1990 or the growing of one in 1991, although he frankly acknowledged some difficulties in the task of interpretation. I prefer the contemporaneous handwritten records of Mr Brian Atkinson to Mr Young's interpretation in this regard. I have already mentioned that I regard as plausible the explanation offered in respect of the 1993 field data sheet [A465] that, so far as it related to 1991, it was expressed as it was because a crop of spring barley would have been sown in 1991 but not harvested because of the very bad flooding which happened in that year. In mentioning this matter again here I record that it may have been responsible for the appearance on the 1991 aerial photograph of the growth in the northern part of the field and thus generated some of the debate about this issue at the inquiry. Mr Young's view was that the 1989 aerial photograph [1404] does not show a developing arable crop. The 1989 aerial photograph was not the subject of the same degree of scrutiny and interpretation at the inquiry as was the 1991 photograph nor is this a year in which there is any contemporaneous document which is at odds with Mr Young's view. I accept Mr Young's view in respect of this photograph

130. There is a good deal of evidence called on behalf of the applicant/the Friends which is to the effect that there was never any arable cropping on the northern part of the field. I prefer the contemporaneous documentary records and the undoubted presence of a cereal crop on the 1992 aerial photograph. I should say that I do not consider that any local residents have given other than honest evidence when they say that they can never recollect arable crops on the field but I consider that those who have said this, who consist of the vast majority of the applicant's/Friends' witnesses, simply cannot have been in and around the field much at the relevant times if they are unable to recall crops or arable farming activity. I find it unlikely that someone who was familiar with the field at the relevant time could simply forget that arable crops had been grown there. I also consider it unlikely that any person who was a regular visitor to the field at the relevant time would simply have failed to recognise that what was growing was an arable crop. By contrast, there are one or two local residents who can remember arable farming in the northern part of the field and this is another factor which shapes my finding that it took place. For instance, Mrs Fisher, a witness whose recollection seemed to me to be generally good, stated that a cereal crop had been grown in the northern part of the field for a period of 2-3 years. Mr Shorney's written statement records that he recalled seeing a corn crop in the top half of the field some years ago (although he could not remember the date and was surprised to see the crop) [1139]. Mr Rhodes could also remember the field being ploughed at some point, a long time ago and he thought before 1986. I think that Mr Rhodes' recollection that the field had been ploughed in the past is correct but I find that such ploughing must have taken place within the relevant 20 year period as part of the arable farming described by the Atkinsons and which I have found to have occurred in 1986 (before the relevant period) and in 1990, 1991, 1992 and 1993 (during the relevant period).

131. I find that the northern part of the field was taken out of arable production after 1993 and put into the set aside regime where it has remained since 1994. It will be apparent from this finding that I regard the changeover from arable

farming to set aside as having taken place between 1993 and 1994 rather than between 1992 and 1993. That the northern part of the field was in arable production in 1993 but in set aside in 1994 seems to me to be established by the land use history of field 3285 supplied by the RPA [A357] and the field data sheets/printouts for 1993 [A464-A467] and 1994 [A468-A473] on which that history was based. The field data sheets/printouts show 0.85ha of field 3285 growing spring barley in 1993 [A465] but in set aside in 1994 [A470].

132. I find that when the northern part of the field was in set aside from 1994 onwards it was cut once a year by the Atkinsons between 15<sup>th</sup> July and 15<sup>th</sup> August as required by the set aside scheme. I regard the evidence of the Atkinsons as reliable in this regard. I note also that, on behalf of the applicant/the Friends, Mrs Fisher refers to there having been annual cutting by the Atkinsons as does the written statement of Mr Smith which records that the farmer always cut the grass in the summer [1164]. Other of the applicant's/Friends' witnesses also refer to occasions when they had seen that the grass had been cut, for example, Mr Shepherd (on one occasion), Mr Nicklin and Mrs Worrall. Dr Gemmell states that his inspection of the northern part of the field in September 2005 showed that the grassland had been cut and the cut grass had been left on the northern part of the site. I do not accept the opinion of Mr Potter that the northern part of the field was cut less than annually. This opinion seemed to be based, at least in part, on his inspection of a dog rose and an inference from its regrowth. I accept the explanation of Dr Gemmell in this regard that the cutting could have passed over the dog rose. My view of Mr Young's interpretation of the aerial photography is that it does not particularly bear on the question of the cutting regime for the northern part of the field but he considered that the 2002 aerial photograph [1412] showed it to have been topped (or silaged) [1384]. I find that before the grass was cut it grew long enough to impede comfortable progress on foot.

133. In respect of the southern part of the field, I find that no arable crops were ever grown there either during the relevant 20 year period or beforehand.

