

**PROPOSED CHILTERN RAILWAYS (BICESTER TO OXFORD IMPROVEMENTS)
ORDER**

CHILTERN RAILWAYS' REBUTTAL PROOF OF EVIDENCE

IN RELATION TO

THE OBJECTION AND EVIDENCE OF ALISON COBB AND STEPHEN COBB

1 Introduction

- 1.1 This rebuttal proof of evidence has been prepared on behalf of the Chiltern Railway Company Limited (Chiltern Railways) to respond to particular aspects of the objection and evidence of Alison Cobb and Stephen Cobb.
- 1.2 In particular, the Objectors have raised points in their proof of evidence provided for the Inquiry that Chiltern Railways had not previously addressed in the proofs of evidence prepared by their witnesses, which were submitted to the Inspector and to certain objectors on 1 October 2010.
- 1.3 It is intended that this rebuttal proof should be a composite response by Chiltern Railways to the points raised in the evidence of the Objectors referred to above. In this respect, for cross-examination purposes, the name of the Chiltern Railways witness who is responsible for each aspect of this rebuttal proof is given at the beginning of each section below.

2 Defined Terms

- 2.1 The following defined terms are referred to throughout this rebuttal proof:

“the Objectors” means the Freeman of Oxford and the Port Meadow Protection Group;

“the Objectors’ evidence” means the Proof of Evidence of the Freeman of Oxford and the Port Meadow Protection Group;

“the Order application” means the application for the proposed Order submitted on 6 January 2010 and the Proposed Modification dated 9 September 2010; and

“the proposed Order” means the proposed Chiltern Railways (Bicester to Oxford Improvements) Order.

3 Chiltern Railways' Rebuttal of the Objector's Evidence

Context

- 3.1 This proof of evidence is jointly written by Alison Cobb, a Freeman of Oxford and Member of the Port Meadow Protection Group and Stephen Cobb. Mr Cobb says that he speaks on behalf of the Committee of the Port Meadow Protection Group
- 3.2 In section 2 of their proof the Objectors set out the history of the Port Meadow Common and the rights of the Freeman to graze horses and cattle on the common.. The Objectors state that the Rights of the Freeman were saved by the Municipal Corporations Act 1835/1882 and that the Freeman are the 'beneficial owners' of Port Meadow. The Objectors state that Port Meadow was first registered in 1967 by the City of Oxford as Common Land under the Commons Registration Act, 1965.

Rights Over Port Meadow, Ian Gilder

- 3.3 In section 3 of their proof, the Objectors set out to clarify the implications of 'beneficial ownership'. The Objector states that Port Meadow was registered as common land in 1967 by the Oxford City Council because it was necessary for this to be done by a body corporate. The Objectors state that the City is thus the registered owner (for the purposes of the Commons Registration Act), but not the legal owner.
- 3.4 The Objectors state that the only body of people to enjoy legal rights over Port Meadow is the Freeman of Oxford although this fact is not asserted in any title deeds to the meadow. They say, nevertheless, that the existence of the rights is 'reinforced' in part of the Oxfordshire Act of 1985 (p.30, c.xxiv, part VI) which refers to 'the rights of the freemen as such.'
- 3.5 The Objectors provide a definition of 'Beneficial Owner' as being those 'entitled to all the benefits of ownership'. The Objector states that the Registered Owner may not legally do anything that is not of benefit to the Beneficial Owner. The Objectors state that if a representative of the Beneficial Owner objects to something that the Registered Owner does, and claims and shows it is not in his or her interests, then doing that thing is illegal.
- 3.6 The Objectors state that the report on 'Progress of Negotiations with Oxford City Council' [CRCL/P/12/E] in which an Officer of Oxford City Council is reported to have agreed that, 'if the Inspector decides to recommend closure of the crossing...the Council would, with reluctance, agree to the mitigation measures'. The Objectors state that these include the grant of vehicular rights of access over Port Meadow between Walton Well Road and the entrance to the Trap Grounds allotments. The Objectors assert, without further explanation, that such rights of access would not be in the interests of the Freeman. The Objectors state that they have been informed recently by the Sherriff of Oxford¹ 'in conversation' that the City Council has no powers to make such concessions, since those powers lie with the Freeman. The

¹ The Sherriff of Oxford is a City Councillor, with special responsibility for oversight of Port Meadow issues.

Objectors state that the Freeman will vigorously resist any proposal that is injurious to their interests on Port Meadow.

- 3.7 The Objectors state that Chiltern Railways in its document **CRCL/INQ/13** paragraph 5.1 is incorrect to dismiss the rights of commoners to be served notice on the grounds that they are not '*owners, lessee, tenants or occupiers*' of any land which it is proposed shall be subject to powers of acquisition or rights to use the land'. The Objectors state that this fails to acknowledge the claimed status of the Freeman as beneficial owners, rather than as simple commoners.
- 3.8 The procedure for giving notice of applications for Transport and Works Orders is prescribed by the Transport and Works (Application and Objections) (England and Wales) Rules 2006 [**CD/5.22**] ("the 2006 Rules"). As mentioned in **CRCL/INQ/13**, Rule 15(1) of the 2006 Rules requires individual notice of the application to be served on all those named in the book of reference described in rule 12(8); these are, "*the owners, lessees, tenants (whatever the tenants period) or occupiers*' of any land which is proposed to be subject to powers of compulsory acquisition rights to use the land". "Owner" is defined in Rule 4 as having the same meaning as in the Acquisition of Land Act 1981 [**CD/5.6**]. Section 7 of the 1981 Act states "*owner, in relation to land, means a person other than a mortgagee in possession, who is for the time being entitled to dispose of the fee simple of the land whether in possession or reversion, and includes also a person holding or entitled to the rents and profits of the land under a lease or agreement, the unexpired terms whereof exceeds 3 years and a person who would have the power to sell and convey or release the land to the acquiring authority if a compulsory purchase order were operative*".
- 3.9 It is therefore clear that if, as asserted by Mrs Cobb, the Freeman of Oxford are persons only having a beneficial interest in Port Meadow they are not "owner(s)" entitled to service, the test being whether the legal title to the land is vested in the person(s) concerned. Oxford City Council is the registered owner of the Common and holds the legal title to Port Meadow.¹
- 3.10 For the reasons given in paragraphs 3.8 and 3.9 above and in section 5 of **CRCL/INQ/13**, there was no requirement under the 2006 Rules to serve individual notices on the Freeman of Oxford or the Commoners. Nevertheless, it can be seen that compliance with the general notice requirements of the Rules (local newspaper advertisement, posting of notices) has been effective in bringing to the attention of the Freeman of Oxford and the Commoners, the existence of the applications which are before the Inquiry. So, even if there had been any non-compliance with the procedural requirements of the Rules (which is not accepted for the reasons given above) the Objectors have not been prejudiced.

