

**REPORT ON THE LEGAL
LIABILITIES ARISING
FROM NEW PERMITTED
ACCESS ARRANGEMENTS**

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Executive Summary

This report identifies the additional costs, related to the additional legal and other liabilities that a landowner might incur if allowing permissive access on land, as set out in the brief and additional information provided by Mike Phillips on behalf of the Kent Downs AONB Unit.

We assess occupiers' liabilities, legal land rights associated with rights of way and permissive access, tenancy liabilities, and associated legal costs and the availability of insurance. We then explore the liabilities in practice through a case study of a real example of proposed permitted access, and finally provide a summary of the costs at Appendix 1.

We have consulted with Acres Insurance to provide specialist advice on insurance availability and likely alterations to premiums arising from proposed permissive access arrangements.

Report

1. Introduction

Our approach is to establish the possible forms of increased access being considered, identify the relevant legal liabilities, and explore associated costs.

We have clarified that the means of increased public access being considered are as follows:

- 1.1. The creation of new permissive access routes for any or all of the following purposes:
 - a) Linking and enhancing the existing public rights of way (PROW) routes to improve the national and regional network;
 - b) Creating local contained permissive routes in certain areas such as village edges to provide targeted benefits to a local population such as for dog walking, perhaps where such habits already exist; and
 - c) Creating high quality new leisure routes.
- 1.2. Permissive upgrading of PROWs, such as from footpaths to bridleways or Byways Open to All Traffic (BOATS);
- 1.3. Creation of new formal PROWs; and
- 1.4. Educational Access in the form of guided visits to farms.

We will not be exploring open access or social prescribing ventures, unless requested, as we understand this is not required at this stage.

We have consulted representatives from the insurance industry to support our assessment of the impact on insurance premiums and the availability of cover where required.

The following sections assess the legal liabilities arising from the proposed options likely to be incurred by landowners and occupiers. Our report summary condenses the liabilities explored, and the financial costs arising.

Version 2.0: Our report has been extended following the landowner workshop series to include an assessment of legal liabilities and insurance costs arising from:

- *Overnight stays on farms as part of educational visits*
- *Farmers visiting schools*
- *Multi-user paths (funded externally but running through farmland)*
- *Permissive open access*

The extension is included by way of additional wording in italics in various sections as required.

2. Health and Safety – Landowners' and Occupiers' Liabilities

The owner and/or occupier of land owes a duty of care to lawful visitors, employees, and trespassers on his/her land.

2.1. Lawful Visitors

Lawful visitors, such as users of footpaths and permissive paths, are protected by the Occupiers' Liability Act 1957 ('the 1957 Act'), which prescribes that a landowner must ensure that such a visitor will be reasonably safe on his property and should manage risks in a manner that is appropriate and practical to the type of hazard, the likelihood of harm being caused, and the likely visitor. For example, signage may be sufficient to warn adult visitors of certain hazards but would not be sufficient to prevent harm coming to children. Typical hazards that would require management to minimise risk to lawful visitors on new permissive or formal access routes would include livestock in fields, nearby ponds and watercourses, trees, major defects to ground conditions, and stiles or gates. Failure to take reasonable steps to manage these risks leaves a residual liability under the 1957 Act in the event of an incident.

Case law has determined that the 1957 Act does not apply to members of the public on a PROW and in theory the responsibility for maintenance of the surface of a PROW is that of the highways authority. However, this does not mean that a landowner can never be liable for an injury caused to a member of the public on a PROW, and it is considered that the 1957 Act would apply to all permissive routes.

It should be noted that the provisions of the 1957 Act are already relevant to any landowners with existing PROWs, which is the majority. Permitted access arrangements are likely to result in an increased exposure to the same liabilities, rather than new ones.

A landowner has two potential liabilities to answer in the event of an incident. Firstly, an individual or group of individuals could make a public liability claim for compensation in the event of death or personal injury. Most landowners or occupiers already hold public liability insurance as explored further below.

A landowner could also face prosecution for criminal negligence in the event of an injury arising from an activity planned by a landowner that was negligent in its planning or operation. A criminal prosecution can result in a custodial sentence or substantial financial penalty, against which no insurance is available.

It is considered very unlikely that an injury caused to a user of an existing PROW, or a trespasser, would result in a criminal prosecution, and the liability remains a public one for which insurance is available. However, the HSE may deem the creation of a permissive route, for which payment is received, to be an express activity for which a landowner has a greater degree of responsibility. A PROW is imposed on a landowner, while in granting a permissive route a landowner will be actively choosing to allow members of the public onto his land and arguably should assess the risks of trees, livestock, water features, machinery etc. before doing so.

