

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN
AS THE SULLY SPORTS FIELD, SOUTH ROAD, SULLY, VALE OF
GLAMORGAN AS A TOWN OR VILLAGE GREEN**

REPORT

Of

James P Marwick

26th March 2018

-Application Number 01/2016/VG49-

The Vale of Glamorgan Council

Holton Road

Barry

CF63 4RU

Ref: C03-01212

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN
AS THE SULLY SPORTS FIELD, SOUTH ROAD, SULLY, VALE OF
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REPORT

Introduction

1. This Report is in respect of an Application made under section 15(1) of the Commons Act 2006 (the “**2006 Act**”) to register land known as the Sully Sports Field, South Road, Sully, Vale of Glamorgan (the “**Land**”) as a town or village green (the “**Application**”).
2. I was instructed by the Vale of Glamorgan Council in its capacity as the relevant Registration Authority (the “**Registration Authority**”) to hold a non statutory public inquiry in relation to the Application and to provide my findings and recommendations by way of a written report for consideration by the Registration Authority
3. The Inquiry was held over four days, namely from Monday 29th January 2018 to Thursday 1st February 2018. Pursuant to my directions, the parties had exchanged evidence and submissions in advance of the Inquiry which was of significant assistance to the Inquiry process. I undertook an accompanied site visit of the Land during the course of the first day of the Inquiry, 29th January 2018. At the request of the parties, I also undertook a further unaccompanied site visit whereby I was able to observe in particular the neighbouring areas to the Land which had been referred to during the course of evidence.
4. The evidence was completed within the allocated four days but there was insufficient time for closing submissions. It was agreed that the parties would file written closing submissions which were provided in due course following the Inquiry.

5. For the purposes of the Inquiry, the Applicant produced two bundles which contained *among others* the Application, the evidence questionnaires relied on in support of the Application and other documentary evidence in support of the Inquiry. The Objectors produced two bundles which contained *among others* their Objection and supplemental statements, the statutory declarations of their witnesses and other documentary evidence in support of their objection. There was a further bundle prepared by the Registration Authority which contained *among others* relevant correspondence relating to the Application.
6. The bundles were paginated and I preface any reference to a page number with an “A” if it relates to the Applicant’s bundles, an “O” if it relates to the Objectors’ bundles, or “RA” if it relates to the Registration Authority’s bundle (e.g. A14). The parties had additionally provided written submissions and authorities in advance of the Inquiry.
7. There was a challenge by the Applicant to the admissibility of some documentation which had been produced late by the Objectors (I address the substance of such documentation where necessary in the body of this Report). At the outset of the Inquiry, I found that it would be appropriate for such documentation to be before the Inquiry and by the close of the Inquiry the issues to which the documents related were largely not in dispute in any event. I have had regard to all of the documentation in preparing this Report.
8. At the Inquiry, Mr. William Richards appeared for the Applicant and Mr. Jeremy Pike appeared for the Objectors. I am grateful for their assistance and the quality of their submissions both oral and written.
9. I make clear at the outset of this Report that the Inquiry was not concerned with the merits or otherwise of any future development of the Land but rather whether the statutory test for registration under section 15(2) of the 2006 Act is satisfied.

The Application

10. The Application was made by the Sully and Lavernock Community Council and the Saving Sully Group (together, the “**Applicant**”) on 12th September 2016 by application form 44 [A3]. The Application was made on the basis that section 15(2) of the 2006 Act applies. The Application was verified by a statutory declaration in support made on 8th August 2016 by Mr. Stephen Thomas of 23 Winsford Road, Sully, Vale of Glamorgan in his capacity as chairman of the Saving Sully Group.

11. The Land is identified as the “*Sully Sports Field*” at section 5 of the application form and the relevant locality or neighbourhood within a locality is identified as “*the community council area of Sully and Lavernock*” at section 6. The locality plan [A18] did not delineate an area representing the locality but it was confirmed at the Inquiry that the Applicant relied upon the administrative area of Sully and Lavernock Community Council. The Objectors accept that this is an administrative area which meets the definition of a locality at section 15(2) of the 2006 Act. In a detailed annex to section 7 of the application form, the Applicant provided its justification for registration of the Land. The Application was supported by witness questionnaires together with relevant plans, photographs, a petition and other supporting documentary evidence (as particularised in the covering letter dated 5th August 2016 [A1]).

12. The Application was advertised by the Registration Authority and objected to by St. Modwen Developments Limited (“**St Modwen**”) and Barry Plastics Sports and Leisure Company (“**BPSL**”) (together, the “**Objectors**”) by an objection served under cover of correspondence dated 18th November 2016 (the “**Objection**”) [B1]. The Applicant responded to the Objection by email correspondence dated 12th December 2016 [A347]. Thereafter, it was determined by the Registration Authority that a non statutory public inquiry be arranged prior to the determination of the Application.

The Land

13. The Land predominantly comprises playing fields and open grassed areas which form part of the site from which BPSL operates a sports and social club (the “Site”). I refer to the sports and social club in this Report as the “**BP Club**”. Unless stated otherwise any such reference is intended to include all predecessors in title of the sports and social club.

The Site

14. The Site lies to the south of South Road in the village of Sully. Development of what is now the BP Club began in or about 1962 when certain restrictive covenants lapsed and buildings and playing fields were laid out on the Site. The northernmost part of the Site now includes *among others* an astro turf pitch, changing rooms, a club house with bar and restaurant facilities, an indoor bowling centre with 8 rinks, staff offices and facilities for car parking. This part of the Site is excluded from the Application. The majority of the Site is laid out as playing fields or grassed open space which can clearly be seen in the various aerial photographs before the Inquiry [O528]. The approximate position of football pitches and rugby pitches (which ultimately I did not understand to be controversial) was set out in the Objectors’ evidence [O46], there generally being 5 football pitches and 2 rugby pitches.
15. The Site is bounded to the south by the coastal foreshore. It is not fenced but a natural boundary is formed with the foreshore. There is a public right of way which runs immediately above the southern boundary of the Site [A33]. This forms part of the coastal footpath. It is Public Footpath (No. 4) marked on the Definitive Map [RA417-418 and O546-548]. There is a gated access point in the south-west corner. The public right of way runs across the southern edge of the Site adjacent to the foreshore before following the line of the boundary where the Site meets the Island View Caravan Park in the direction of the north-east to the point where that boundary meets Beach Road where there is a further gated access point. There are signs at these access points which *among others* state that dogs are not allowed on the playing fields on the Site. There are photographs of the access points and signs [A48-60].