This matter was not in dispute between the parties. The evidence provided by the Atkinsons in relation to the cutting of the southern part of the field was much less clear than the evidence they gave in relation to the northern part of the field, the tenor of Mr Donald Atkinson's evidence being that there had no proper cutting of this area for a considerable period of time with Mr Brian Atkinson's evidence being that there had been frequent cutting to the extent that conditions would allow. The evidence I have heard certainly does not establish the position originally advanced in Mr Donald Atkinson's first witness statement that an annual hay crop was taken from the southern part of the field [497]. This accords with Mr Young's rejection of that position by his analysis of the aerial photographs. In my view there is some measure of agreement between the evidence of Mr Potter on behalf of the applicant/Friends and Dr Gemmell on behalf of the objectors to the effect that there has been sufficient cutting of the southern part of the field to prevent the general development of scrub and/or woody species. Dr Gemmell's evidence was that his inspection in September 2005 showed that the southern part of the field was uncut then but he thought that there had been occasional or infrequent cutting before then. The opinion he proffered in relation to the frequency of cutting before his earlier inspection in 2000 was that it had been more regular. Dr Gemmell's view as to the cutting regime which preceded his September 2005 inspection is similar to that expressed by Mr Potter in relation to the past cutting regime before his October 2008 inspection, namely, that it had been intermittent. My overall finding is that the southern part of the field has been cut during the relevant 20 year period as and when, and to the extent that, conditions have allowed and that latterly such cutting has been intermittent.

134. I also find that the southern part of the field will have frequently flooded, have often been in a wet condition and will have often had tall and coarse vegetation on it.

135. There is no dispute between the parties, as I understand it, that when a strip of land has been cleared alongside the beck that has arisen in connection with the work of the internal drainage related to their activities of maintaining the beck.
136. I find that archaeological investigation work has been carried out on the field as follows. In the summer of 1996 several trenches were dug in the north west corner of the field, several were also dug in the southern part of the field and one was dug in the north east corner of the field. In November 2002 a further trench was excavated in the north east corner of the field and one in the south west part of the field in substitution for one which should have been in the former allotments area. A further trench was excavated in the north east corner of the field in 2003. In March 2006 a metal detecting survey was carried out in the field.
137. I turn next to the question of use of the field by local residents. I have already found that arable crops were grown on the northern part of the field for 4 years in the early part of the relevant 20 year period, that is 1990, 1991, 1992 and 1993.<sup>8</sup> I find that there was no significant use of the northern part of the field for any recreational activity in these years at times when the crops were growing and, to the extent that there was recreational activity in the field at these times it would have been associated with the beck area.<sup>9</sup> I have already expressed the view that those who are unable to remember arable crops being grown in the northern part of the field could not have been in and around the field much at the time this was happening. I also take the view that it accords both with common sense and the standards of behaviour which one might reasonably expect that an arable field which was growing a cereal crop would not usually be the kind of place where local residents would be indulging in informal recreation or lawful sports and

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<sup>8</sup> But probably not harvested in 1991.

<sup>9</sup> For instance, I consider that Mr Luke Smith's schoolboy memories of the field from 1986-1991 are mainly in relation to the beck area, with his descriptions of fishing and weeds that grew around the stream area whilst dredgings from the beck would be the obvious source of the mud mounds he mentioned. It was Mrs Fisher who pointed out that people still walked along the beck when crops were grown in the northern part of the field, although she herself did not.

pastimes. The absence of any significant use of the northern part of the field for any recreational activity when cereal crops were growing there is also consistent with the Atkinsons' more general evidence of absence of any recreational use at all. Moreover, no evidence is advanced on behalf of the applicant/Friends that recreational activity was carried out in growing crops on the northern part of the field. This is not surprising given that the vast majority of the applicants/Friends' witnesses cannot remember any arable crops but it does not alter the fact that this is not a case where the evidence is that arable cropping activity and recreational pursuits were carried out at the same time. There is not, for instance, evidence that people walked through crops in the tramlines. At most the western boundary of the field may occasionally have been used as a route to the beck from Germany Lane at this time.

138. Mrs de Vries argues that use of the cropped land could have happened and, if a crop was taken, it would not have been inconsistent with recreational activity. What might have happened is neither here nor there if there is no evidence that it did happen. In fact the evidential position is even more difficult for the applicant/the Friends because various of the applicant's/Friends' witnesses have specifically confirmed that they would not have used a field for recreation if there had been a crop there. Thus Mr Vevers said that, if a crop had been there, he would not have gone into it. Mr Rhodes, who had stated that the ploughing would not have stopped his going on to the land, also confirmed that he would have not walked through anybody's crop. Mr Hagyard said that he might have gone on the land but he would not have damaged a crop and could always have walked down the side. Mrs Fisher (who could specifically remember arable crops in the northern part of the field for a period of 2-3 years) said that she would have waited until the crop was cut before going into the field.

139. Mrs de Vries also relies heavily on a passage in the speech of Lord Hoffman in **Oxfordshire County Council v Oxford City Council**<sup>10</sup> where, at

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<sup>10</sup> [2006] 2 AC 674.

paragraph 57, he said that he did “not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not.” For the avoidance of doubt, I should make clear at this point that I find that the agricultural activities which were involved in arable cropping of the northern part of the field in this case, extending as they would have done from ploughing through to harvesting, were not in any sense “low level”. In my view the question of consistency of activities arises when one is being carried out at the same time as another. Lord Hoffman’s remark above was directed to what Sullivan J had said in **R (Laing Homes) Ltd v Buckinghamshire County Council**,<sup>11</sup> a case in which, as Lord Hoffman described it, “the land was being used for ‘low-level agricultural activities’ such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes.”<sup>12</sup> On the finding I have made that there was no significant use of the northern part of the field for any recreational activity in those years at the time arable crops were growing there the issue of consistency does not arise and I need not make a finding on it.