Hence, while the risks associated with permissive routes are unlikely to be different to those relevant to landowners already, it is considered that the risk of criminal negligence in the absence of proper planning is greater.

Educational visits to farms are likely to encompass a greater number of and greater exposure to hazards, such as moving farm machinery, contact with employees, closer contact with livestock, and time spent in

farmyards and buildings. The access is likely to involve larger groups of children, under teacher but not parental supervision, than would be expected on permissive access routes at any one time.

The provision of educational or group visits would be deemed to be an activity for which a landowner has specific responsibility to mitigate risk, and failure to do so could result in prosecution for criminal negligence as well as a public liability claim.

The legal liabilities in respect of lawful visitors are the same for permissive open access. The scale of the liabilities will depend on each example. For example, a linear footpath crossing a field naturally provides a smaller quantum of access than if permissive open access were granted on the whole field, and therefore arguably the potential for hazards increases. Conversely, a linear footpath crossing several fields and encountering different tree lines, groups of livestock, farm tracks etc might encounter a greater number of hazards than permissive open access confined to one field.

Multi-user paths imply a surfaced path for the purposes of bicycles and horses and perhaps wheelchair access. In this circumstance, the liabilities increase with the provision of a surfaced track which would be deemed to be suitable for the invited use and hence the responsibility for the surface of the path would need to be clearly understood. The creation of a path is an express activity for which a landowner would have a greater duty of care. Further, it is considered likely that multi-user paths are more likely to encourage unlawful visitors such as motorbikes who are intended to be excluded from the arrangement. Assuming entrance is gated to allow horses and cyclists to enter rather than with stiles, entrance for such unlawful visitors may be made easier. The landowner, in order to fulfil the responsibilities of the Act, will need to make reasonable endeavours to prevent such access, at the very least with appropriate and consistent signage.

The provision of overnight accommodation, such as camping, increases obligations on landowners to manage risks. The requirements to ensure the safety of children while sleeping overnight are undoubtedly greater. Considerations will need to include:

- *Welfare provisions for washing, toilets and drinking water*
- *Provision of lighting to ensure children can be supervised and walk safely after dark*
- *Protection from fire, flood, fumes, poisonous plants etc*
- *Security to protect children from intruders and hazards in the vicinity which could present a greater risk after dark or to groups of children, such as water bodies, roads etc.*

It is assumed that the detailed operations of camping would be arranged and supervised by schools, such as the provision of equipment and basic supplies.

2.2. Unlawful Visitors

The Occupiers' Liability Act 1984 ('the 1984 Act') imposes a duty of care on the occupier of any premises to unlawful visitors or trespassers, which is to manage risks of which he should reasonably be aware, taking into account the likelihood of any unlawful visitor becoming harmed. Therefore, a lesser liability exists than towards lawful visitors under the 1957 Act which is to more actively protect individuals from harm. For example, management of the same hazards outlined above is less in circumstances where the hazard could only present itself if a trespasser breaks through a fence or wilfully deviates from an access route. However, an occupier should consider the likelihood of trespass, such as areas where existing trespass habits have established or are likely to take place. It should be considered that visitors on permissive routes are lawful while on the route, but once deviated and trespassing become unlawful,

and the likelihood of walkers taking shortcuts or looping away from linear routes and encountering hazards would have to be considered. The management of the risk should account for the obviousness of the risk and its likely effectiveness; for example signage is unlikely to protect children from hazards such as open water or dangerous structures.

As above the provisions of the 1984 Act in relation to unlawful visitors already apply to most land occupiers. The proposed access schemes may increase the scale of the risk but it is assumed that the scheme will allow sufficient flexibility for an applicant to devise a new route that does not encourage additional unlawful trespass.

It is envisaged that unlawful visitors to permissive open access or multi-user paths are types of visitors who are expressly excluded from the arrangement, such as motorbikes. The legal liability is the same as above. It is likely that a multi-user path would be physically more accessible to motorbikes than footpaths if entrance ways consist of openings or easily openable gates, and hence the unlawful activity may only require an unlawful visitor to ignore signage and enter.

2.3. Common Agricultural Hazards

Certain common agricultural hazards and risks would require a particular level of management and control which is likely to incur cost or loss of profits as a result of adapted management practices if new permitted access arrangements brought lawful visitors into closer contact than before.