¹ It is worth noting that since the Law of Property Act 1925 which simplified the English law of property, the legal estate land can only be held by up to four people and legal (as opposed to equitable) interests in land are confined to those set out in the Act. The purpose of the 1925 reforms were to ensure that the persons holding the land could readily be identified to facilitate land being bought and sold. See the extract from 'Elements of Land Law 15th Edition 2009 by Kevin Gray and Jason Frances Day in Appendix A and, in particular paragraphs 1.7.18, 1.7.25, 1.7.26 and 1.7.29.

- 3.11 The position of Oxford City Council is that it is the legal owner of Port Meadow. It appears also to control vehicle access to, and exercise management functions over, Port Meadow not only for the benefit of the Freeman of Oxford and Commoners but also for the benefit of the general public in accordance with the statutory obligations which are relevant to those functions.

Extent of Port Meadow and Registered Common Land, Ian Gilder

- 3.12 The Objectors state that the extent of the Registered Common as shown on the official countryside (MAGIC) mapping extends down the west side of the present railway and at Walton Well Road flanks the railway on the east and west sides. The Objectors state that both the land north of Walton Well Road between the railway and watercourse and the moorings south of Walton Well road are part of the Registered Common, although labelled as 'Ewelme Cow Common'. The Objectors show what they consider to be the extent of the Registered Common in Figures COBB 1, COBB 2 and COBB 3 attached to their evidence.
- 3.13 Chiltern Railways understanding of the extent of the registered common is taken from the map included in the Commons Register [CRCL/INQ/13: Appendix A]. This includes the area of north of Walton Well Road between the railway and watercourse and the moorings south of Walton Well road.

Omission of Reference to the Status of Registered Common Land from the Book of Reference and Application for Planning Permission, Ian Gilder

- 3.14 The Objectors state that Registered Common Land of Port Meadow is either wholly or partially included in Plots 29007, 29009, 29010, 29011, 29012, 29013, 29014, 29015 29018 and 30009 on Plan Sheets 29 and on the Deposited Plans [CD/1.9]. The Objectors state that the Book of Reference [CD/1.10], in referring to these parcels, does not indicate their status as Registered Common Land.
- 3.15 The Objectors state that neither the Planning Direction Drawings [CD/1.13] at Sheets 29 and 30 or the Environmental Statement Volume 3 Plans [CD/1.17] identify the Registered Common Land on Port Meadow.
- 3.16 The Objectors state that they are 'taken aback' and 'mystified' that Chiltern Railways have failed to take notice of or make reference to one of the most ancient designations of rural land.
- 3.17 Rule 12(8)(e) of the 2006 Rules [CD/5.22] prescribes the categories of land which should be specified in the Book of Reference. Rule 12(8)(e)(i) requires the Book of Reference to specify "land the acquisition of which is subject to special parliamentary procedure "SPP" under section 12 of the Transport and Works Act 1992. Section 12 of the 1992 Act [CD/5.7] applies section 19 of, and paragraph 6 of Schedule 3 to, the 1981 Act [CD/5.6] to applications for TWA Orders. There is no additional requirement to identify land which is part of a registered common. The purpose of specifying the status of the land is simply to provide notice that the special safeguards under the 1981 Act relating to the compulsory acquisition or creation of rights over the special categories of land protected under the 1981 Act apply.

- 3.18 Paragraph 6 of Schedule 3 to the 1981 Act applies to “land forming part of a common, open space or field garden allotment”. ‘Common’ is widely defined as “including any land subject to be enclosed under the Inclosure Acts 1845 to 1882 and any town or village green”. The procedures and protection of paragraph 6 apply equally to common land and to open space. However, this is no longer relevant, see paragraph 3.28 below.
- 3.19 The Book of Reference [CD/1.10] described the parcels of land over which rights are sought (29010, 29011 and 30009) as being part of Port Meadow and as being ‘open space’. This was sufficient to identify the relevant parcels of Port Meadow as being subject to SPP in compliance with the requirement of Rule12(8)(e)(i). As notified in the proposed modifications **CRCL/INQ/16**, Chiltern Railways no longer seek to provide a ramp from the existing bridge to the Trap Ground Allotments.
- 3.20 In addition, Chiltern Railways have determined that, on the evidence before the inquiry, it is no longer necessary to seek powers to provide a permanent vehicular access for allotment holders over Port Meadow. Proposed amendments to the Order will be submitted to the inquiry to remove all powers from the Order which would grant permanent powers over Port Meadow. The application for a certificate under paragraph 6 of Schedule 3 to the 1981 Act will therefore be withdrawn as regards to any permanent rights over Port Meadow.
- 3.21 There is no requirement to describe common land as such in the Planning Direction Drawing.
- 3.22 Plot 29007 [CD/1.9:Sheet 29] is within Network Rail ownership and the railway boundary fence, so not regarded as part of the registered Common.
- 3.23 Plot 29009 is to be used as working space associated with the works to raise the level of bridleway BW320/10.
- 3.24 Plot 29010, 29012, 29013 and 29014 are all part of the public bridleway or the railway, so are not within the registered Common.
- 3.25 The designation of the Common at Port Meadow, however, is recognised in the Environmental Statement [CD/1.16] paragraph 5.4.4 where it says ‘Port Meadow is also a ‘common’ registered under the Commons Registration Act’. Figure 8.1 of the Environment Statement [CD/1.17] illustrates statutory and non-statutory designated sites within 2 and 10km of the Scheme; Port Meadow with Wolvercote Common and Green are shown.