140. It is possible in principle that there could have been some recreational use of the northern part of the field in those years when arable crops were growing there in the period between one year’s crops having been harvested and the preparation for the next year’s crop. However, the applicant’s/Friends’ evidence does not address matters on this basis other than Mrs Fisher’s evidence that she would have waited until the crop was cut before going into the field and there is insufficient evidence to come to the conclusion that what might have happened did in fact happen. No-one says, for example, that he enjoyed walking over stubble in the northern field after the crop had been taken. Again, the fact that local residents do not remember any such experience and simply cannot remember any crops having been grown at all suggests to me that they could not have been frequent visitors to the field at the times in question. I find that any

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<sup>11</sup> [2004] 1 P & CR 573 at 578.

<sup>12</sup> Reference as per fn 10 above, at paragraph 57.

recreational use in the arable cropping period at times after harvest but before preparation for the next season's crop would have not been significant. My overall finding is that there was no significant use of the northern part of the field at any times of the year during those years when it was in use for arable cropping.

141. The applicant's/Friends' Forms A, which tend to show a generalised use of the whole field do not affect this finding because these forms do not purport to show the period or duration of use of any particular part of the field, let alone its frequency. My finding is similarly unaffected by Mr Wilkinson's data analysis because this is based on evidence questionnaires which do not distinguish between various parts of the Claimed Land. I think that there is a further danger in placing any particular reliance on Mr Wilkinson's analysis in relation to what may have happened at any particular point in time in the relevant period because it is based on the unsubstantiated assumption that someone who says he has used the land over a particular period has used it at least once in each year in that period.

142. Once the northern part of the field went into set aside in 1994 I find that its attraction to recreational users would have increased. Since that time I find that there has been some recreational use of the northern part of the field, predominantly for walking and dog walking. These were the main types of use which came through from the evidence I heard. These are also the main activities referred to in Mr Wilkinson's analysis of activities carried out by users [A38], an aspect of his analysis which plainly does not rely on the unsubstantiated assertion referred to above. I also find that most of this walking and dog walking would have been on the defined route which runs from the north west corner of the field along its western boundary towards the beck and, since the later 1990s, the defined route from the same corner of the field inside the Germany Lane hedge to the north east corner of the field and thence to Germany Lane. The route along the western boundary of the field would have been attractive as a way to the beck and the track alongside it and as offering a short cut to the bridge on Fordlands Road. The route inside the Germany Lane hedge shows up as well defined on the 1999



aerial photograph [1410] and in subsequent aerial photographs but not before, suggesting that it would not prior to that date have had a sufficient degree of regular use to make a significant impression on the ground or in the vegetation. It does not show up on the 1995 aerial photograph [1401] nor on the 1996 one [1403] (when there was significant disturbance in this area by the archaeological investigations) and was not seen by the archaeologists. I find that it cannot have come into existence until 1997 at the earliest. Mr Cheyne said that there were lots of people who only went along this path and Germany Lane. The more southerly path in the northern part of the field running from the western boundary to the north east corner and which I have described in the section of this report headed “The Claimed Land” would appear to be a more recent creation still, not showing up on any photographs until those of Mrs Urmston in December 2005 [1456].

143. I should stress that I am not finding that, since the northern part of the field went into set aside in 1994, people have never gone elsewhere in it apart from along the western boundary route or the route inside the Germany Lane hedge or the more recent more southerly route from the western boundary to the north east corner of the field. Simply to pick out one example, Mr Hagyard said that he walked all over the field. No doubt there were also others who sometimes did similarly. On occasions, people will have followed their dogs as they ran more widely over the field. Much more often, however, I consider and therefore find that a dog walker would have let the dog off the lead whilst he would stay on the path in the fashion described by Mr Nicklin given the fact that the grass was left to grow unchecked by other than its annual cutting. I find that there has not been a significant pattern of use sustained over time with regularity in the northern part of the field away from defined routes. It is of significance that, as the grass grew in this part of the field, it would not generally have been suitable for the kinds of sports and pastimes, such as ball games, in which the participant would have moved more widely across it. Unsurprisingly, Mr Wilkinson’s analysis of activities records only 5 users have taken part in ball games [A38]. It is also to be noted that the third most popular activity of users recorded by Mr Wilkinson,

blackberry picking [A38], is something that could not have taken place generally across the northern part of the field as there are no stands of blackberry bushes within it but only associated with the verge of Germany Lane and the hedges. Mrs Urmston's evidence to the planning inquiry (which I have found to be the only clear reference to informal recreation specifically in the field contained in local objections made during the planning process) referred only to informal pathways [A63], which included the path into the northern part of the field from the narrow gap in the hedge just past the old people's home [A67]. I consider that the vast majority of children's play, the second most frequently observed activity on the land according to Mr Wilkinson's analysis of the evidence questionnaires [A39], would have been associated with the beck and not the northern part of the field.

144. The Forms A [A398-A435] which have been submitted by the applicant/Friends do not deflect me from my above finding that there has not been a significant pattern of use sustained over time with regularity in the northern part of the field away from defined routes. It is true that many of the Forms A appear to show a general use of the field, including its northern part. However, apart from the fact that these forms have not generally been tested, they do not in any event (as I have already indicated) purport to show the period or duration and frequency of use of any particular part of the field, including its northern part. For example, a walker who over a number of years from 1999 predominantly stuck to the path in the northern part of the field parallel with the hedge but who on one or two occasions over that time wandered more generally over the field could legitimately show that more general spread of use on his form. Moreover, I consider that several of these forms are in fact broadly consistent with a picture of use along defined routes, for example, Johnson [A409], Hodgson [A424], Nicklin [A430], Fisher [A431], Worrall [A432], Shorney [A434] and Watson [A435].