2.3.1. Livestock

Livestock is a potential hazard and hence requires management in accordance with the Occupiers' Liability Acts, as well as compliance with additional legislation. The Animals Act 1971 places a strict liability on the keeper of animals which cause harm if that harm should have reasonably been foreseen. For example, a keeper of cattle would be deemed liable for an injury caused by an animal known to be aggressive, or of a quiet nature but with a calf at foot which is a known cause for increased aggression in any cattle. Further, a landowner is liable under the act for injury caused as a result of an animal escaping, even if the escape arises from a gate being left open by a member of the public. Hence, any new permissive access arrangements will require management controls to avoid stocking fields with certain animals or animals in certain circumstances, where permissive access arrangements have been entered into, and to ensure that gates or stiles are fitted that are self-closing.

Further, the Wildlife & Countryside Act 1981 bans bulls over 10 months of age of recognised dairy breeds from being placed in fields with public rights of way, and all other bulls unaccompanied by cows or heifers. While the legislation applies to PROWs, it is considered that a landowner would be deemed liable for an incident in the same circumstances applying to permissive access arrangements.

The same issues arise for permitted open access, and multi-user paths. The risk of animals escaping could be greater in the case of multi-user paths given that gates are likely to be required instead of stiles or kissing-gates, but it is considered unlikely that permissive open access, or multi-user paths, would be considered compatible with livestock other than possibly extensive sheep grazing in upland or common areas without confined fields.

Clearly, the use of land for overnight camping accommodation is unlikely to be compatible with some livestock such as cattle.

2.3.2. Trees

Trees are recognised as potential hazards to individuals who pass within falling distance. The risk being that of falling trees or limbs caused by defects to the tree health/dead trees, particular weather conditions such as high winds or heavy snow, or varying factors such as stress from drought or wet ground conditions. The Occupiers' Liability Acts and case law establish that a landowner has a duty of care to take reasonable steps to minimise these hazards. Regular assessment of trees by a competent individual is required, together with management action to remove hazards, such as felling dangerous trees, removing dangerous limbs or reducing overgrown trees.

A landowner must assess the risk to determine the likelihood of an accident. Trees within falling distance of PROWs and permissive paths require more regular monitoring, and most remedial work requires the appointment of a tree surgeon in order that it is completed competently and safely. As above, a landowner planning a permissive route is likely to be deemed more culpable of criminal negligence than in relation to PROWs.

The same issues arise for multi-user paths and permissive open access. The issue is a question of scale in terms of the numbers of trees accessible to a lawful visitor for either a linear route of any form or open access and would depend on the circumstances.

In terms of overnight accommodation such as camping, it is not uncommon to consider wooded areas as potentially suitable campsites as they are sheltered, available for use while open arable land or grazed pasture may not be suitable and provide an appealing setting. The liability for trees safety is set out above, but it is generally viewed that the obligation to manage trees is at its most pertinent at campsites as visitors will be asleep for a number of hours and therefore less able to detect emerging hazards such as increasing winds, and winds may be stronger at night. The use of a wooded area for a number of hours as a campsite requires careful tree management, and consideration to any impact of the use on tree health, such as compaction or damage to tree roots, and the likelihood of children attempting to climb trees or slippery logs. While the tree safety remains the responsibility of the landowner, the activities of children would remain the responsibility of schools.

2.3.3. General Hazards

The requirement to manage other general hazards includes a test of reasonableness. Open water bodies such as ponds are not unusual features to find in rural areas and members of the public have a general duty to take responsibility for their own safety, and that of young children. The introduction of a new access route may require increased control measures such as signage or even fencing if a hazard such as a water course attract attention and could be reasonably foreseen as the source of harm, but it is envisaged that routes can be planned to avoid such features or the scheme will allow flexibility to move permissive routes.

Consideration has been given to the possibility of general hazards presenting a greater risk to members of the public in relation to permissive open access where users may be more inclined to loiter than on a linear route – for example spending time with picnics or ball games. Although the reasonableness test remains unaltered and can be compared to ponds and rivers or canals in other public places such as parks, consideration should be given to how the space will be used and by who. For example, a permissive route over undulating terrain is most likely to be accessed by adult pedestrians, while open access schemes adjacent to towns or villages could well be frequented by children, possibly

unaccompanied. The assessment of responsibilities under the Occupiers' Liability Act 1957 will require a landowner to manage hazards accordingly and consider a greater degree of preventative management where hazards present a greater risk to children or certain groups of individuals.