Compliance and Notification of the Freeman of Oxford, Ian Gilder

- 3.26 The Objectors state that while the terms of the Transport and Works (Applications) Rules 2006 [CD/5.22] may have been followed with regard to Open Spaces (including commons), it appears curious to them that this can be done without any reference to proposed works being carried out on Registered Common Land. The Objectors state that the Compliance Statement at Section 11 ‘Open space land’ merely refers to ‘land at Port Meadow’ [CRCL/INQ/4, paragraph 11.1], and the certificates obtained from the Government Office [CRCL/INQ/4, item 27] make no reference to Common Land. The Objectors state that the Acquisition of Land Act

1981 [CD/5.6] at Schedule 3 (6) 'Commons Open Spaces etc' does not even mention Registered Commons in its definition. From all this Objectors draw the conclusion that the 'Compliance' actually lies with procedures under other legislation.

- 3.27 The Objectors state that, in the respect of the failure to notify the Freeman of Oxford the application, may not be compliant with requisite procedural rules. The Objectors state that the Transport and Works (Applications and Objections Procedure) Rules 2006 [CD/5.22] refer in Schedule 6 paragraph (9) to the requirement to serve Application notices on persons 'specifically named' in relevant Acts of Parliament. The Objectors state that the Freeman of Oxford fall within this category, since an entire section of the Buckinghamshire Railways Act, 1850 [CD/5.4] was devoted to the rights of the Freeman of Oxford on Port Meadow [Sect. xiv, at p.82] and the compensation that was then paid to the Freeman's Charities. The Objectors state that this is a serious omission in compliance as well as a lapse of good manners.
- 3.28 The position as regards the 1981 Act is explained in paragraphs 3.17 and 3.18. Paragraph 6 of Schedule 3 to that Act applies to 'land forming part of a common'. The effect of registration under the Commons Act 1965 is to preserve the status of the registered land as common land: it does not alter its status. The definition of "common" therefore includes a reference to a registered common. As mentioned at paragraph 3.19 above, however, Chiltern Railways propose to withdraw the application under paragraph 6 of Schedule 3 to the 1981 Act with regard to obtaining rights over Port Meadow.
- 3.29 Paragraph 9 of Schedule 6 to the 2006 Rules applies where a TWA Order proposes "the modification, exclusion, amendment, repeal or revocation of a provision of an Act of Parliament or statutory instrument conferring protection or benefit upon any person specifically named". In that case, notice of the application must be served on the "person on whom such protection or benefit is conferred, or the person currently entitled to that protection or benefit". The TWA Order does not propose the modification, exclusion, amendment or repeal of section 14 of the Buckinghamshire Railways Act 1850 [CD/5.4] or any enactment which confers protection or a benefit on the Freeman of Oxford. Further, section 14 of the 1850 Act does not confer a continuing benefit on the Freeman of Oxford but records that a payment was made to them by way of compensation when the railway was originally constructed, presumably by way of a negotiated settlement of their objection to the railway scheme. As such the provision is now spent.
- 3.30 The requirements of the 2006 Rules and the 1981 Act have been complied with, and CRCL are not aware of any other procedural requirements which are relevant to the applications before the Inquiry.
- 3.31 Chiltern Railways regrets that the Objectors are offended that the land was not referred to throughout the application documentation as registered common land. No discourtesy was intended. The relevant procedures have been complied with; and, in any event, the Objectors have appeared at the inquiry and are able to make their objections to the Order. As stated in paragraph 3.25 above, the Environmental Statement recognised the status of Port Meadow as a registered common, and this status is a relevant consideration for the Inquiry.

Consideration of Impacts on the Beneficial Owners of Common Land, Ian Gilder

- 3.32 The Objectors state as ‘beneficial owners’ of the common land that is Port Meadow, the Freemen of Oxford have a right to be consulted on the proposed nature of these works and they have not been. The Objectors restate the point that works on Common Land require the authorisation of the Secretary of State for Environment, Food and Rural Affairs, and such authorisation has not been sought, and seemingly cannot be obtained by a Transport and Works Order. The Objectors state that these matters cannot be decided as part of this Inquiry and should be the subject of a separate Inquiry under the Commons Act 2006.
- 3.33 The position as regards the Commons Act 2006 is set out in **CRCL/INQ/13**, paragraph 7. There is no need for a separate consent under Section 38 of the Commons Act 2006 because works authorised by an Order under the Transport and Works Act 1992 fall within the exemption under Section 38(6) which applies to works which are carried out under a power conferred in relation to that particular land “*by or under any enactment*”.

Port Meadow Protection from Encroachment on the Meadow, Ian Gilder

- 3.34 The Objectors state that the Port Meadow Protection Group (PMPG) ¹ has, like the Freemen, been concerned to restrict illegal access and activities on Port Meadow. The Objectors state that in 1989 the Port Meadow Protection Group successfully prevented the expansion of Medley Boat Station which would have granted vehicular access across the Meadow from Walton Well Road to the river bank, for a period of 125 years. The Objectors state a settlement was eventually reached that protected Port Meadow and terminated the rights of vehicular access to the boat station.
- 3.35 As set out in paragraph 3.19 of this rebuttal Chiltern Railways propose to modify the Order so as not to seek any permanent rights over Port Meadow. Paragraph 3.36 and 3.37 describe the works to be carried out on Common Land.