16. The rest of the eastern boundary of the Site is a combination of palisade fencing and heavy foliage. The eastern edge of the Site forms a border with Beach Road up to where it meets with South Road. The western edge of the Site runs along the boundary with the rear of residential properties on Clevedon Avenue which adjoin the Site to the west. It is bounded by either fencing or stone walls. The north edge of the Site is fenced by palisade fencing with two gated entrance points which allow vehicular and/or pedestrian access to the Site. The two gates are located in the palisade fencing. Inside part of the palisade fencing, separating its car park from the area of the BP Club used by the BP Club and its members for sporting and other activities is a wire fence. Three gates are located in the wire fencing. There is a further gate on the terrace of the BP Club.

The Land

17. The boundaries of the Land were delineated by way of a red outline on the plan in support of the Application [A17]. The northern edge of the Land follows an irregular line immediately below the buildings and facilities in the northern part of the Site. The western, eastern and southern boundaries otherwise follow the equivalent boundaries of the Site save that it was not clear as to whether the southern/south eastern boundary was meant to encompass Public Footpath (No 4). On the second day of the Inquiry, the Applicant confirmed that the Land did not encompass Public Footpath (No. 4) but that the southern boundary of the Land lay immediately to its north. Thus, the Site encompasses the facilities on the northern part of the site and the coastal footpath but the Land does not (and references to the same in this Report should generally be read in this way, although with the extent of references it is not always possible to guarantee consistency given the inevitable overlap).
18. The Land is owned by the Objectors. It comprises three freehold titles [O34 to O45]. Two were acquired by BPSL upon its formation in 1995. BPSL acquired leasehold title to the third parcel of land in 1995 and St Modwen purchased the freehold to the same in January 2010 subject to BPSL's 125 year lease.

The Evidence

19. I heard evidence on behalf of both parties at the Inquiry. I also gave the opportunity to others present at the Inquiry to give any further evidence whether for or against the Application. The evidence was not taken on oath. I am quite satisfied that those who gave evidence to the Inquiry did so in an open, honest and straightforward matter. The human memory is not infallible (see *Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)* for the seminal exposition of the unreliability of the human memory in the context of giving evidence) and there were instances of mistakes (usually corrected or accepted as a mistake) and inconsistencies but I am satisfied that each witness endeavoured to assist the Inquiry to the best of their individual recollection in most instances.

20. I am grateful to both parties for providing detailed notes of the evidence provided to the Inquiry. I summarise relevant aspects of the oral evidence of the witnesses below and proceed on the basis that copies of the written evidence relied upon will be made available to the committee determining the Application. I also address certain discrete criticisms or inferences which the Applicant has invited me to draw from the evidence of a witness in its closing submissions.

Applicant's Oral Evidence

21. The Applicant's witnesses had each completed Open Spaces Society pro forma questionnaires in support of the Application. Those pro-formas had appended to them, in many cases, a plan which identified the relevant application land as the entire Site rather than just the Land. In a matter where there was already an inherent danger that those completing the questionnaires would conflate formal recreational user by the BP Club with informal recreational user by members of the public, this had the unfortunate consequence that there were many references in the questionnaire evidence to user which was likely referable to organised activities and events undertaken or arranged by the BP Club whether on the Land or through user of its formal facilities. Likewise a reference in the questions to the neighbourhood and/or locality identified the relatively small area of Sully shown on the plan as the relevant area.

22. Therefore there was a particular need for caution in assessing the oral evidence of witnesses as against the questionnaire evidence (I emphasize through no fault of the witnesses). I am very grateful for the Applicant's witnesses for their assistance.
23. Dorothy Scaglioni [A22-26]- she had lived in Sully since 1962. She lives at 12 Smithies Avenue which is in the residential development to the west of the Land. She had gradually used the Site less over the years and perhaps once or twice a month for strolls since 1996 in the warmer months. Prior to that, her children had used the Land, sometimes for organised sports, in particular football. She would access the Site using Public Footpath (No. 4) in the south-west corner, walk in a circle and exit using the same point. The coastal footpath had been resurfaced recently. Her husband might stray a short distance off the coastal footpath to watch football if it was being played. She would never go as far as any pitches. She liked the quietness of the footpath.
24. She had never been challenged on her use of the Land. She had seen the signs restricting access to those walking dogs. She did not have a dog herself. She had been to at least one car boot sale. She was aware of other organised events on the Land. She could not assist with what pitches were laid out or when as she generally stuck to the southern end of the Land on or near to the coastal footpath. She thought that most users of the Land would come from the immediate Sully area (in the region of 80% or 90%); a similar response was forthcoming from most witnesses when this question was posed in examination in chief.
25. I did not form the impression from Ms. Scaglioni's evidence that she had seen extensive user of the Land for leisure walking (rather than user of the public right of way) or informal sports and pastimes, certainly not in the recent (and material years) from 1996 to 2016. I was satisfied that her witness questionnaire to the extent it referred to informal recreation spoke to historic user before 1996.

26. James Ken Jones [A34-38]- he has lived in Sully since 1953. He lives at 29 Winsford Road which is a road immediately to the north of the Site, perpendicular to South Road. He has lived there since 2011 and he previously lived at Smithies Avenue. His evidence was that he accessed the Site to walk his dog.
27. Whilst prior to 1996 access to the Site had been relatively unfettered, it had been more controlled since the playing fields were marked out which was at about that time. He accepted he would generally keep off the pitches and would use the coastal footpath. .
28. He had been challenged by the groundsman once or twice to keep his dog off the sports pitches. He accepted this was reasonable particularly as awareness had grown about the use of faeces. He had not been challenged when without his dog. Further signs had appeared in the last few years. He had though seen a few people walking over the pitches with dogs. The coastal footpath had recently been resurfaced but prior to that, whilst the path was not clearly marked at times, people would walk in its general position and keep to the southern part of the Site. He attended car boot sales and had paid to sell items. He had also seen the classic car shows twice. He accepted that both events covered a substantial amount of the Land. He had seen organised sports on the Land, in particular football which his grandson had attended for about 5 to 6 years between about 2002 to 2008. There would be 2 to 4 junior football games on a Saturday together with adult sport such as rugby. Most users were from Sully.
29. In re-examination he gave evidence that going back to the 1950s and 1960s that the Land was used for *among others* flying kites and blackberry picking. He was asked about more recent user and his answer was a qualified one that he would have thought so. Again, I was satisfied that his questionnaire evidence spoke to historic user for informal recreation.

30. Judith Lynn [A96-100]- she lives at 40 Cog Road which is a street to the north/north-west of the Site. She had returned to live permanently in Sully in 1985 and had lived on Cog Road since 1996. Her evidence was that she liked to walk along the beach. She would often start at Sully Church. She would sometimes go on to the bottom part of the Site in order to take a break and to look out to sea. Her frequency of user would depend on whether she was required to walk the dog for her children.

31. She was aware of certain events on the Land but had limited direct knowledge of them. Similarly she was aware of at least some marked out pitches but generally she stayed to the southern part of the Site and/or the beach. She had not been challenged in any user of the Land. She would not use the Land on weekends and not had seen it being used for playing football or rugby. She thought most users were from Sully.