2.3.4. Agricultural Working Activities

The Health and Safety at Work Act 1974 places a duty of care to ensure the safety of individuals in the work place and extends to members of the public in addition to employees. Therefore, a landowner could be held liable for an accident or injury to a member of the public arising from an agricultural or other operation, such as moving agricultural machinery, alterations to ground conditions, creation of hazards such as excavations or construction, or operations involving livestock.

The Act requires that such work is properly planned to identify risks and manage them to reduce or eliminate as far as possible. An accident could result in a public liability claim, likely to be insurable, but also a prosecution by the Health and Safety Executive (HSE). A successful prosecution could result in a financial penalty, for which there is no available insurance, or a custodial sentence.

The liabilities identified are no different for new permissive access routes as for existing footpaths but create an increase of activity and hence any landowner considering permissive access would need to consider safe work planning and possibly adjustments to working operations which could result in increased costs. The liability becomes more manageable if permissive routes can be managed with flexibility to divert or temporarily close routes while working operations take place.

Educational visits will involve a greater degree of planning to identify risks and manage hazards, given the larger number of individuals present in one group and likely to be visiting areas of the farm with increased risks. A landowner will need to conduct a written risk assessment to control hazards such as machinery, livestock, water bodies, uneven surfaces, transmission of bacteria, hazards attracting children such as trees, plant reactors etc, and may need external advice. Costs are likely to include some professional advice, the cost of physical adaptations necessary, alterations to working practices during the visit which could impact on profitability, and insurance. Premiums for public liability insurance are likely to be greater if educational visits are proposed on a landholding, and as above the increasing recommendations to obtain cover for up to £20 million in cases of group visits and to account for the impact of the Ogden principle will increase premiums.

As above, overnight accommodation will require greater planning and will depend on the degree to which the landowner is responsible for the detailed arrangements such as equipment and food etc. Public liability insurance at a minimum of £10 million but more likely £20 million will be required for groups of children staying overnight.

2.4. Associated Costs and Insurance

Most landowners and occupiers carry public liability insurance and levels typically range between £5 million and £10 million in cover. Such cover provides insurance against claims by members of the public for damages, injury or death resulting from an incident on the insured party's property. Public liability insurance provides protection for each and every claim up to the covered sum, and hence a greater number of access routes could in theory lead to a greater number of claims (noting that claims are already reasonably rare) but each individual claim will be no greater, and hence there is no requirement for

additional cover. There is therefore no justification in increased premium costs, but the insurance market may react to increased public access with increases in premiums. In particular, the likely increased culpability for permissive routes could result in increased premiums.

Some larger estates or landowners will consider cover of up to £20 million, typically where a large number of people could be injured or killed by a single risk or hazard. Examples include festivals and events near trees, or people in groups near trees, livestock, moving machinery or being transported in vehicles. Claims could reach £10 million per individual claimants and occupiers considering group visits to farms will need to procure cover of up to £20 million, which will increase premiums. Typically cover over £10 million has to be purchased as an additional layer of cover rather than an incremental increase, and hence a separate premium is payable. Claims are affected by what is known as the Ogden principle, established by one particular case in which the court deemed that costs required to support life changing injuries were not properly reflected, and the process of calculating payment has been altered to increase claims.

Overall, it should be noted that while insurers are censured by the Financial Ombudsman and are unlikely to decline payment of a proven claim, an insured party is obliged to maintain risk in a state worthy of insurance and hence the management of risks outlined above is still necessary.

3. Permissive Path Management – Equalities Act 2010

A landowner providing a permissive path or access is deemed a 'supplier of services' and hence must comply with the Equality Act 2010 which requires that any reasonable adjustments should be made to ensure that those with disabilities, which could be physical or mental impairments, are not substantially disadvantaged.

While it would not necessarily be considered reasonable to ensure that a path includes a surface and entry point suitable for wheelchair use, as this would be incompatible with agricultural uses, it could be claimed that a particularly heavy gate or awkward catch creates a disadvantage to an individual with a physical or mental impairment.

A reasonableness test prevails and it is considered that the risk to a landowner is relatively low, particularly given the requirement for a 'service provider' to respond to requests as a first duty and consider the reasonableness of such requests.

The provision of a multi-user path increases the breadth of 'service' and a surfaced path is more likely to require consideration to the Equalities Act 2010, as a new surface has been provided. A risk assessment would be required to consider the need for pictorial signage with graphics in addition to lettering to warn of hazards etc.