Works on Common Land, Ian Gilder

- 3.36 The Objectors quote from the Planning Inspectorate website that “*Under Section 38 of the Commons Act 2006 consent is generally needed from the Secretary of State [for Environment, Food and Rural Affairs] for any restricted works on registered common land. Restricted works are those which prevent or impede access to or over land, which might include erecting fencing, constructing buildings, digging ditches or resurfacing of land with tarmac and similar materials*”. The Objectors state that this goes on to explain that the Planning Inspectorate is responsible “*for determining applications under section 38(1) of the 2006 Act to construct restricted works on common land*”.
- 3.37 The Objectors state that with regard to the Land to be Acquired or Used (LAU) at Aristotle Lane, they have found it difficult to understand for what purpose so much

⁽¹⁾ An ad hoc association set up in the 1980s to prevent encroachment upon Port Meadow

land is required on the Port Meadow side of the Aristotle Lane bridge. The Objectors state that this information is not obvious in the documentation.

- 3.38 The Objectors state that they have seen proposals for the footpath crossing of the Aristotle Lane footbridge in drawing **5083741-BOX-CBR-08619** in the rebuttal of Ian Salisbury's evidence [**CRCL/R/OBJ15**]. The Objectors note that the plan in the 'Inspector's Note on Common Land and Mitigation Works at Aristotle Lane [**CRCL/INQ/13**, Appendix C] shows substantially the same information. The Objector states that this shows a re-grading of the path descending from the footbridge over the Registered Common Land on Port Meadow, and a reconstitution of the initial part of the track on Port Meadow (Plot 29012).
- 3.39 The Objectors dispute the assertion in **CRCL/INQ/13**, at section 7.2 that the raising of the footpath does not constitute a 'work', based on any reasonable interpretation of the word. The Objectors state that the present path is used by pedestrians, bicycles and occasionally horses which has greatly increased due to the building of new housing developments between the canal and the railway line to the east. The Objectors state that the proposal (on both east and west sides) is for a series of surfaced 'ramps' separated by 'landings'. The Objectors state that they do not accept that these steps or a hard surface are really appropriate on common land such as Port Meadow.
- 3.40 It is accepted that the proposed raising of the bridleway by means of putting material such as crushed stone on the path constitutes 'works'. It is however doubted that the works are "restricted works" for the purposes of section 38 of the Commons Act 2006 (**Appendix 4 to CRCL/INQ/13**) for the reasons set out in paragraph 7.2 of **CRCL/INQ/13**. But even if they are 'restricted works' the works can be authorised by means of the proposed TWA Order. If the works are authorised under the TWA Order, they would fall within the exemption in section 38(8). Separate consent under section 38(1) of the Commons Act 2006 is not required. See paragraph 7.2 and 7.3 of **CRCL/INQ/13**.
- 3.41 The re-grading of the bridge approach ramp and inclusion of short, level sections is being undertaken to make the bridge easier to use for those accessing the Trap Ground Allotments. The works will make the route over the footbridge, which is a public bridleway, easier to use for all users of the route as it will incorporate features designed to assist mobility-impaired users. In recognition of the current informal nature of the path, it is intended to avoid the use of hard surfacing materials such as bitmac and use instead a compacted stone surface, similar in appearance to the existing path.

Access Across the Common Land, Ian Gilder

- 3.42 The Objectors state that under the Law of Property Act 1926, section 193, it remains an offence to drive on Common land without lawful authority. The Objectors state that resistance to driving on Port Meadow has been a recurring feature of its recent history. The Objectors state that exceptional and necessary access to the river, moorings and indeed the allotments can be obtained by the permission of the City of Oxford, which constitutes 'lawful authority'. The Objectors state that they believe that the nature of the current informal arrangements for occasional access for allotment

holders is correctly reported in the note '*Port Meadow: Arrangements for Vehicle Access to Allotments*' [CRCL/INQ/17]. The Objectors bear witness that it is a very exceptional event to see any vehicle on Port Meadow.

- 3.43 The Objectors state that the track across the Meadow from Walton Well Road towards the Allotments is an existing, though disintegrating, concrete and tarmac track, originally formed as an access for lorries going towards the City refuse dump on Burgess Field which lies north of the Trap Ground Allotments. The Objectors state that it was closed for this use in about 1975 with the cessation of dumping. The Objectors state that the original 1935 agreement between the Freeman and the City, which included a payment in recognition of the Freeman's rights to the land, provided for the land to be returned to its original state after its use as an access track had ceased. The Objectors state that the City Council has yet to fulfil this obligation. The Objectors state that the track is only used very exceptionally by the Port Meadow Countryside Ranger checking stock and horses and as tractor access for cutting thistles.
- 3.44 The Objectors state that at present the gate onto Port Meadow from Walton Well Road is locked at all times and the keys are in the care of the City Council's Countryside Ranger. The Objectors state that issuing keys to an unknown number of allotment holders would immeasurably reduce the security which the Meadow currently enjoys. The Objectors state that this security is important to the Freeman as there have been incidents of rustling of valuable cattle and horses and they are seeking to minimise the likelihood of this happening again. The Objectors state that at times of year when the grazing is at its best, the livestock on the Meadow has a value of about £500,000. The Objectors state that the present security measures are an essential part of protecting this asset.
- 3.45 The Objectors state that the plans they have seen do not show how cars would turn or park at the Trap Ground Allotments. The Objectors note that some car parking would be necessary at the gateway from Port Meadow to the Trap Ground allotments. The Objectors state that this would necessitate the raising of further ground with consequent further loss of floodplain in an area that is popular with ornithologists. The Objectors state that their enjoyment would be impaired if it were covered with parked cars.
- 3.46 The Objectors state that the Draft Order [CD/1.2] in Article 25 includes at paragraph (5)(d) acquisition of rights over '*the land numbered 29010, 29011 and 30009 in the city of Oxford on the deposited plans to provide a means of vehicular access for the benefit of the owners and occupiers of land affected by the closure of Aristotle Lane Crossing*'. The Objectors state that these parcels are all part of the Registered Common Land, on Port Meadow and that the acquisition of these 'rights' would not benefit the owners and occupiers of this common land whether for grazing their animals or enjoying fresh air and exercise, an enjoyment they are happy to share with countless other citizens of Oxford.
- 3.47 The Objectors state that the lawful authority to grant this right does not lie within the powers of the Secretary of State for Transport alone under the Planning Acts or the Transport and Works Act. The Objectors submit that it should be the subject of a separate Inquiry by the authority of the Defra Secretary of State under the Commons