145. As to the southern part of the field, I find that over the course of the relevant period people have been able – with lesser or greater degrees of ease depending on the season and how recently internal drainage board clearance

works had taken place - to walk, and have walked, with and without dogs, along a defined route at the edge of the beck which has in large part been created by the operations associated with maintaining the beck. I find that this has accounted for the vast majority of the use which has taken place in the southern part of the field. Users will have come: from the west, via the route through the southern margin of the former allotments area and from Garden Lane at times when that route was available and passable; from the north via the route along the western boundary of the field from Germany Lane; and from the east via footpath 5 in the south east corner of the land at the bridge. I am not persuaded, however, that the use of the beck side route has at all times been regular and frequent over the relevant period. I also find that there would have been little attraction to dog walkers to follow their pets if let off the lead to splash in the stream or run into the often tall and coarse vegetation to the north.

146. I find that there has been little by way of more general recreational use of the southern part of the field away from the beck side route and so much of the western boundary route as lies within the southern part of the field. This reflects the wet, frequently flooded, conditions and coarser, often tall vegetation of this part of the field which (as I have already found) would have been cut only intermittently for several years past. Over the years there will have been a degree of recreational activity, particularly in the form of children's play, associated with the beck itself and its immediate environs and I find that bmx biking has taken place for the last few years on the mounds in the south east corner of the field (which were probably preceded in 2002 by mounds in the south west corner of the field). In respect of my finding that there will also have been a degree of recreational activity, particularly in the form of children's play, associated with the beck itself and its immediate environs I do not consider that the evidence has painted a compelling picture of such activity on a regular basis throughout the relevant period.

*The southern verge of Germany Lane*

147. As to the southern verge of Germany Lane where Germany Lane lies to the north of the field, I can make no more precise finding than that in some years over the relevant period berries have been picked in some locations here by some people. Amongst those from whom I heard some examples are provided by Mr Shepherd (blackberries and elderberries), Mrs Worrall (elderberries) and Mrs Derbyshire (blackberries). Whilst blackberrying picking was the third most popular activity referred to by users according to Mr Wilkinson's analysis [A38], the evidence does not permit a finding as to what years people engaged in this particular activity nor where precisely they did it. I also find that there were not many brambles in the verge in the late 1980s and early 1990s in accordance with the evidence given by Mr Young in his interpretation of the aerial photographs of that period. I also find that the verge will have been crossed in places to access the field. There is no other evidence of any substance relating to this area of the Claimed Land.

*The area to the east of the field*

148. I find that footpath 5 and the bridge which takes it across the beck have been well used by walkers and dog walkers over the relevant period. There is no evidence of any substance directed specifically to the issue of recreational use of the rest of the small area comprised within this part of the Claimed Land.

*General comments in relation to findings*

149. In coming to my findings I have endeavoured to take into account the totality of the evidence placed before me, to place weight as appropriate on tested and untested material and to resolve conflicts of evidence as best I can. It will be perhaps apparent that my findings as to use lie somewhere between the picture of almost complete absence of use presented by the objectors' evidence and the

picture of more widespread and general use presented by the applicant's/Friends' witnesses but incline to having found less rather than more use. Part of the evidential conflict is no doubt explicable on the basis that the some of the objectors' witnesses have had relatively limited experience of the Claimed Land. I should also record that some of the objectors' evidence in relation to use I have found difficult to rely on: Mrs Dinsdale's recall appeared to me to be fragile; I thought that the metal detectorists' evidence was generally preferable to that of Mrs Ware in relation to the presence of people on the land when metal detecting was carried out; and the September 2008 survey seems to me to suffer from unrebutted criticisms of where the surveyors stationed themselves and how they went about their task. Nevertheless, the objectors' evidence in its generality has led to me think that use has been a good deal less frequent and intensive than the applicant's/Friends' evidence considered in isolation would suggest. I also mention here 2 general indicators of the caution I have needed to apply in dealing with some of the latter's evidence. The first is that I believe (as I have already pointed out) that the inability of the majority of the applicant's witnesses to recall arable cropping in the northern part of the field must call into question their familiarity with the field at the relevant time. The second and similar point relates to the archaeological trenching works carried out in the field which were on any view significant, particularly in 1996. Some of the applicant's/Friends' witnesses had no recollection of these works at all (Mr Vevers) or a clearly incomplete recollection (Mr Rhodes and Mr Hagyard, recalling only 2 trenches south of Germany Lane) which is suggestive of either lack of familiarity with the field at the time or incomplete memories. There is also the more general point that the planning proposals for the Germany Beck development have been common knowledge in the local area for very many years. I recognise that the development proposals affected a much larger area than just the Claimed Land and that many issues were raised. Notwithstanding that, if the Claimed Land, and the field in particular, had been such a significant resource for informal recreation as it is now sought to argue it was, it is surprising that this matter would not have come to light during the extended planning process.