4. Creation of Formal Land Rights – PROWs and Town and Village Greens

4.1. Public Applications for PROWs

PROWs are administered by Highways Authorities (typically County Councils) in accordance with the Highways Act 1980. The statute provides legislation relevant to the creation, diversion, stopping up and management of PROWs, but not permissive access arrangements.

An application can be made by members of the public to register a PROW following a period of continuous overt use for 20 years without permission or challenge from the relevant landowner or occupier. Similarly,

the Wildlife and Countryside Act 1981 allows members of the public to apply for an upgrading of a PROW, such as from a footpath to a bridleway after 20 years.

The creation of new or upgraded PROWs imposes new liabilities on landowners and in many cases affects land value, particularly where a new PROW route creates disadvantage to a residential property or set of farm buildings. PROWs can impede alternative land uses such as development, diversification enterprises, or increased agricultural production such as the erection of buildings or polytunnels. Should there be a successful application for a new or upgraded PROW, a landowner will become responsible for the maintenance of stiles and fences etc, and the occupiers' liability aspects outlined above.

4.2. Preventing a Claim for a PROW

Preventing a formal right of way being established can be attempted in a number of ways. Firstly, to create a permissive route as proposed typically by installing signage indicating the permissive route and notifying visitors that the access may be withdrawn. Such an approach still requires ongoing management, to record the existence of the signage over a sustained period, and to manage any visitors who deviate from the route and by way of overt trespass could make a claim for a PROW after 20 years in an alternative route.

Secondly, by challenging the creation of a PROW a landowner can defeat an application as above. A physical challenge would be contrary to the objectives of the scheme and a permissive approach is more appropriate, but an opportunity for legal challenge exists, in which a landowner can make a statutory deposit to the highways authority under s.31 of the Highways Act 1980. The deposit is a sworn statement by a landowner expressing an intention to create no new PROWS which is then registered at the highways authority for a period of 20 years.

It is assumed that any scheme option for increased public access under the ELM scheme will not override the statutory provisions for the establishment of a PROW under the Highways Act 1980 and the Wildlife and Countryside Act 1981 and therefore the liabilities facing landowners will remain relevant. The creation of a right of way is not an immediate financial loss and hence is not insurable. A landowner must take steps to manage a permissive access route accurately, and make PROW deposits regularly, both of which are likely to require professional costs.

Information resources are available to landowners on how to manage permissive access without allowing formal rights of way to become established, and on how to make statutory deposits. Those resources are typically provided by representative bodies such as the Country Land and Business Association (CLA) and National Farmers Union (NFU). Provision of advice and management support within an ELMS permissive access option would reduce liabilities and the requirement for legal advice.

It is possible for a private individual to establish a private right of access by using a route continuously for a period of 20 years, without permission or challenge, for the purposes of accessing his/her own property. It is not considered that the proposals for increased public access increase the liability to a landowner or occupier in this respect to a significant degree.

4.3. Town and Village Green Applications

The Commons Act 2006 enables any individual to make an application to register land as a town or village green where a significant number of the inhabitants of a locality or a neighbourhood in the locality have undertaken 'lawful sports and pastimes' on the land, which can include dog walking and picnicking, for a period of at least 20 years continuously and continue to do so at the time of the application. The inhabitants must have used the land without force, without permission, without disguise, and used the land freely rather than by following a particular route.

An application will not be successful if the relevant land is subject to a planning application or has been identified for possible development by a neighbourhood or local plan.

While we understand that open access is not being considered as an option under the new ELM scheme, we are advised that local dog walking routes will be considered for scheme eligibility. Allowing a permissive route in a field could inadvertently encourage or enable open access to a field that is neither permitted nor prevented, and ultimately could lead to an application for a town or village green under the Commons Act 2006.

The consequences of a village green registration would be significant, and would comprise of:

- Legal and professional cost in representation and defence against an application
- a reduction in capital value of the land, including both its immediate agricultural or amenity value and any longer term development value if no development progress has yet been made which would prevent an application
- long term and increased occupier liabilities as outlined above
- Reduced agricultural profitability as use by members of the public could render the land unsuitable or unsafe for mowing or grazing with livestock

While occupiers' liabilities could be at least partially addressed with public liability insurance as outlined above, there is no means of recovering a loss in capital value in the event of a successful application.