Act 2006. The Objectors state their strong objection on behalf of the Freemen of Oxford and the Port Meadow Protection Group to the granting of any powers whatsoever of driving across or parking cars on Port Meadow.

- 3.48 It is not accepted that the Secretary of State does not have power to include the acquisition of rights of way over common land as part of the TWA Order and 1981 Act determinations. The granting of rights would constitute “lawful authority” for the purposes of section 193 of the Law of Property Act 1925. However, Chiltern Railways do not now propose to seek powers for a permanent vehicular right of way over Port Meadow for the allotment holders, as noted in paragraph 3.28 above. Consequential changes to the Order are in hand and will be submitted to the inquiry forthwith.

Impacts on Port Meadow’s Livestock, Andy Coates

- 3.49 The Objectors state that Port Meadow has never in recorded history been anything but grazing land. The Objectors state that the cattle and horses of the Freemen and Commoners make frequent use of the refuge of raised land, grass, wet ditch and tree-cover in the vicinity of the track between the Walton Well Road entrance and Aristotle Lane, as Port Meadow is open and windswept. The Objectors state that the Freemen agreed in the 1880s to the use of this land for deposit of rubbish so that the land here would be raised to save animals cut off by the floods that start and are most severe at the southern end of the Meadow.
- 3.50 The Objectors state that the Freemen have contested the removal of higher land refuge from the grazing land. The Objectors state that the remaining high-ground refuge is a small fraction of the Meadow as a whole and it is vital to keep what little is left undisturbed. The Objectors state that the land they use for shelter includes all the land to the east of the track to which Chiltern Railways wish to have access in particular alongside the path leading up the ramp to the Aristotle Lane footbridge. The Objectors state that horses and cattle need to shelter from the wind, otherwise they suffer, lose weight and lose value.
- 3.51 The Objectors state that the livestock and horses would be disturbed from this area if allotment holders cars regularly travelled along the track beside their flood refuge and frightened if large lorries of aggregate and similar materials did so, during construction. The Objectors state that the livestock and horses would not use the area and would be put in danger. The Objectors state that a very important part of the grazing land of Port Meadow would be lost to them, and with it a great deal of the value of their rights on the Meadow.
- 3.52 The Objectors state that any changes that impact on these resources is a matter of concern to the Freemen.
- 3.53 Chiltern Railways hydrologists have been involved throughout the development of the designs for the works detailed in the Order Scheme at Aristotle Lane, and have conducted flood risk and flood storage assessments [CD2.22]. Chiltern Railways agree with the Objectors that Port Meadow provides an important function in terms of sustainable flood risk management and flood water storage, which is reinforced by the latest flood modelling data available for the area.

- 3.54 The raising of the existing footpath/bridleway at the western end of the present Aristotle Lane bridge has been progressed to minimise potential impacts to the SAC and SSSI, in accordance with the wishes of Natural England. This is intended to overcome a dip in the path, which becomes inundated at lower water levels than would flood the allotments themselves and is intended to improve access for allotment holders, when the existing level crossing is closed as part of the Scheme.
- 3.55 The present illustrative design [PK/002 of **CRCL/INQ/13**] is for a stone path with earth berms and through-drainage pipes to maintain hydraulic continuity at the present path level. The current footprint of the proposed raised footpath / bridleway within Flood Zone 3 is minimal, and detailed designs will be progressed with ongoing input from the Scheme's hydrologists in order to further reduce land take within this Flood Zone where possible. In support of this process, Chiltern Railways has committed to conducting detailed Level 3 Flood Risk Assessment at Aristotle Lane in order to ensure that the designs for the proposed works do not impact adversely upon flood storage or flows at this location, in accordance with PPS25 and responsible flood risk management. Any requirements for compensatory flood storage will be provided offsite, within identified areas within the same sub-catchment, and no increase in flood risk will therefore result from the works.