32. Her questionnaire evidence had confirmed she had not seen any informal recreation on the Site. .

33. Robin Lynn [A106-110]- He lives at 40 Cog Road with his wife [A96-100]. He tends to access the Site from the Beach Road access on to the coastal footpath. He would then either follow the coastal footpath or cut across the Land, subject to conditions underfoot. His evidence was that others would do this. Prior to about 2012, he accessed the Site using the footpath a couple of times a month. After his retirement, he had done so twice weekly. He had not paid much attention to the signs at the Beach Road entrance. He was aware that the coastal footpath had been resurfaced abut 3 years ago. He was aware of events on the Site and had attended the car boot sale. He was unaffected by sports matches as he would be below the level of the pitches. He did not give oral evidence as to any real user of the Land for informal recreation.

34. My impression from the evidence of both Mr. and Mrs. Lynn was that their evidence was consistent with a conclusion that the majority of observed user related to walking on or close to the coastal footpath or as a direct cut through between the Beach Road access and the south-west corner access (in addition to organised events on the Site).
35. Chris Dixon [A65-69]- he has lived at 17A South Road since about 1993. His evidence was that he had used the land informally with his 5 children and subsequently with his 7 grandchildren. Activities including a kick-about, kite flying and rounders. This would generally be close to the south-west corner having accessed the Site at that point. He had attended both car boot sales (as both buyer and seller) and the classic car shows. He described the car boot sales as huge in terms of the area occupied by them. He had observed informal activities on the Land but these would generally be confined to the bottom end of the Land.
36. Jennifer Pateman [A56-64]- she lives at 12 Somerset View which is a very short distance from the south-west access to the Site. She had moved to Sully in 1980. She had accessed the Site more frequently in recent years as her husband has Alzheimer's and it is a traffic free area. They would access the Land to attend events such as the car boot sale and also the classic car shows. Her user since about 1996 has been for walking without a dog and attending events. Her evidence was consistent with her questionnaire evidence which primarily referenced user for walking and dog walking.
37. John Arbourne [A39-43]- He has lived at 25 Winsford Road since May 1978. He had unfettered access until about 1998 when access was restricted following the erection of a perimeter fence and locked gating. After 1998 he would generally access the Site from Beach Road. He did not use the Site often between 1998 and 2016. He would tend to stick to the coastal footpath in winter. At other times he might cut diagonally across the Land.

38. My impression was that Mr. Arbourne's evidence was consistent with that of James Ken Jones in that there had been a step change in access to the Land in or about 1996 coinciding with the BP Club formalising most user of the Land. Whilst Mr. Arbourne's questionnaire had referenced ongoing user for picnicking and football, I was satisfied that his oral evidence gave a clear impression of the nature of his user and the user of others of the Site.
39. Vivian John [116-120]- he lives at 8 Westminster Drive in Sully and had done so since 1991. He uses the Land for walking his dog as well for foraging for mushroom and for collecting blackberries. The gate near the changing rooms had been locked since the 1990s and so he would enter the Site from the south-west access. He would not walk over the pitches with his dog though they might stray 30 to 40 yards on to the Land.
40. He had about one year previous been challenged by Fred Johnson as he had departed from the coastal footpath. He had played organised sports on the Land including cricket and football into the early 1990s. He was aware that there would be at least 5 pitches marked up during the sports season(s) and he accepted that certain aerial photographs over time were reasonably accurate [O524 to O527]. After some understandable reluctance, he gave evidence that mushrooms would be found in certain parts of the Site, including a belt across the playing fields. His evidence was that most using the Site would be from Sully although generally they would be using the coastal footpath. .
41. David Davies [A50-55]- he lives at 10 Ashby Road to the west of the Site. He was an on and off member of the sports club between 1996 and 2016. To the best of his recollection he was a paying member of the BP Club for about half of that time altogether. In about 2015, he had also joined one of the bowling clubs. He would typically park in the car park and then access the Land. He was accustomed to this through his membership of the sports club. He would go to the Site for a combination of socialising and walking.

42. Colin Lyons [A27-33]- he lives at 1 Highbridge Close in Sully and has done so since 1969. He had been heavily involved in tennis at the Site in the 1970s and had been instrumental in assisting with the construction of tennis courts at the Site. He had attended the classic car shows on the Land and although he had not attended the circus itself he had been on the Site whilst it was present. He mainly used the Land for recreational walking. He had not been challenged over any user of the Land. He had provided photographs of a family birthday picnic close to the coastal footpath in about 2010. My impression from his evidence that most informal access for was walking whereas the Land was used primarily for organised sports.
43. Brian Davies [A126-134]- He lives at 60 Cog Road. He uses the Land regularly for walking. He accesses the land via the south-west entrance and generally exits by the Beach Road access. Until about 8 to 10 years ago, he would regularly run a circuit of the Land. He had observed children playing football on the Land in a location consistent with where the children's pitches are laid out on the eastern side of the Land. He would sometimes watch organised games on the sports pitches. He was aware of the car boot sales and had attended the classic car shows.
44. Peter Murrin [A70-74]- He lives at 16 Smithies Avenue. He has done so since 1986. He would generally gain access from the south-west entrance and cross the Land leaving by the Beach Road access. This would be about twice a week. He would reverse the route for his return journey. He was aware of football and rugby games being played on the Land. My impression from Mr. Murrin's evidence (consistent with that of other witnesses) was that outside of formal organised sports on the Land or attendance at formal events, most user was confined to walking across the coastal footpath or using a more direct line between the two access points for the coastal footpath. His questionnaire had spoken to only using the Land for walking.

45. Corrine Shields [A80-84]- She lives at 46 Smithies Avenue. She had previously walked her dog on the Site. She would use the south-west access and would not let her dog on to the pitches. She was aware of the signs and the reasons for keeping the dogs off the pitches. She would proceed along the footpath to the Beach road access and then would reverse her route or go up Beach Road to complete a larger circuit. Her son had played for Sully Colts and her grandson plays for Sully Dragons both junior football teams. She had attended the classic car show and would sometimes go to the car boot sale on a Sunday.
46. Ms. Shields was asked in cross examination whether she had ever been challenged by Fred Johnson and asked to leave the Land. Mr. Pike asked such questions on instructions in proper accordance with his role as advocate for the Objectors and in an appropriate manner. I reject any assertion to the contrary. Ms. Shields remained steadfast in her evidence that she had and that Mr. Johnson was a friend of a friend who she believed he had once given her a lift to the airport. In the event, Mr. Johnson (who was in attendance) realised he was mistaken and I understand that an apology was offered outside of the Inquiry. This was unfortunate but I did not consider it impacted on the quality or contents of the evidence of Ms. Shields who I found to be a reliable and credible witness.
47. Gaynor Williams [A44-49]- She lives at 1 Winsford Road. She has lived in Sully since at least 1973. Her children have dogs and when she walks them she would walk them on the coastal footpath as is aware of the signs prohibiting dogs on the playing fields. Her main activities are walking and dog walking. Most people she would observe would be local people walking. She attends car boot sales on the Land and is aware of the other events organised on the Land from time to time.