A new 20 year establishment period can be prevented with correct management. Permitting the use of land for recreational access would prevent a successful Commons Act registration, but is unlikely to be acceptable to any landowner, particularly without the incentive of a financial payment to recover management time and costs. Physical challenges such as signage and gates are unlikely to be compatible with a permissive access scheme, and lead to confusion about what is permitted and what is not.

Landowners can deposit a statement and map under S.15A of the Commons Registration Act 2006 which will interrupt and end any accruing 20 year use by the local inhabitants. This route offers ultimate protection, but in most cases requires some professional advice and hence cost.

A permissive open access scheme increases the likelihood of an application for a commons or village green, and hence the process outlined above becomes particularly relevant.

5. Tenancies – Liabilities for Landlords and Tenants

5.1. Tenancy Agreements – General Provisions

Many landholdings are occupied by tenants, typically by way of Farm Business Tenancies (FBTs) under the Agricultural Tenancies Act 1995, or Agricultural Holdings Act 1986 agreements (AHAs). While terms vary, both forms of agreement will typically contain the following provisions:

- Tenants may not allow unauthorised access onto the holding nor allow the establishment of any public or private rights
- Landlords typically reserve a right to grant access to a third party as required
- Tenants may not enter into schemes without the consent of the landlord.

There would also usually be a forfeiture clause included such that if a covenant of the tenancy is breached by the tenant, the landlord has a right to forfeit the lease.

If there is no written agreement, it is unlikely, particularly if occupation is under the Agricultural Tenancies Act 1995, that there would be an implied covenant not to enter into grant schemes without consent, but the tenant would not have the ability to enter into such a scheme or grant access rights if such a scheme or rights outlived the length of any agreed term. Furthermore, a right of forfeiture which is required to redress any breach could not be implied. Consequently, it is assumed when considering liabilities below that there is a written agreement in place.

5.2. Legal Liabilities

In the event that a tenant under an AHA tenancy entered into a scheme for permissive access routes without the landlord's consent the consequences could be severe, should such a landlord latterly object. Such action would amount to a breach of tenancy, which under the '86 Act falls into one of two categories; remediable or irreparable. If the breach is deemed remediable, there is a set procedure a landlord can follow requiring service of notices, which set out a reasonable timescale for the tenant to put the breach right. If under any ELMS scheme there was provision for a tenant to break any access agreement in such circumstances, then the act of having signed up to the scheme would most likely be considered remediable and the tenant would be faced with a decision of exercising the break or risking the security of the tenancy.

If there was no provision for the permissive access scheme within ELMS to be terminated, or at least terminated on expiry of the tenancy, there is a risk that this would be considered an irreparable breach if the access provisions were such that they could be deemed to have materially prejudiced the landlord's interest in the land. In such an instance, a landlord would likely be entitled to serve a valid notice to quit.

In addition, under either an FBT or an AHA tenancy a landlord is able to seek redress for a breach of covenant via forfeiture, assuming that the tenancy agreement contains an express and valid reservation allowing the landlord to re-enter for a breach of covenant. The requirements to exercise such a reservation are statutory and contained in section 146 of the Law of Property Act 1925. In a similar way to the notice to quit procedure briefly outlined above, a landlord must serve notice specifying any breach complained of and giving the tenant an opportunity to remedy the breach. Much then turns on whether the breach can be put right and if not, to what extent the tenant can financially compensate the landlord for the breach as to whether or not a tenant might be granted relief from forfeiture.

Clearly in either circumstance the potential exposure of the tenant to legal fees is significant. In practice therefore, an applicant who is a tenant will require the consent of a landlord in order to proceed. A landlord's incentive to consent will be to generally maintain the profitability of the farm, and hence support the rent, accepting the principle that ELMS and its component parts is important to support income and replace existing subsidy support. The methods available to a landowner to deposit a deemed dedication of existing PROWs and commons are relevant to the landlord as landowner, and hence a landlord can control this preventative management.

However, a landlord is also likely to be concerned about an access scheme that cannot in practice be terminated at the end of a tenancy as public habits will have become established. Further, the management of at least some hazards, such as trees, are ascribed to the landlord in the terms of the tenancy agreement, and hence overall a landlord may be reluctant to grant consent for a scheme that creates new landlord liabilities.

In theory the rights reserved in most agreements could enable a landlord to grant a right of access to third parties, and hence a landlord could enter into a permissive access arrangement, leaving many of the occupiers' liabilities outlined above to the tenant. The applicant eligibility under the new ELMS scheme is not yet sufficiently understood to identify if this is a risk for tenants that could in practice manifest itself.