Impacts on the Hydraulic Capacity of the Floodplain, Ian Gilder

- 3.56 The Objectors state that the low-lying path to the footbridge on Port Meadow is intended to be raised by over 2 feet (67 cm) to provide dry access in flood-time. The Objectors state that this raises questions of the surface treatment, and the effect on drainage (eg. culverts in Parcel 29010). The Objectors state that this would have the general effect of reducing the absorptive capacity of the land and reducing the area of the floodplain. The Objectors state that the Environment Agency's guidance on these matters in PPS25 Development and Flood Risk [**CD/3.30**] presumes against such works in floodplains, and numerous development plans proposed in recent years within the Oxford floodplain have been refused on these grounds.
- 3.57 The Objectors state that both raising of the path and creation of a car-parking area at the entrance into the Trap Grounds allotments, would constitute a barrier to the free flow of water and a reduction in the water storage capacity of Port Meadow. The Objectors state that there have been three severe episodes of flooding in the last decade (December 2000, January 2003 and July 2007) and in each of them it is clear that Port Meadow performs a vital role as a reservoir, holding floodwater back from flood-prone residential areas downstream in West Oxford and beyond. The Objectors state that this is well documented in a report by one of the country's most respected river and floodwater hydrologists¹.
- 3.58 The Objectors state that they object to any works that have the effect of reducing, by however little, the flood-absorptive capacity of Port Meadow.
- 3.59 The Environment Agency's current Flood Map for this area (<http://www.environment-agency.gov.uk/homeandleisure/floods/default.aspx>), includes the results of the latest

¹ Rickard, C (2008) Report on flood risk in the west Oxford floodplain.

hydraulic modelling, conducted (the 'Wolvercote Model'). The footprint of the proposed works within Flood Zone 2 represents minimal land take in an area bordered by existing urban development. Considerably larger areas classified as Flood Zone 2 and some areas of Flood Zone 1 are located to the north, and south, further from existing potential sources of disturbance and suitable for livestock and horse flood refuge. Chiltern Railways do not therefore consider that the access alterations proposed in this area would have the potential to restrict materially the ability to provide flood refuge on higher ground.

Impacts on Floodplain Ecology, Andy Coates

- 3.60 The Objectors state that Port Meadow is the more important of two areas in England for the rare plant, Creeping Marshwort (*Apium Repens*) and its presence is one of the reasons that Port Meadow is a Special Area of Conservation. The Objectors state that it needs moist ground to grow and the winter floods are a necessary part of its regime, whilst summer floods are detrimental to it as the water becomes anoxic under bright sunshine and the plant dies.
- 3.61 The Objectors report the observations of Dr. Alison McDonald, who they say is the undisputed expert on the ecology and history of Port Meadow, about the extent to which the Creeping Marshwort has declined after summer flooding and how she fears they might lose it altogether if summer flooding becomes greater or more prolonged. The Objectors state that the Freemen of Oxford are proud of having this incredibly rare plant on their land, and will do all they can to preserve it.
- 3.62 The Objectors state that Port Meadow is an exceptional site for migratory waterfowl, recognised in 1952 when Port Meadow became one of the first Sites of Special Scientific Interest. The Objectors state that throughout the winter, there are up to 2,500 ducks of eight species, a wide variety of other wading birds and 1,500 golden plover, in addition to thousands of roosting gulls and many other species in smaller numbers.
- 3.63 The Objectors state that the Oxford Ornithological Society maintains meticulous records of the rare bird visitors to this site which shows that core area for these is within 200 metres of the Aristotle Lane gate onto the Meadow, which is the area over which Chiltern Railways is seeking powers. The Objectors state that they are not aware of a any other city in Britain which has a natural wetland on this scale within its city boundaries. The Objectors state that this 'exceptional ornithological site' relies on the correct flooding conditions and lack of disturbance for its success as waterfowl habitat.
- 3.64 The current designs for Aristotle Lane have been progressed in order to minimise any potential impacts to the SAC and SSSI, both in terms of direct impacts and changes in the hydrological status of the site. The resulting design within the Order Scheme has been endorsed by Natural England, and has been developed in close consultation with both Natural England and the Environment Agency. The installation of through-drainage, minimisation of the footprint within Flood Zone 3, provision of low levels of offsite compensatory storage, if required, and commitments for further assessment during detailed design will ensure that the flooding characteristics and sustained habitats of Port Meadow are not compromised.

- 3.65 Prolonged flooding on the Port Meadows site can have a detrimental impact on *Apium repens*, although it has recovered through vegetation spread and by seedling emergence in July and August [CRCL/INQ10]. The species remains present in the SAC despite flooding events. In any event it has been agreed with the Environment Agency that the Scheme will not affect the hydrology of the Oxford Meadows SAC site, and will therefore not affect the *A. repens*.
- 3.66 We note the concerns raised about disturbance to wintering birds which use the Port Meadow area. The Order powers no longer seek a permanent right of access along the track which runs through Port Meadow, and there will be no new car parking provided within Port Meadow. The Order will include raising the footpath leading to the allotments at Aristotle Lane to maintain the existing access for the current allotment users. The main source of disturbance to birds is usually people, especially if they are those walking with dogs. Port Meadows is already well used by walkers including with dogs. The Order Scheme will not result in a significant increase in the number of people walking in this area, and hence significant disturbance to birds is not envisaged.

4 Conclusion

- 4.1 This rebuttal sets out Chiltern Railways response to the evidence submitted on behalf of the Freeman of Oxford and the Port Meadow Protection Society. This rebuttal states that the application for a certificate under paragraph 6 of Schedule 3 to the 1981 Act will be withdrawn as regards to any permanent rights of Port Meadow.
- 4.2 The rebuttal clearly demonstrates that Chiltern Railways complied with the terms of the Transport and Works (Application) Rules 2006 [CD/1.16].
- 4.3 The Order Scheme will not have an adverse impact on hydrology in the area, nor will it give rise to any significant impact on livestock, wintering birds or Creeping Marshwort.

Appendix A

CRCL/R/OBJ314

Extract from Elements of
Land Law



OXFORD

ELEMENTS OF
LAND LAW

FIFTH EDITION

Kevin Gray and Susan Francis Gray

Rights authorised to exist 'at law' (ie as legal rights)

1.7.18 In English law the range of proprietary entitlements in or over land is relatively few in number. From within this cluster of rights the Law of Property Act 1925 isolates a group of estates, interests and charges which are expressly declared to be 'capable of subsisting or of being conveyed or created at law' (ie as *legal rights*).¹ By reason of their exclusion from this category, *all other* proprietary rights in land are relegated, automatically and irreversibly, to equitable status only.² The entitlements which, in the words of section 1(4) of the Law of Property Act 1925, are 'authorised to subsist or to be conveyed or created at law' include:

- the fee simple absolute in possession
- the term of years absolute
- easements
- profits *à prendre*
- rentcharges
- charges by way of legal mortgage and
- rights of entry.³

The distinction between 'legal' and 'equitable' rights in land is therefore both artificial and crude; but it is nonetheless clear. Whether an entitlement can *ever* be legal depends quite simply on whether reference to it can be found in the catalogue of rights contained in section 1 of the Law of Property Act 1925.