48. Her property overlooks the Site and her evidence was that she would be regularly able to observe a group of 5 or 6 boys on the Land kicking a football from her sitting room window which is on the second floor of the property. They would typically enter from South Road and proceed on to the playing fields. Ms. Williams did not, understandably, give evidence as to whether or not these groups of children were members of any of the sports clubs which operate at the Site particularly in a context where most informal access appears to have been using the Beach Road and south-west access points. There was very limited evidence of informal user for football presented to the Inquiry and whilst I readily accept the evidence of Ms. Williams that she has observed games of football on the Land, I have greater difficulty in accepting that it was necessarily user by non members for informal recreation.
49. Geoff Dunn [A101-105]- He lives at 32 Porlock Drive in Sully. He has lived there since 1987. He used to walk his dog on the public right of way (or a route close to it subject to weather conditions) up until 2002. Between 2002 to 2005 he was a regular seller at the car boot sales (primarily selling off a stock surplus from his previous business). He did give evidence that historically he had walked past the clubhouse when it was “*in full swing*” and his access to the Land was not challenged. I accept that evidence but my impression of this evidence, consistent with his lack of user of the Land in recent years, was that it spoke to access most likely before the step change in access in 1996 and certainly before the more interventionist approach in recent years. I do not therefore regard it as inconsistent with the Objectors’ evidence in that respect.
50. David Currier [A85-89]- he lives at 12 Highbridge Close in Sully and he has lived there since 1978. He accesses the Site for walking and for dog walking. He accesses the land from South Road and walks between the two main buildings on the northern part of the Site. He has not been challenged. He generally completes a circuit of the perimeter of the Site though sometimes he cuts across the playing fields. He is a member of one of the community groups behind the Application.

51. He was questioned robustly but fairly by Mr. Pike about such matters, including how he came to complete his questionnaire. I accept that Mr. Currier sought to give his evidence honestly to the best of his recollection to the Inquiry.
52. David Andrew Smith [A111-115]- he lives at 3 Elkley Road and has done since November 1993. He has accessed the Site for dog walking and foraging for mushrooms. He plays indoor bowls at the club. He had before 1996 played football on the Land. His main user was for dog walking and he would stay on the coastal footpath as he was aware of the signs. He would, however, when in season (which is about twice a year) forage for mushrooms though he had not done this for 2 to 3 years. He had attended events at the Site including the classic car show. He could not recall people using the rest of the Land during the classic car show.
53. Barrie Hill [A121-125]- he lives at 11 Highbridge Close in Sully. He has lived there since 1969. Since 1996 he has not accessed the Site for anything other than walking. He has attended events on the Land including the classic car show at least twice. He would access the Site from Beach Road though he would not necessarily stick to the coastal footpath.
54. Annie Rees- she lives at 12 Clevedon Avenue. She was a member of the public who had attended much of the Inquiry and responded to my invitation to for members of the public provide any further evidence. She did so in support of the Application. She was one of life's characters who gave evidence of fairly extensive user of the Land. She has rambled over the Land on a regular basis and undertaken activities, certainly historically, such as blackberrying. It transpired that Fred Johnson had spoken to her about her rambling but, and I unhesitantly accept this evidence, did not have the heart to tell her to desist and thus permitted her to continue on her way.

Applicant's Written Evidence

55. There was further questionnaire evidence relied upon the Applicant in addition to the oral evidence presented to the Inquiry. There was a petition signed by approximately 650 people supporting the Application together with other documentation and photographs in support of the Application. I have had regard to all of that material and the Registration Authority must bear it in mind in considering the Application.
56. The starting point is that I ought to attach less weight to evidence that has not been tested by cross examination before the Inquiry. The further questionnaire evidence contained similar contents to the questionnaire evidence of those witnesses whose evidence was tested at the Inquiry. I have already raised the issue with the plan(s) appended to the questionnaires which necessitates additional caution when considering the extent of user referred to in the questionnaires. I am satisfied that the oral evidence of those witnesses in support of the Inquiry was likely a reasonable representation of the nature and extent of user at material times. I approach the untested questionnaire evidence on the basis that it can only support the Applicant's case insofar as it is consistent with the oral evidence before the Inquiry.

Objectors' Oral Evidence

57. The Objectors' witnesses had provided their evidence by way of detailed statements verified by statutory declarations. I was satisfied that there were no concerns raised by the manner in which their written evidence had been prepared and presented to the Inquiry (there was close scrutiny of the process in cross examination).
58. Michael Cruttenden [O80-92]- he has been a member of the management committee for the last 3 years and his particular role relates to organising the bar and arranging entertainment. He lives on Beach Road and has done so since 1993. He has been a member of the BP Club since 1993. His user of the Site for dog walking had stopped in about 1996. At that time the grass near the coastal footpath was not mown and approximately as high as a table.

59. He would often walk to the Jubilee Hall playing field with his children, which is to the west of the Site. There was a small play park for the children and a sports day was held on that playing field.
60. Family days on the Site would involve a number of displays of entertainment similar to a fairground including candy floss stalls, bouncy castles and live music. People would come from all over such as in from the valleys. Other events had taken place on the Site between 1996 and 2016 including antique and craft festivals. The sections of the BP Club included rugby, football, indoor bowls and a telecommunications (radio) group. New signage had been erected in 2014. He had on two occasions had cause to challenge persons on the Land. The dog walker he had challenged had hurled some abuse and then left the Land. His time at the BP Club was restricted by his business interests. He would spend up to 16 hours a week at the BP Club, primarily at the weekend or between about 5pm to 7pm during the week.
61. The previous manager had used the loudspeaker system to challenge those straying off the coastal footpath. This was not presently the case most likely because of the extent of signage positioned around the Site. The signs did not expressly prohibit the use of the Land for informal recreation. He could not offer an explanation as why the BP Club had not erected such signs. He and other staff members would challenge members of the public on the Land as a matter of course. He would politely remind the public that no dogs were allowed. He had had cause to do this in November 2017. He had seen the letter relating to Mr. Johnson's challenge to a member of the public.
62. He accepted there was scope for informal user of the Land during the organised events on the Land such as the family days. Some events, however, took up about 90% of the Land and it was unlikely that there could be any informal user at such times. Fencing had been erected because it was private property. There could be access between the club house and the indoor bowls centre but generally gates would be locked outside of BP Club hours.