Assessment

*The former allotments area*

150. The application to register the former allotments area as a village green is in my opinion plainly unsustainable. In general terms there is manifestly insufficient evidence to show that there has been any material use of this area for lawful sports and pastimes, let alone over a 20 year period and by significant numbers of local inhabitants. As to the individual plots, I consider each in turn by reference to the sequence I used when making my findings of fact,

151. Starting with plot E, I have already found that there is no evidence of any lawful sports and pastimes in this plot save for Mr Stuart's Form A which is a wholly inadequate basis to sustain any claim to registration. I consider that the use of the narrow strip along the southernmost extent of this plot next to the beck as part of a route through from the bridge in Fordlands Road to the field (which probably involved at some point force in the breaking down of an internal chicken wire fence in the allotments) is referable to a footpath rather than a claim to village green status.<sup>13</sup> The same reference to footpath use goes for any use of the very northern part of the plot as a diversionary route off Garden Lane to avoid the obstacle posed by fallen tree and get to the field, which use would in any event, as I have already found, have been very occasional and in recent times only. There is therefore simply no case for the registration of this plot.

152. In respect of plot C, I have already found that there is no evidence of any lawful sports and pastimes on this plot. Accordingly, there is no basis at all for its registration.

153. Turning to plot B, I have already found that there is no evidence of any sports and pastimes carried on as of right on this plot and no use after it had

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<sup>13</sup> I discuss the law on this issue later when dealing with the field.

become overgrown. It is unnecessary for me to express a view as to whether Mr Bean's use of the plot for the purpose of an allotment in the early years of the relevant period was a pastime in the terms of section 15(2) of the 2006 Act because it was a use which was plainly carried out with the licence of the landowner and not as of right. Again, therefore, there is no basis for the registration of this plot.

154. As to plots A and D, any use by Mr Benson for the purposes of his allotment was use by the licence of the landowner. Whether or not Mr Atkinson and Mr Todd were themselves indulging in a pastime when they grew things on the plots, I take the view that they were not doing so as of right but were effectively doing so with the permission of the allotment holder, Mr Benson. Further, on their own Mr Atkinson and Mr Todd could hardly be regarded as a significant number of any group of local residents. I do not regard visits by locals to the allotments to pass the time of day with Mr Atkinson and Mr Todd, chat and drink tea as being in the nature of a pastime for the purpose of section 15(2) of the 1996 Act and also consider that those who engaged in this activity were not on the allotments as of right but rather with the de facto permission of those in effective occupation of the plots at that time, Mr Atkinson and Mr Todd. In any case, I have already found that Mr Atkinson's and Mr Todd's use of the allotments stopped at some stage in the mid-1990s and, after that point, I have found only that at some time after 2000 there was some den building activity somewhere in these plots and that the periphery of plot A at the bottom of the slope down from the Fordlands Road bridge has been used on occasions for children's play in the form of hide and seek and the like. Even if one were to make the assumption that the den building activity involved in this case was in the nature of a lawful sport and pastime rather than a cover for teenage smoking and drinking as described by Mr Courcier, I do not consider that the den building activity and the children's play could possibly be sufficient to establish any valid claim to registration for plots A and D given the limitation of these activities in duration and their physical extent on the ground. I consider that the use of the route through to the field

utilising the southern margin of plot A alongside the beck is referable to a footpath rather than to a claim to village green status.

155. I found above in respect of Garden Lane that, whilst it would have been more regularly used in the past in the first half or so of the relevant period, particularly whilst the allotments were in use, its use for several years past would have been no more than occasional. I do not think that such a pattern of use would be sufficient to sustain an application for village green status but I consider in any event that such use as there was was referable to a footpath rather than to a claim to a village green. It may also be that some use was by force, particularly after the breaking down of the original fence erected in 1999.

*The field: northern part*

156. I consider that my factual findings are such that the application to register the northern part of the field must fail. I have already found that there was an absence of significant recreational use of the northern part of the field during the first part of the relevant period when arable cropping occurred from 1990 to 1993. In my view, any degree of use that did take place at this stage would have been trivial and sporadic and thereby would not carry the outward appearance of use as of right to use the words of Lord Hoffman in **R v Oxfordshire County Council, ex p Sunningwell Parish Council**.<sup>14</sup> I thus consider that there was an absence of qualifying use for some 4 years during the early part of the period which is fatal to the claim for registration.

157. Another way of putting this would be to say that there has not been continuous use throughout the relevant 20 year period. I have no doubt of the existence of the principle that use must be continuous throughout the relevant qualifying period. A recent recognition of this is found in the Court of Appeal

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<sup>14</sup> [2000] 1 AC 335 at 357.



decision in **R (on the application of Lewis) v (1) Redcar and Cleveland Borough Council (2) Persimmon Homes (Teesside) Limited**<sup>15</sup> in which Dyson LJ quoted with approval a passage from the judgment of Lindley LJ in the case of **Hollins v Verney**<sup>16</sup> (which was a case involving the Prescription Act). The quoted passage includes the following: “No use can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not to be recognised, and if resistance to it is intended.” The passage was cited by Dyson LJ to illustrate the well-established nature of the proposition that use must be such as to give rise to the outward appearance to the landowner that the use is being asserted and claimed as of right and it is right to record that, in the case itself, there was, according to Dyson LJ,<sup>17</sup> “no doubt that the local inhabitants indulged in lawful sports and pastimes continuously over the land for a period of more than 20 years.” Nevertheless, in citing the words of Lindley LJ which I have quoted and in recording the absence of doubt on the facts of the case before him that use had been continuous, Dyson LJ was, in my view, plainly acknowledging the principle that use must be continuous.