¹ LPA 1925, s 1(1)–(2). At one point the 1925 Act seems to reserve the terminology of 'estate' for the fee simple absolute in possession and the term of years absolute, these being entitlements which one can hold in respect of land occupied by oneself, whereas the remaining forms of legal entitlement are labelled 'interests' and 'charges', perhaps in order to emphasise that they are essentially rights acquired in or over the land of another. Little now turns on any such distinction.

² LPA 1925, s 1(3).

³ The Law of Property Act 1925 also refers to an anomalous group of legal charges on land not created by the voluntary transactions of individuals but imposed by statute (see LPA 1925, s 1(2)(d)). These charges have been greatly diminished by repealing legislation and are now of virtually no consequence. (Tithe rentcharge was abolished by the Tithe Act 1936, s 1; and land tax by the Finance Act 1963, Pt V, Sch 14.)

A necessary, but not necessarily sufficient, index of legal quality

1.7.19 The structural classification of rights in the 1925 legislation indicates merely whether a given proprietary entitlement in land has the potential of legal status. For the purpose of attaining *actual* legal status, most potentially legal rights are subjected to certain basic requirements of formal creation or transfer (and also of registration at Land Registry). Once created or transferred in compliance with any appropriate requirement of formality or due registration, all potentially legal rights become known generically as 'legal estates' in land.¹ Amongst these estates the fee simple absolute in possession and the term of years absolute—the 'freehold estate' and 'leasehold estate' respectively—provide the central conceptual apparatus of the law of realty.

¹ LPA 1925, ss 1(4), 205(1)(x); LRA 2002, ss 7(1), 132(1). See eg LRA 2002, s 13(a); LRR 2003, r 73A (easements and appurtenant profits *à prendre*); *First National Bank plc v Thompson* [1996] Ch 231 at 240C per Millett LJ (mortgages). For reference to the inevitably 'proprietary' connotation of the word 'estate', see *R v Toohey*; *Ex parte Mencling Station Pty Ltd* (1982) 158 CLR 327 at 342 per Mason J.

Estates which 'subsist' at law

1.7.20 A limited class of estates can be said to subsist 'at law' without the necessity of compliance with any requirements of form or registration. The best examples are provided by certain kinds of lease granted for a term of not more than three years.¹ Such leases may be created either by informal writing or even orally and rank immediately as 'legal estates' quite irrespective of whether the land to which they relate has been the subject of any registration at Land Registry.²

1 LPA 1925, ss 52(2)(d), 54(2) [PARA 4.2.23].

2 In other words, a perfectly valid *unregistered* legal estate (eg a short lease) can be carved out of a *registered* parent estate.

Estates which must be created or conveyed by formal means

1.7.21 In most other cases the Law of Property Act 1925 stipulates a requirement of documentary formality before the creation or transfer of a potentially legal entitlement can generate a 'legal estate' in the hands of its recipient. With certain exceptions, all conveyances of land or of any interest in land are declared to be 'void for the purpose of conveying or creating a legal estate' *unless* made by 'deed' (ie formal writing).¹ Many 'legal estates' in unregistered land owe their origin precisely to compliance with this statutory requirement of a deed, although most new dealings with such estates now trigger an additional requirement of first registration at Land Registry as a condition of the continuance of the 'legal estate'.²

1 LPA 1925, s 52(1); LRR 2003, rr 58–60 [PARA 3.1.7]. For the constituent elements of a 'deed', see [PARA 8.1.88]. The technical requirement of a deed will soon have to be modified to take account of electronic dealings (ie 'paperless' transactions) in respect of land [PARA 8.1.95].

2 [PARAS 3.1.11, 4.2.38].

Estates which require registration at Land Registry

1.7.22 The Chief Land Registrar is statutorily authorised to register title to certain 'unregistered legal estates' in land,¹ ie to estates whose legal quality has already been established through compliance with the formality of creation or conveyance by deed, but which have never before been recorded in the Land Register. Registration of title to such estates may be 'voluntary' on the part of the estate owner² or 'compulsory' in the case of specified 'events' which trigger a mandatory requirement of first registration at Land Registry.³ The Chief Land Registrar is likewise authorised to register title to certain 'interests capable of subsisting at law' which are created by a 'disposition' of an estate whose title is *already registered* at Land Registry.⁴

1 LRA 2002, s 2(a). 2 LRA 2002, s 3 [PARAS 3.1.10, 4.2.30].

3 LRA 2002, s 4 [PARAS 3.1.11, 4.2.31–4.2.35].

4 LRA 2002, s 2(b). Here the term 'disposition' is broad enough to embrace not merely outright transfers of the registered estate itself, but also dealings under which lesser entitlements (eg certain leases, easements and profits *à prendre*) are carved out of the registered estate (LRA 2002, s 27(2)).