63. He would observe dog walkers on the southern part of the Land. They now stick to the coastal footpath since it had been resurfaced. He would assume that if he saw dog walkers or walkers in the bottom part of the Land from the club house that they were using the coastal footpath. He was unaware that the presence of circus animals broke the byelaws of the BP Club.
64. I reject that his evidence was misleading in any respect. I accept there is some force in a submission that Mr. Cruttenden occasionally gave inconsistent or defensive evidence, such as in respect of whether the Site was overlooked by properties on Clevedon Avenue, but not to an extent that I consider that his evidence ought to have little weight attached to it. I ultimately found it to be consistent with the evidence of the Objectors' other witnesses and to no small extent consistent with the evidence in support of the Application.
65. Richard Gully [O168-204]- He is a member of the BP Club's rugby section. He had recently retired. There are 2 adult rugby teams at present. There are approximately 16 adult games on the Land during a season in addition to training sessions during the week. Additionally, the youth team would train and play on the Land. The previous bar manager would challenge members of the public on the Land using the loudspeaker system. He himself had challenged members of the public and the rugby players had a protective attitude to the pitches.
66. He has acted as a steward for the car boot sales. There is a traffic management system. He has also seen standalone fairs and caravan shows on the Land. There used to also be a significant rugby 7s tournament in the late 1990s which occupied most of the Land. He has been on the BP Club's committee for the last 2 years or so. He was not aware of any contraventions of byelaws by virtue of the presence of circus animals on the Land during the circus. He was aware that circus had been on the training pitch and that the circus had left a mess which the BP Club had paid to tidy up.
67. He would observe walkers and dog walkers on the coastal footpath. Some might cut the corner which leads up to Beach Road but not many.

68. I unhesitatingly reject any suggestion that Mr. Gully's evidence gives rise to a finding that he had an irresponsible disregard to the BP Club's rules. He was an honest, straightforward and reliable witness. He was not challenged on his oral evidence that he himself had challenged members of the public on the Land and I reject any submission that his evidence undermined the Objectors' case in respect of the challenge to trespassers.
69. Fred Johnson [O205-244]- He has been club secretary since 2014. Before that time he had attended the BP Club about 4 to 5 times per year. In the summer he would be there most days of the week. This would include *among others* helping to run the burger van in the car park, dealing with office duties and assisting with events such as the car boot sale on a Sunday.
70. The car boot sales would occupy most of the Land. There could be up to 500 sellers and 1,500 vehicles. The aerial photographs [O226] showed a typical car boot sale. He confirmed that he had challenged families who had set up picnics on the Land (generally in the vicinity of the coastal footpath). This had happened a couple of times. He had also challenged someone who had come to hit golf balls on the Land. He had overall responsibility for the enforcement of byelaws and the rules of the BP Club. There was no written procedure for challenging members of the public on the Site. Club staff would challenge as necessary.
71. He has had an active role in local politics including as chairman of the Vale of Glamorgan in 1996 and as mayor of the Vale of Glamorgan elected in May 2014. He also undertook other roles such as a member of the PROW committee and as a Justice of the Peace. He was also the managing director of West Quay Properties. He accepted the significant time involved in carrying on these other interests but was clear that he had more than sufficient time to carry out his role as club secretary and that he was regularly at the BP Club.

72. He had not witnessed any regular informal recreation on the Land since becoming club secretary in 2014. He would challenge those coming on to the Land and this would mainly be dog walkers. He had to do so fairly frequently over the last few years. He had only had cause to approach one trespasser in 2018. However, the vast majority of people stuck to the coastal footpath and the problem was if they strayed off the coastal footpath with their dogs off the lead. There were two rugby pitches and five football pitches marked out on the Land. These were frequently in use by the sports teams or during the organised events on the Land. It was difficult to distinguish between those attending events and members of the public during busy events.
73. The Applicant invites me to attach no weight to the evidence of Mr. Johnson on the basis of a weight of inconsistency, contradiction and inaccurate recollection of events. I reject this submission. I have two fundamental difficulties with the submission.
74. The first is that I found Mr. Johnson to be open, honest and straightforward in his evidence and I did not consider there to be a serious weight of inconsistency or contradiction. I have already addressed the instance of mistaken identity in respect of Ms. Shields. The mistake, to Mr. Johnson's credit, was admitted promptly and he proffered an apology. I accept it was an honest mistake. The human memory is not infallible.
75. The second is that the key aspects of Mr. Johnson's evidence were consistent with the balance of evidence presented to the Inquiry. The oral and documentary evidence presented by the Applicant supported Mr. Johnson's evidence that he had challenged members of the public trespassing on the Land. The manner in which he did so is not relevant. Further, his evidence that he had primarily witnessed dog walkers and walkers using the coastal footpath (or in close proximity thereto) with occasional straying on to the Land or occasional instances of other activities such as picnics, was consistent with the thrust of the oral evidence given by those in support of the Application.

76. Many of the other criticisms are, in my view, irrelevant or not well made. The instance of excrement being left by the circus, for example, happened before Mr. Johnson was appointed as club secretary. The authorisation and management of events such as the circus by the committee struck me as irrelevant to the determination of the Application. Insofar as there were attempts to undermine the credibility generally of Mr. Johnson, these were not made out.
77. Stephen Greenslade [O93-167]- he is the representative of the football section on the management committee of the club. He has been involved in the football section since 1999. There are 5 football pitches and 2 rugby pitches marked on the Land. The 2007 minutes confirm that there were 28 teams. The majority of teams are mini/juniors. There would be a maximum of 2 senior teams playing at home on a Saturday and up to 4 to 5 of the mini/ junior teams. The football season runs from late July when training commences and ends in the first week of May.
78. There might be up to about 40 spectators at a senior game. There is a well attended annual football festival which takes up much of the Land with five a side pitches and organised stalls and activities. The groundsman had cut the whole area of the playing fields but about once every 10 days, he would cut the grass shorter on the football pitches. The work was now dealt with by a contractor. He would also mark pitches out for about 2 to 3 hours per week.
79. He had had cause to challenge dog walkers on about 5 occasions. He would be firm but polite. The majority of people walked on the coastal footpath. Those coming to play football on the Site were likely part of the football section. If they were not members, he would move them on but he could not recall coming across such a situation. He accepted that not all gates were locked and that the Land could not be policed "24/7".

80. Patricia Taylor [408-504]- she had worked as an administrative assistant at the BP Club from 1989 until her retirement in December 2016. Car boot sales had started in the early 1990s and had expanded over time. There had been other events including the caravan show from about 2013. She accepted there were no signs prohibiting informal recreation. She did believe that there had previously been signs which made clear that the Site was private but at least one had been vandalised nearly immediately after erection. Exceptions to the by-laws were made for events such as the circus. She gave unchallenged evidence that signs prohibiting dogs had always been in situ throughout the 20 year period.