158. Mr George submits that the need for continuous use should be approached on the basis that what is required is the exercise of lawful sports and pastimes, if not month by month, at the very least over a substantial part of each year throughout the 20 year period, sufficient to alert a reasonable landowner to the fact that a right is being asserted in each year, and on several occasions within each year. I need not express a view on that submission because my view is that

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<sup>15</sup> [2009] EWCA Civ 3 at paragraph 35.

<sup>16</sup> (1884) 13 QBD 304 at 315.

<sup>17</sup> At paragraph 48.

the absence of significant recreational use of the northern part of the field for the period of arable cropping means that the requirement for continuous use would not be met in this case even on the most generous approach one could reasonably take to this requirement. Mr George also submitted that what was needed was that *in each year* of the relevant period a significant number of inhabitants had to have used the land, because otherwise a reasonable landowner, reviewing what had happened within a particular year, would not, *throughout the period*, observe a significant number of inhabitants on his land. He characterised this point as going to the depth of user. Again, I need not express a view on this submission given my finding as to the absence of significant recreational use of the northern part of the field for the period of arable cropping as a whole and my characterisation of any use that may have taken place in that period as trivial and sporadic.

159. Whilst the above analysis is determinative of the application insofar as it relates to the northern part of the field, I think that I should say some more to reflect the fullness of the evidence and submissions made at the inquiry. The first matter I would like to deal with here is Mr George’s proposition of law [722] that where a use is more or equally consistent with exercise of a right of way (with or without dogs), and notwithstanding that no public right of way has yet been registered, “the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use a green)”: **Oxfordshire County Council v Oxford City Council**<sup>18</sup> and **R (Laing Homes Ltd) v Buckinghamshire County Council**<sup>19</sup> described respectively as ‘sensible suggestions’ and ‘useful common sense observations’ in **Oxfordshire**.<sup>20</sup> I regard this proposition of law as an accurate one.

160. I must next consider my finding of fact that, after the northern part of the field went into set aside in 1994, the predominant informal recreational use which took place was walking (with and without dogs), most of which took place on the

<sup>18</sup> [2004] Ch 253 at paragraphs 102-103.

<sup>19</sup> [2004] 1 P & CR 573 at paragraphs 102-109.

<sup>20</sup> [2006] 2 AC 674 at paragraph 68.

defined route along the western boundary of the field and, since the later 1990s, along the defined route inside the hedge. I also bear in mind my finding that the usual behaviour of a dog walker would be to let the dog off the lead whilst he would stay on the path in the fashion described by Mr Nicklin. I consider that the use which is encompassed in these findings should, when judging the matter by reference to how it would have appeared to a reasonable landowner, be regarded as referable to rights of way rather than rights to use as a green. It should therefore be discounted from the assessment. The appropriateness of that discount is reinforced by the perimeter nature of the routes in question. Once this discount is applied I consider that the evidence of use of lawful sports and pastimes would clearly be insufficient to sustain a claim for registration of the northern part of the field as a village green. I found above that there had not been a significant pattern of use sustained over time with regularity in the northern part of the field away from defined routes. In these circumstances it could not be sensibly said that the whole of this part of the field had been used for lawful sports and pastimes.<sup>21</sup> Even if the use of the northern route inside the hedge were not discounted, the use of it would fall well short in time of the required period given that, as I have found, it only came into existence in 1997 at the earliest. It follows overall that, even if my findings and assessment in relation to the pre set aside position were wrong, the application could still not succeed in relation to the northern part of the field.

161. For the sake of completeness I should mention 3 other matters. They relate to further objections advanced by Mr George to registration of the northern part of the field other than those which have led to my conclusions above. It is strictly unnecessary for me to deal with them but I do in deference to the submissions made to me. The first is that I do not consider that any use of the northern part of the field could be characterised as forcible and I reject Mr George's submission in this respect on the basis of my factual findings that access to the field would not have been impeded by fencing at the beginning of the relevant period. Secondly, I

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<sup>21</sup> See the discussion of this test in connection with the assessment of the southern field.

would not be inclined to accept Mr George's submission that the application in respect of the northern part of the field is fatally compromised on the basis of interruption by the archaeological trenching, especially in 1996 and again in the north east corner in 2002 and 2003. Had there otherwise been sufficient use I tend to the view that, as a matter of fact and degree, it would not have been interrupted sufficiently often and/or for sufficiently long periods of time by the works in question that it would not carry the outward appearance of use as of right.<sup>22</sup> I also consider that there is little evidence (save for Mrs Fisher) of behavioural adjustment by local inhabitants in response to the works which would convey the appearance that they were not asserting a right. Thirdly, there is no evidence of deference to the annual set aside cutting of the northern part of the field although naturally persons on the land would have got out of the way when the cutter came through. Had I thought that there was sufficient evidence of lawful sports and pastimes on the northern part of the field in respect of the set aside period, I would have been disinclined to think, as a matter of fact and degree,<sup>23</sup> that any deference to what I consider to have been the low level agricultural activity of annual cutting would have been sufficient to defeat use as of right.<sup>24</sup>

*The field: southern part*

162. I have already found that over the course of the relevant period people have been able – with lesser or greater degrees of ease depending on the season and how recently internal drainage board clearance works had taken place - to walk, and have walked, with and without dogs, along a defined route at the edge of the beck which has in large part been created by the operations associated with maintaining the beck. I have also found that this use (which I was not persuaded

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<sup>22</sup> See the test posed by Dyson LJ in **R (on the application of Lewis v (1) Redcar and Cleveland Borough Council (2) Persimmon Homes** [2009] EWCA Civ 3 at paragraph 41.