1.7.23 It is a pervasive feature of the Land Registration Act 2002 that the *legal* status of any entitlement which is caught by a requirement of compulsory registration crystallises finally and permanently *only* when the disposition of that interest is duly registered.¹ At this point the arrival of the 'legal estate' in the donee is said, in the self-explanatory parlance of the Act, to equip the donee in most cases with a 'registered estate', ie a 'legal estate the title to which is entered in the register'.² In this way the withholding of the legal quality of estate ownership until completion by registration

provides an incentive for those dealing in land to apply for registration and also ensures that the Land Register is kept constantly updated.³

1 For want of appropriate registration, a transaction with a *previously unregistered* legal estate quickly becomes 'void as regards the transfer, grant or creation of a legal estate' (LRA 2002, s 7(1)). An even more draconian outcome affects estates which are already recorded in the Land Register. The disposition of a *registered* estate 'does not operate at law'—even briefly—unless and until it is appropriately 'completed by registration', ie by entry of the disponee in the Land Register as proprietor of the relevant estate (LRA 2002, s 27(1)).

2 LRA 2002, s 132(1).

3 Notwithstanding the failure of any attempted vesting of a 'legal estate', it remains quite possible that the *equitable* version of the same estate may already have vested in the intended disponee—usually by force of some pre-existing and specifically enforceable contract.

Simplification of legal ownership

- 1.7.24 With its rigid redefinition of the boundary between law and equity, the 1925 legislation achieved at least three further simplifications of estate ownership at law.

Sweeping of limited interests into equity

- 1.7.25 Prior to 1 January 1926 many kinds of limited interest in land (eg life interests and fees tail¹) could rank as legal estates in land. In order to obtain a comprehensively valid legal title, a purchaser was often required, in consequence, to take his conveyance not merely from the owner of the fee simple absolute but also, quite possibly, from an assortment of limited legal owners. The purchaser's task in investigating the component parts of a legal title could therefore be a complex and protracted affair. This difficulty was finally removed by the Law of Property Act 1925, which deliberately swept limited interests into equity behind the curtain of some form of trust.² Since 1 January 1926 all purchasers have known that the only person competent to transfer a freehold estate at law is the owner of an estate in fee simple absolute in possession. It is correspondingly clear that the only vendor competent to transfer a legal leasehold estate is one who owns a term of years absolute in possession.

1 [PARAS 1.3.8–1.3.9]. 2 LPA 1925, s 1(1)–(3). See also TOLATA 1996, Sch 1, para 5(1) [PARA 1.3.18].

Restriction of the number of owners of a legal estate

- 1.7.26 Before the enactment of the 1925 legislation, even an absolute legal estate (eg an estate in fee simple) could be held by, and fragmented between, an almost limitless number of persons, each holding a specific share or proportion of that legal estate. In order to take a good conveyance, a purchaser had to investigate each co-owner's individual title¹ and then ensure that the conveyance was executed by all concerned. The process could be cumbersome, costly and time-consuming. This potentially disadvantageous feature of co-ownership was greatly alleviated by the provision in the 1925 legislation that the maximum number of persons who may hold a legal estate is generally limited to four.² The number of persons from whom a disposition of a legal estate can now be taken is therefore at most four; and these four are regarded as owners of one and the same legal estate, with the result that the purchaser need investigate only *one* composite title.³ In this way a much greater degree of simplicity and convenience was introduced into the process of title transfer, lease and charge.

1 See *City of London Building Society v Flegg* [1988] AC 54 at 76H–77A per Lord Oliver of Aylmerton.

2 TA 1925, s 34(2); LPA 1925, s 34(2). 3 [PARA 7.4.26].

Prohibition of legal ownership by a minor

1.7.27 The 1925 legislation (and indeed subsequent enactments) confirmed that a legal estate in land may not be held by a minor (ie by a person who has not attained the age of 18 years)¹, although a minor may validly hold the *equitable* version of any estate,² necessarily behind some trust of land.³ Any attempt after 1996 to transfer a legal estate to a minor operates instead as a declaration that the land is held in trust for the minor.⁴

1 LPA 1925, ss 1(6), 20, 205(1)(v); TOLATA 1996, Sch 1, para 1(1)(a).

2 See *Kingston upon Thames BC v Prince* [1999] 1 FLR 593 at 603A-D (minor competent to succeed to secure tenancy as an equitable estate).

3 [PARA 7.1.1].

4 TOLATA 1996, s 2(1), (6), Sch 1, para 1(1)(b). A purported transfer to two or more minors operates as a declaration of trust for both. If, however, the intention was that the minor or minors should hold on trust for some other person, the purported conveyance takes effect as a declaration of trust for that other person.

Categories of merely equitable entitlement

1.7.28 The equitable character of certain entitlements in or over land is ultimately confirmed by statute, but equitable rights fall into one or other of two broad groups.

Inherently equitable rights

1.7.29 Some entitlements in land enjoy equitable status precisely because they fall outside the range of estates, interests and charges specifically declared by statute to be capable of 'subsisting or of being conveyed or created at law'.¹ This residue of rights has no potential to exist at law and therefore remains inevitably equitable.² The inherently equitable character of such rights can usually be rationalised in terms of the maxims, thematic concerns and historic jurisdiction of equity.³ Examples include:

- determinable fee simple estates⁴
- beneficial interests existing under a trust of land
- life interests under the Settled Land Act 1925
- estate contracts (including options)
- equitable liens and
- restrictive covenants.

1 LPA 1925, s 1(1)-(3).

2 Such rights remain equitable irrespective of their mode of creation (eg even if created by deed).

3 [PARA 1.4.5].

4 [PARA 3.1.30].

Rights made equitable by some deficiency of form or registration

1.7.30 There remains a further category of rights which, by reason of some deficiency of formal creation or transfer or of some failure of completion by registration at Land Registry, survive as merely equitable entitlements. These entitlements are, quite simply, the analogue of those rights which, to borrow the terminology of the old Land Registration Act 1925,¹ have the capacity to subsist validly at law if properly 'clothed with the legal estate', but which, for want of such clothing, are consigned to equitable status only. Most important amongst these rights are:

- the fee simple absolute in possession²
- the term of years absolute³