81. Peter Stockall [O245-407]- he was a chartered town planner engaged by St Modwen. He had visited the Site approximately 8 times from April 2014 onwards. The thrust of his observations was that he had seen user of the public right of way but no general user of the Land for informal recreation during his visits.

Written Evidence of the Objectors

82. I have had full regard to the additional documentation relied upon by the Objectors including the statutory declaration of Mr. Alwyn Davies [O505-544]. His evidence was not tested by cross examination and therefore I attach less weight to it than I would do if it had been so tested.

Relevant Law

83. The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. So far as is relevant section 15(2) provides that land is to be registered as a town or village green where:-

*“(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least years; and
(b) they continue to do so at the time of the application.”*

84. The determination requires the straightforward application of law to the facts.

85. The burden of proving that the Land has become a town or village green lies with the Applicant. The standard of proof is the balance of probabilities. All the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on the balance of probabilities, per the guidance given by Lord Bingham in R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889:-

"As Pill LJ. Right pointed out in R. v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111, "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green..."

"It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."

86. The constituent elements of the statutory criteria are not defined in the 2006 Act but have been the subject of extensive judicial consideration in the authorities. The parties are largely agreed on the law and I summarise material matters below.

Lawful Sports and Pastimes

87. This is a composite expression and it is sufficient for use to be either for a lawful sport or lawful pastime: per R. v Oxfordshire County Council ex parte Sunningwell Parish Council [2000] 1 AC 335 at 356G onwards.
88. If user for walking is referable to formal or informal paths or straying from such paths, the decisive factor is how matters would have appeared to the reasonable landowner: R. (Laing Homes Limited) v Buckinghamshire County Council [2003] EWHC 1578. The reasonable landowner is entitled to consider that user of the kind referable to the exercise of a public right of way may extend beyond the limits of the right of way but still be referable to right of user, support for which can be drawn from Oxford County Council v Oxford City Council [2004] Ch 253 at 258.

Significant Number of the Inhabitants of any Locality, or of any Neighbourhood within a Locality.

89. A “locality” is a division of the County known to the law: MoD v Wiltshire CC [1995] 4 All ER 931 at 937b onwards.
90. A “significant number” means that the number of people using the land in question is sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation rather than occasional use by individuals as trespassers: R. (McAlpine) v Staffordshire County Council [2002] EWHC 76 (Admin) at paragraph 71. In Leeds Group v Leeds City Council [2011] EWCA Civ 1447 it was expressed in terms that there must be use of such an amount and in such a manner as would reasonably be regarded as the assertion of a public right. It is for an Applicant to demonstrate “significance” in relation to the chosen locality and only qualifying user counts for that purpose.

As of Right

91. Use of land “as of right” has been held to be use which is without force, without secrecy and without permission (user *nec vi, nec clam, nec precario*): per R (Lewis) v Redcar and Cleveland BC [2010] UKSC 11. What matters is the outward appearance of user to the reasonable landowner and not the subjective intention of the user.
92. User will by force if undertaken in the face of prohibition by the landowner. Thus signs prohibiting access without permission will prevent user from being “as of right”: Taylor v Betterment Properties (Weymouth) Ltd and Dorset CC [2012] EWCA Civ 250.
93. User which is permitted expressly or by implication is user by permission. In R (Mann) v Somerset CC [2017] 4 WLR 170, positive acts of a landowner which demonstrated that he was exercising and retaining his right over the land by excluding the public subject to payment of a charge was sufficient to reach a conclusion that the local inhabitants might reasonably be appreciated to have no right over the land and thus any user of the land was by implied permission. In Winterburn v Bennett [2016] EWCA Civ 482, the presence of signs indicated the landowner’s objection to unauthorised parking and any unauthorised user of the land in question could not be said to be “as of right”. Anyone who ignored the signs was not entitled to obtain legal rights over the land.

Continuous User for 20 Years of the Land

94. The qualifying user for lawful sports and pastimes must be continuous throughout the relevant 20 year period.
95. The land must be clearly identified so that it is clear what area of land is subjects to the rights established by registration. It was well established that there is no requirement for a piece of land to have characteristics of what might be regarded as the traditional village green to be registered: per Oxford County Council.

96. The Objectors have rightly identified in their closing submission that the authorities make clear that the different elements of the definition take colour from one another and for the purposes of analysis they must combine in the decision maker's overall assessment of the facts. I accept the submissions at paragraph 26 of the Objectors' closing submissions in this respect. This is indeed a case where there is a real overlap and interaction between the constituent elements of the statutory criteria.

Analysis

The Land

97. The relevant land sought to be registered is now clear. It is that identified on the plan in support of the Application [A17] and referred to as the Land in this Report. The Applicant has clarified that the southern edge of the Land sits immediately above Public Footpath (No. 4). With this ambiguity clarified, I am satisfied that the Land is sufficiently identified for the purposes of being capable of registration.

20 Year Period

98. It is agreed by the parties that the relevant 20 year period is that immediately preceding the making of the Application on 12th September 2016, namely 13th September 1996 to 12th September 2016.

Locality

99. The Applicant clarified during the Inquiry that it relied upon the administrative area of Sully and Lavernock Community Council. The Objectors accept that this is an administrative area within the meaning of the established authority. I am satisfied of the same applying MoD v Wiltshire Council.
100. The population of this administrative area according to the 2011 Census information [O556] was at least 4,543. This was the best evidence before the Inquiry as to population and I accept that the 2011 Census information provides a reasonably accurate approximation of population numbers during the relevant 20 year period. I accept that the majority of local inhabitants reside in Sully (3,545 or 78.01%) according to the same Census figures.

101. I was not invited to find that there had been any particular decrease or increase in population in the administrative area whether before or after 2011.

Sufficiency of User: *was the user of such amount and in such manner as would reasonably be regarded as being the assertion of a public right?*

102. My material findings on the evidence of user are as follows:-

102.1 I accept that the 19 witnesses who gave evidence on behalf of the Applicant did so honestly and credibly.

102.2 My findings on their evidence were that:-

- i. Access to the Land had been less restricted prior to 1996 when the BP Club was incorporated. Some witnesses described it as unfettered prior to 1996. My clear impression from the witnesses was that 1996 represented a step change and any access to the Land was much more controlled consistent with the construction of secure gates and fencing and a pro-active approach to the management of the Site by the BP Club thereafter. Public access to the Site was primarily from the coastal footpath access thereafter.
- ii. Following 1996, access to the Site by local inhabitants had been for three primary purposes:-
 - a. Walking with and without dogs which was concentrated on the southern part of the Site, on or close to the public right of way, save that some would take a short cut towards or away from the Beach Road Access.
 - b. Some sporadic user of the Land for informal recreation such as picnicking, mushroom collecting or blackberrying.
 - c. Attendance for events, activities and/or sports authorised and/or organised by the BP Club on the Land.
- iii. The vast majority of user by those who gave evidence in support of the Application was for walking with or without dogs close to the public right of way on the southern boundary or by the taking of the short cut (i.e. a. above).