<sup>23</sup> The relevant test – see **Lewis** at paragraph 49.

<sup>24</sup> The facts in **R (on the application of Laing Homes Ltd) v Buckinghamshire County Council** [2004] 1 P & CR 36 are clearly distinguishable and it was not a simple grass cutting case.

had at all times been regular and frequent over the relevant period) has accounted for the vast majority of the use which has taken place in the southern part of the field. The attractions of deviating from the track to the north would have been limited by the often tall and coarse vegetation as I have already found. I consider that the use of the becks side track is referable to footpath walking rather than to use as a green and should be discounted in the same way that I discounted use of defined routes in my assessment in relation to the northern part of the field. I also consider that use of so much of the route along the western boundary of the field as is within the southern part of the field should be similarly discounted.

163. I also found that there had been little by way of more general recreational use of the southern part of the field apart from use of the beck route and western boundary route, reflecting the wet, frequently flooded, conditions and coarser (often tall) vegetation of this part of the field which (as I had already found) would have been cut only intermittently for several years past. I found that over the years there will also have been a degree of activity, particularly in the form of children's play, associated with the beck itself and its immediate environs and that bmx biking has taken place for the last few years on the mounds in the south east corner of the field (which were probably preceded in 2002 by mounds in the south west corner of the field).

164. Having discounted the footpath use, I consider that there has been insufficient general recreational use of the southern part of the field for it sensibly to be said that the whole of this part of the field has been used over the relevant period for lawful sports and pastimes. I consider that this is the appropriate test to apply basing myself on that passage of the judgment of Lightman J in **Oxfordshire** where he said that it was necessary to "decide on a common sense approach whether the whole of the land the subject of the application was used for the 20-year period for the required recreational purposes."<sup>25</sup> The bmx use has

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<sup>25</sup> These words were spoken in the context of considering an application where only part of the land was accessible but I see no reason why they should not hold good as a more general test.

been relatively recent and confined to a small corner of the south eastern part of the southern part of the field. It does not add significantly to the general picture and does not affect my overall assessment. In the light of this I do not need to consider whether such use should in any event be discounted as use which has only been facilitated by an initial unlawful activity of digging on someone else's land or whether it was in fact permitted (as Mr West believed). If anything the degree of focus in the inquiry on the bmx activity in the south east corner of the field threw into sharp relief the absence of evidence more generally about recreational use of the southern part of the field.

165. Having dealt above (in respect of the southern part of the field) with the common sense test which is to be taken in relation to the question of whether the whole of the land subject to an application has been used for the required recreational purposes, this is a convenient point to consider a particular matter which Mrs de Vries relies upon heavily. That is that in **Oxfordshire** the inspector, Mr Chapman had found that an area of scrubland which was only 25% reasonably accessible was registrable.<sup>26</sup> In that case the scrubland was intersected with paths, glades and clearings. It appears to have been a wholly different piece of land from the field which is under consideration here. Mr Chapman was no doubt persuaded in that case that the evidence before him established that so much of the scrubland which could be accessed was accessed and used for informal recreation continuously over the relevant period. In this case the evidence I have considered has not persuaded me that there has been much by way of recreational activity in the general area of the southern part of the field and that whilst there is evidence of more activity associated with the beck itself that has not, as I have said, painted a compelling picture of such activity on a regular basis throughout the relevant period. Moreover, it could by no stretch of the imagination be said that, by way of example, a family user group who entered the field by its south east corner, proceeded west by the route alongside the beck and stopped off on the way to

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<sup>26</sup> See the passages from his report and the comments of Lord Hoffman on them set out at [2006] 2 AC 674 at paragraphs 65-67.

paddle in the water before exiting to Fordlands Road would convey the appearance that they were asserting a right to recreate over the whole of the southern part of the field.

166. I thus consider that the application must fail in respect of the southern part of the field.

167. Before leaving the southern part of field, I think that it is right, however, to say a few more things about some of the submissions Mr George has advanced. As I have already concluded that the application must fail in respect of the southern part of the field what I next say is strictly unnecessary for the purposes of my reasoning and my remarks are provided for the sake of completeness. First, I am not entirely persuaded by the argument that regular flooding of the southern part of the field would have made the requisite continuity of use impossible but express no concluded view on this. I am more inclined to think not that continuity of use was impossible in the sense that a 20 year period could not run at all but that the wet conditions left by such floods was a factor in making the land which had been flooded unattractive to use when not flooded (not least through the tall and coarse wetland vegetation) and thus contributed to lack of use. Secondly, I would also have been disinclined to accede to Mr George's submissions in respect of interruption on the basis of internal drainage board work and archaeological investigation for reasons which parallel those which I have set out above when I deal with Mr George's corresponding submission in relation to the archaeological works in the northern part of the field. Thirdly, I am not persuaded by Mr George's argument in relation to deference to cutting in the southern part of the field for the same reasons which I gave when dealing with the corresponding argument in relation to the northern part of the field. There was also, as I have found, less regular and extensive cutting in the southern part of the field than there was in the northern part.