The provision of overnight accommodation for educational visits would be deemed a non-agricultural use and hence require express consent for both tenancy types. Further, sub-letting is an irremediable breach which can risk the continuation of a tenancy agreement, which could be relevant if camping operations are undertaken by another party. Any camping or accommodation venture would require the express consent of a landlord, who may require share of income.

The alteration of a holding, including a permanent surfaced path, would also require the consent of the landlord.

6. Environmental Liabilities

Increased access in any form may increase a landowner or occupier's liabilities. Increased litter drop on permissive routes is unlikely to result in financial penalty to a landowner, but circumstances could enable increased incidences of fly tipping. While the Environmental Protection Act 1990 establishes the 'polluter pays' principle in which the liability for clearing contaminated substances rests with the culprit, in practice that culprit is often unable to be traced. Hence the liability for removing fly tipped material then rests with the occupier of land, and costs of clearing material such as asbestos can be very expensive.

Most land occupiers will already carry insurance for Environmental Impairment Liability to cover the costs of dealing with contamination caused by a third party such as fly tipping. However, the regularity of fly tipping incidences already mean that most policies will include an increased excess which is payable by the insured party. Hence, insurance cover is limited, and repeated claims is likely to result in an increase in premium costs.

It is anticipated that litter drop could increase in areas of permissive open access.

The enactment of the Environment Bill, now planned for later this year, will include new obligations on developers to enhance Biodiversity Net Gain by replacing biodiversity lost as a result of the development with 110% in a replacement scheme. Land adjacent to towns and villages is likely to become utilised for

such a purpose, and landowners will enter into arrangements with developers called conservation covenants. Such biodiversity covenants may well prohibit permissive open access (or even any linear access) depending on the biodiversity intentions of the scheme.

7. Farmers Visiting Schools

We have been asked to consider the legal liabilities farmers and landowners would need to consider if visiting schools. It is envisaged that such visits would be supervised and managed by schools and hence the liabilities would be limited. A single individual entering a school, and following the requirements provided to him/her by the school, is unlikely to face any additional liabilities beyond the normal course of the law. A school may require a landowner or farmer to undertake a DBS check, but the liability for doing so rests with the school.

8. Summary

We have explored the liabilities facing landowners entering into the access arrangements identified to us and considered the availability and cost of insurance.

In many cases, the liabilities arising are likely to be already relevant to most landowners and in theory the availability and cost of insurance should not increase. However, increased public access is an increased exposure to the relevant risks and it is anticipated that the insurance market may react accordingly.

We have put our research into practice by applying the various issues to a specific case study. We have researched likely costs relevant to these issues, and relevant to the case study.

At Appendix 1 we provide a summary of all the liabilities identified, the availability of insurance, and the likely costs. Those costs are deduced from our case study, with adaptations to moderate any special circumstances, and in consultation with Acres insurance, arboriculturists and health and safety consultants known to us. While the case study assesses all costs, only legal and insurance costs are summarised in Appendix 1.

Case Study

3. CASE STUDY – LAND TO THE WEST OF WROTHAM, KENT

3.1 Background

The land shown tinted pink on the enclosed Plan 1 is owned by our client and forms part of a larger estate ('The Estate'). As shown, the estate ownership surrounds the western boundaries of Wrotham, a large village immediately south of the M20 in Kent. The location is within the North Downs AONB.

The line coloured purple on the plan is a Byway Open to All Traffic (BOAT) called the Pilgrim's Way and is a section of a long and well-used route from London to Canterbury. It is immediately accessible from Wrotham and consists of a track with a hedge and tree line on either side. As demonstrated by the pink shading, the estate ownership includes the land immediately either side of the BOAT proceeding west from Wrotham. The field immediately west of Wrotham is called Cherry Orchard.

The line coloured red on Plan 1 is a restricted byway and in practice is used as a footpath.

Kemsing Road to the south of the byway is a narrow line with little or no verge, high hedges and a reasonable volume of fast-moving traffic. It does not present a suitable or safe route for pedestrians. In practice the use of the land, by members of the public, is considerable. In particular, individuals walk with dogs in various routes and many users make a complete circumference of Cherry Orchard field using the BOAT, the byway and unauthorised use of the southern and eastern boundaries of Cherry Orchard. Some walk smaller loops in the top right hand corner of Cherry Orchard which is grassed, and some walk north south behind the houses before walking back into the residential road network.