- iv. Indeed, I was struck fairly immediately by the lack of evidence which suggested any real extensive user of the Land for wider informal recreation. I accept the Objectors' closing submission at paragraph 41 in its entirety.
- v. There was a near total absence of evidence as to any informal user which was anything more than sporadic and occasional (e.g. a walker crossing over the Land towards the club) in relation to the Land beyond its southern portion.
- vi. References to sporting activities in the questionnaires were very substantially to organised sports on the Land. I do not attach any weight to the untested questionnaire evidence to the extent which suggests any wider user of the Land than that evidenced by the Applicant's witnesses during the Inquiry. Apart from the fact that such evidence is untested, it was clear that those who did give evidence had identified activities in their questionnaires which did not take place on the Land (but rather the northern excluded part of the Site) or which had not been witnessed beyond 1996.
- vii. A significant proportion of the witnesses had also attended events on the Land including the car boot sale, caravan shows and the classic car shows together with attending or playing organised sports on the Land. I accept the closing submission of the Objectors at paragraph 42 in its entirety.
- viii. There had been challenge to informal user by the BP Club. There had been signs in position at certain access points which among others made clear that dogs were not allowed on the playing fields. These signs were on the whole followed and those giving evidence recognised this.

102.3 I accept that the 5 witnesses who gave evidence in support of the Objection did so honestly and credibly.

102.4 My findings on their evidence were as follows:-

- i. I found their observation of limited user of the Land for informal recreation to be entirely consistent with the evidence presented on behalf of the Applicants.

- ii. I found their evidence that there had been little “warning off” of members of the public to be consistent with the fact that such warning off was not regularly required due to the lack of informal user of the Land and that most dog walkers in particular obeyed the signs in place.
- iii. I accept that Mr. Johnson had been pro-active in challenging members of the public since he became club secretary in 2014. I have already rejected certain criticisms of his evidence.
- iv. I did not consider that any suggestion that the running of the BP Club was dysfunctional was well made or indeed particularly relevant. I make this point especially in relation to the animal excrement related to the circus. I did not consider that such an issue was relevant to the enforcement generally of byelaws generally by the BP Club.
- v. There was no real challenge to the evidence of use of the Land by the BP Club for organised sports and events. I accept unreservedly the evidence of the Objectors’ evidence in that respect, in particular the evidence of Mr. Gully and Mr. Greenslade as to the regular and widespread user of the sports pitches by the football and rugby sections of the BP Club and Mr. Johnson as to the 14 or so car boot sales that would take place each year covering a significant portion of the Land. Further, this is not a case where there has to be any forensic analysis of the competing uses of an application site (in particular such as the sports pitches) as the evidence in support of the Application was limited as regards the nature and amount of user beyond the southern portion of the Land.

Lawful Sports and Pastimes

103. I accept that the majority of evidence of user presented to the Inquiry was in effect that it was walking with and without dogs which took place along the line of the public right of way on the southern boundary of the Site. The starting point is that any user of the coastal footpath must be discounted as that is not within the Land.

104. However, I further accept that any user of the Land along the line of the public right of way in the vicinity of the southern boundary, or the taking of a short cut would have appeared in any event to a reasonable landowner to be consistent with user of the existing public right of way or a claim for a broader public right of way on the southern part of the Site to the extent it occurred within the southern part of the Land: per Laing & Oxfordshire To put it this way, if the landowner witnessed persons taking a linear route across the south part of the Land, whether they were on the public right of way or not, he or she would most likely associate that with the exercise of a right of way not the assertion of another public right. I am satisfied that any straying, particularly in years where the public right of way was less well defined or indeed overgrown and inaccessible, falls to be considered in the same manner and to the extent there was any ambiguity that ought to be interpreted in favour of the landowner, particularly where walkers deviated on to the Land. I accept that the presence of an un-demarcated recreational footpath is a clear explanation for any such user.
105. Such user therefore falls to be discounted in considering whether a significant number of local inhabitants have used the land “as of right” for lawful sports and pastimes.

As of Right

106. I do not understand it to be in dispute that any attendance by local inhabitants at organised events or sports on the Land was by permission and therefore this also falls to be discounted. I have already observed that the references in the questionnaire evidence to sports such as rugby, football and bowls were inevitably references to organised sports on the Land which fall to be discounted. User by those witnesses who were members of the BP Club at material times also falls to be discounted.
107. The further difficulty that the Applicant faces is that some user was often indistinguishable from user by those expressly permitted on the Land for attendance for organised sports or during activities.

108. A reasonable landowner would not be able to identify that someone entering the Land during an event such as the car boot sale would be doing so by way of an assertion of a public right rather than as an attendee. Likewise, informal football games (of which there was very limited evidence) could reasonably be attributed to user associated with members of the BP Club as could walking to and from the direction of the BP Club. Where there is any ambiguity, I find that such user must be discounted.
109. I also accept that any dog walking which went beyond simply straying from the public right of way or taking a short cut across the Land was contentious by virtue of the presence of the signs and ought to be discounted: per Winterburn v Bennett. In terms of when the signs were put in position, I accept Patricia Taylor's evidence that the signs prohibiting dogs on the playing field had been in situ when she commenced employment with the BP Club prior to 1996 which is consistent with the evidence of most of the Applicants that at all relevant times they did not let dogs stray on to the playing fields. I have already referred to the material photograph. I do not accept that the signs rendered any other user of the Land to be contentious and I accept the Applicant's submission at para 6.21 of its closing submission in this respect.
110. I also accept that there were challenges to members of the public who were not authorised to be on the Land. These were primarily challenges to dog walkers on the Land. I accept that such interventions were relatively infrequent but I find on balance that this was because there was a limited need to make such challenges. Such uses that were subject to challenge must also be discounted from the qualifying use as they were contentious and not "as of right".
111. I address later in the Report the submission developed at paragraph 91 onwards of the closing submission of the Objectors, namely that the positive acts in relation to the Land were sufficient for users to appreciate they were doing so by virtue of implied permission: applying R. (Mann) v Somerset CC [2017] 4 WLR 170. I do so because if correct that argument would in itself defeat the Application.

User of Land for Lawful Sports and Pastimes by a Significant Number of the Inhabitants of the Locality for at least 20 years.