*The southern verge of Germany Lane*

168. It has not been established that lawful sports and pastimes have been carried out continuously for the requisite 20 year period over the whole of this area. Moreover, my view is that the picking of berries which grow in the hedge, or in bushes in the verge, alongside rights of way should generally be regarded, and should be so regarded in this case, as referable to exercise of that right of way or the occasional excessive exercise of that right rather than a right to assert village green use over the verge.

*The area to the east of the field*

169. The use of public footpath 5 (and the bridge carrying it over the beck) by walkers and dog walkers will simply have been use of an existing right of way and referable to the existence of that right of way. It will have been use by right and not as of right. In any case I do not consider that village green rights can be asserted on a public footpath because the sports and pastimes which would be lawful on a village green (such as organised and informal games) would be incompatible with the use of a public footpath as a highway and be unlawful thereon. There is no evidential basis at all for the registration of the remainder of this part of the Claimed Land.

*The need to show that use was predominantly by the inhabitants of the relevant area*

170. Mr George submitted that the application should fail in any event on the basis that the applicant/Friends had not shown that the use was predominantly by the inhabitants of the Fordlands Road estate. Mr George began by accepting that the Fordlands Road estate could in principle ground a village green application. I think that this was a realistic position to take and I consider that the Fordlands Road estate is indeed a neighbourhood, within the locality of the Fulford Parish [1611] and was shown to be such in the evidence. Nevertheless, Mr George



argued that, even if (which was disputed) a significant number of the inhabitants of the Fordlands Road estate, had used the Claimed Land for 20 years, that would not be enough given the absence of evidence that users were predominantly from the estate. He drew support for his submission in factual terms from the fact that evidence had been given from users who came from outside the Fordlands Road estate (for instance, Cheyne, Smith and Jones) and the inference that users were as likely to come from areas in Fulford to the north of the Claimed Land as they were from the Fordlands Road estate. He put the legal basis of his submission on the approval by the House of Lords in **R v Oxfordshire County Council, ex parte Sunningwell Parish Council**<sup>27</sup> of the customary law approach in **Hammerton v Honey**<sup>28</sup> and argued that the continuing applicability of this approach had not been affected by later statutory changes.

171. I have already come to the conclusion that the application should fail for reasons which I have set out in some detail but it is important nevertheless that I consider Mr George's submission because it is an overarching one of considerable potential importance. If it is correct it means that an application will fail even if all the ingredients of the statutory definition are met if the applicant has failed to demonstrate that the use has been predominantly by the inhabitants of the relevant locality or neighbourhood.

172. I cannot accept Mr George's submission. Before coming to the reason for that it is worth pointing out that in **Sunningwell** the House of Lords did not actually decide that the required use to establish what were then known as class c greens under section 22(1) of the Commons Registration Act 1965 had to be similar to that which would have established a custom. Lord Hoffman pointed out that section 22(1) did not say use *only* by the inhabitants of the locality. He went on to say that he was willing to assume, without deciding, that use had to be similar to that which would have established a custom. On that assumption he

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<sup>27</sup> [2000] 1 AC 335.

<sup>28</sup> (1876) 24 WR 603 at 604.

then said that it would be sufficient to satisfy the customary law approach if land was used predominantly by inhabitants of the village (as it was in that case).<sup>29</sup>

173. Be that as it may, my view is that any requirement for use to be shown to be predominantly by the inhabitants of the relevant area was abrogated by the amendment made to section 22(1) of the Commons Registration Act 1965 by section 98 of the Countryside and Rights of Way Act 2000. That amendment introduced the test that the qualifying use must be “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality”, which is the test now found in section 15(2) of the 2006 Act. Again, the test does not say that use must be *only* these inhabitants so there is an absence of explicit statutory wording which to support the predominant use test. If the statutory wording is considered ambiguous it is permissible to resort to Hansard to clarify Parliament’s intention. This makes it plain that it was Parliament’s intention to abolish any predominant use test. In introducing the amendment which became section 98 of the Countryside and Rights of Way Act 2000 Baroness Farrington of Ribbleton said the following in the House of Lords: “[t]he amendment ... makes it clear that qualifying use must be by a significant number of people from a particular neighbourhood or locality. That removes the need for applicants to demonstrate that use is predominantly by people from the locality and means that use by people from outside the locality will no longer have to be taken into account by registration authorities. It will be sufficient for a significant number of local people to use the site as of right for lawful recreation and pastimes.”<sup>30</sup>

### Summary

174. I consider that the application should fail for the following reasons :

(a) former allotments area – lack of lawful sports and pastimes;

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<sup>29</sup> [2000] 1 AC 335 at 357.

<sup>30</sup> Hansard HL Debates 16 November, columns 513 and 514.

- (b) field (northern part) – absence of 20 years continuous use for lawful sports and pastimes; insufficient lawful sports and pastimes over the whole area;
- (c) field (southern part) – insufficient lawful sports and pastimes over the whole area;
- (d) Germany Lane verge - lawful sports and pastimes not carried out continuously for the requisite 20 period over the whole of area; use referable to public right of way;
- (e) area east of field – use referable to public footpath.

Recommendation

175. I recommend to the Council that the application should be rejected.

Kings Chambers  
36 Young Street  
Manchester M3 3FT

Alan Evans  
22<sup>nd</sup> February 2009

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