112. I have assessed the evidence and its consequences in terms of what can be regarded as qualifying user. The non-qualifying user I have set out above must be discounted. I am satisfied that the undiscounted qualifying user falls markedly below the amount and manner of user which is reasonably required for the assertion of a public right. This is because it is no more than irregular and sporadic rather than that which would indicate to a landowner that recreational rights were being asserted over the Land.
113. I have summarised the Applicant's evidence above but the qualifying user which remains is no more, in essence, than the occasional mushroom foraging of a Mr. John or a Mr. Smith, the leisure walking of a Ms. Rees or the other occasional informal recreational activities, including leisure walking, spoken to by the witnesses. Unfortunately for the Applicant, I have found that most claimed user must be discounted. Such a conclusion is supported by the observations of the Objectors' witnesses and, as I have already made clear, I reject any submission that there was more extensive user for informal recreation beyond occasional picnicking or informal games. The further difficulty, which I have set out above, that the Applicant faces is that some user would inevitably have been indistinguishable from user by those expressly permitted on the Land for attendance for organised events or during activities. A reasonable landowner would not be able to identify that someone entering the Land during an event such as the car boot sale would be doing so by way of an assertion of a public right rather than as an attendee. Likewise, informal football games (of which there was very limited evidence) could reasonably be attributed to user associated with members of the BP Club as could walking to and from the direction of the BP Club.
114. In coming to this conclusion I bear in mind that the Applicant relies upon a locality with a population of in excess of 4,500 such that quantitatively it has a higher threshold to surmount than might be the case in other applications. It is but one of the factors I bear in mind but given the undiscounted user is so minimal, it fortifies my view that the Applicant falls well short.

115. This is not a case where the non-qualifying user presented itself as particularly significant once it was clarified that the Land did not encompass the public right of way. I am compelled to the conclusion that even if I was wrong to have discounted any of other user referred to above (beyond obviously permitted user) as non-qualifying user that I would still be satisfied that the Applicant had failed to demonstrate user of a sufficient manner or amount for the assertion of a public right. I am fortified in this conclusion by the fact that what evidence there was of informal user was restricted to the southern part of the Land save for discrete instances. The evidence was compelling that there was not, on balance, any user of the Land as a whole and I accept the Objectors' evidence in this respect.

116. I note what the Objectors say about an implicit requirement for a "spread" of users to be evidenced and that they reserve their position in that respect pending the Court of Appeal's judgment in the appeal of Lancashire County Council v Secretary of State [2016] EWHC 1238 (Admin). In a matter where the balance of evidence is from residents of Sully and approximately 80% of the population of the locality reside in Sully, I would not be immediately attracted to such an argument.

117. In the end, it is immaterial given my above conclusion. That finding is in itself sufficient to reach a recommendation that the Application be dismissed.

As of Right: R (Mann) v Somerset CC [2017] 4 WLR 170

118. In Mann, the Inspector was satisfied that the applicant had demonstrated sufficient user of the land to suggest the assertion of a public right. However, the landowner satisfied the Inspector that such user had not been "as of right" by virtue of it being by implied permission. This was because the landowner organised an occasional beer festival and funfair on part of the application site which required payment of a fee. The Inspector found that this was sufficient for it to be implied that the use of the entirety of the field by the public on other days was with the landowner's permission and therefore not "as of right".

119. It was accepted by Robert Owen QC in the High Court that the Inspector had correctly applied the guidance of Lord Bingham in Beresford with the relevant principles adumbrated at paragraph 71 of the Judgment:-

“From these observations, which I take as authoritative guidance on conduct by an owner which may count as an overt act or as a relevant or demonstrable circumstance sufficient in law to allow an inference of permission, it appears that the owner must make it clear that the public’s use of the land is with his permission and that that may be shown by excluding the public on occasional days (per Lord Bingham, para 5; and see para 79 per Lord Walker); he must do something on his land to show that he is exercising his rights (as owner) over his land and that the public’s use is by his leave (para 6); there must be a positive act by owner qua public though a notice is not necessary provided the circumstances relied on allows the inference to be drawn (para 59); implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice (para 75); such conduct need only occur from time to time (I should add, perhaps once only during the period under scrutiny) (para 76); such conduct will be expected to have an impact on the public and show that when the public have access (I should add, to all or part of the land) they do so with the leave or permission of the owner (para 83).”

120. The Objectors submit this is a paradigm case to apply the approach adopted in Mann. It is argued that the authorising of the exclusive use of parts of the Land for events such as the car boot sale, circuses, classic car shows and caravan shows was sufficient to demonstrate the exercise and retention of rights over the Land such that local inhabitants ought to have appreciated that they had no rights over the Land. The Objectors emphasis that a landowner must not be deprived lightly of their exclusive rights over their land.

121. The Applicant says that the conduct was not sufficient so as to make it clear to local inhabitants that they were using the Land with permission and emphasizes that in its submission this was no manifest act of exclusion but rather that the public would by choice not use the Land when it was otherwise being used if their use would conflict. I have had careful regard to all of the Applicant's submissions in this respect at paragraph 6.22 and 6.28.
122. I would accept that if the positive acts over the Land were limited to the holding of sports matches on the fields that my finding would be that this would be an insufficient positive act. However, in this case, the positive acts go well beyond this and I am satisfied that they go beyond the occasional holding of a beer festival and funfair as was the case in Mann. I am satisfied that the holding of organised events on the Land, including the car boot sales (to which the vendors incur a fee), the vintage car show (to which all attendees incur a fee), the circus (to which all attendees incur a fee) and other organised events including the football festivals and the regular organised sports matches (especially on a weekend) demonstrated an exercise and retention of rights over the Land to a significant degree.
123. I am satisfied that there were manifest acts of exclusion including, as accepted by the Applicant in its closing submissions, by the exclusion of the public from parts of the Land during certain events. I therefore reject the submission that this was case where the public would not choose to use those parts of the Land during such events. I am fortified in this view by the fact this was privately owned land and that it was the landowner who was excluding the public. I am further satisfied that the extent of activities which took place on the land (including in particular the car boot sales and organised sports games) limited any user to such an extent that it must have been understood that any user by the public was by implied permission. Such a finding is entirely consistent with the fact that from 1996 the BP Club had quite obviously run the Site as a private member's club.

124. Therefore, if I was wrong in my assessment that the Applicant has failed to demonstrate sufficient evidence of user, I would still be satisfied that the Application must fail because any such user was by implied permission and therefore not “as of right”.

Continuation

125. I am satisfied that any claimed user continued up to until the date of the Application.

Conclusions & Recommendations

126. My overall conclusion is the Application must fail because a significant number of local inhabitants have not indulged in lawful sports and pastimes during the relevant 20 year period and further that any claimed user in any event was not “as of right” but, on the contrary, by implied permission.

127. I recommend to the Registration Authority accordingly that the Application be dismissed and the reasons for the dismissal be stated to be those set out in this Report.

128. For the avoidance of doubt, I make clear that I would not have been satisfied that there was sufficient claimed user of any smaller part of the Land (in particular the southern portion) and if a submission had been made that the Registration Authority ought to consider registration of part of the Land only in the alternative, I would have rejected it for *among others* that reason.

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27th March 2018

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