Although the majority of the use is pedestrian, the estate has encountered periods of unauthorised activity by trespassers on motor bikes which has led to complaints from residents. The extent of the use by members of the public is such that visible paths and tracks have been established identifiable on Plan 2 and the enclosed schedule of photographs.

3.2 Land-owner impact

The impact of the unauthorised access are as follows:-

- i) Considerable crop damage arises from regular walking, and in particular motor bike access.
- ii) Littering is relatively common and in particular, dog walkers hang bags of waste in trees along the Pilgrims Way.

3.3 Proposed permissive arrangements

The owner of the estate wishes to regularise the practices that are observed and has considered both options of either taking steps to prevent unauthorised access or entering into a permissive access arrangement. He recognises that the public benefits of permitting access, particularly in this context where the estate ownership surrounds a large number of residents, and as the land is used to access the existing public rights of way network with particular landscape value.

Consideration to the possibility and route of the permissive access scheme needed to balance commercial impact on the estate with meaningful benefits to users. The impact on crops, and Basic Payment Scheme needs to be carefully managed.

Hence a permissive access route as shown blue on Plan 1 is proposed which is designed to create a circular route from the Pilgrims Way and with a link to the highway as currently enjoyed in practice by many walkers.

Liabilities and legal issues associated with the proposed scheme have been explored and are assessed as follows:

- i) Trees - The northern boundary of the proposed route consists of a tree line of mature specimen trees, and these would need to be included in tree safety surveys. We have established from our experience and from consulting with several tree surgeons as part of this exercise that tree survey costs are in the region of £500 per day and therefore the maximum additional time applicable to the subject area would be £250 as a half day of work. Remedial works to fell or remedy dangerous or defective trees depends entirely on the nature and extent of the works required. Costs could vary between £50 to cut ivy stems to approximately £800 to fell a large tree. Costs are also likely to be greatest in the first year when trees are managed for the first time. The budget for this particular tree line would be £1,000 for the first year, and £500 thereafter.
- ii) Fencing – Observation of emerging habits and the presence of worn tracks across Cherry Orchard indicate that some walkers are travelling extensively across the estate. It is considered that the permissive route will need to be fenced to control wider and more general trespass. Fencing is estimated to cost in the region of £4,000 at £8 per metre. This is unviable for the estate at present. Additional patch repairs have been undertaken to prevent further encroachment from the Pilgrims Way onto the cropped ground which costs in the region of £750. A kissing gate at the north-eastern entrance to the proposed route is likely to be installed to prevent motor bike access at a cost of £150.
- iii) Dog-waste bins – The majority of users are expected to be dog walkers and hence the estate owners have discussed the arrangement with the relevant parish council who will in turn make an application to the local authority to supply and empty dog-waste bins. It is understood that there will be no charge for providing this service, but this is to be confirmed.
- iv) Litter picking – It is anticipated that littering will continue at current levels if permissive access is confirmed. The estate owner is in discussion with the parish council about a potential monthly litter picking arrangement by volunteers but if this is not agreed, the cost of providing estate labour to pick litter once a month would cost approximately £50 per month, or £600 per year. Monthly litter picking is deemed

necessary in this particular context where the land is used by a lot of local residents very frequently. A linear route in a different setting is unlikely to require the same extent of litter clearance.

v) Insurance costs – The estate insurance cover currently includes public liability insurance to a level of £10,000,000. The cost of an additional layer of insurance to £20,000,000 will cost in the region of £900, based on the turnover and acreage of the estate. In this particular circumstance, it is deemed that the proposed arrangement does not present additional risks requiring additional insurance as would be required if groups of people were invited onto the estate for educational purposes.

vi) Signage – Signs will need to be procured to advise members of the public of the existence and route of the arrangement, estimated to cost £150 per annum, assuming a need for regular replacement.

vii) Management time and Risk Assessments – in light of the consideration that permissive access arrangements require a greater degree of risk management than PROWs, the arrangement will need to be regularly monitored and managed. No guided group visits are proposed, and agricultural activity will be limited to annual topping of hay, and hence only some management time is required.

viii) Managing land rights – the estate already registers deposits to prevent new PROWs and Town and Village Green applications, and no further cost is deemed necessary in this particular instance.

In summary, the additional cost to the estate of providing the new arrangement is calculated as follows:

Annual costs

Tree surveys	£250
Tree remedial works	£500-£1,000
Dog waste bins	£0
Litter clearance	£0 - £600
Insurance premiums	£0
Signage	£150
Management time	£0
Managing land rights	£0
Fencing maintenance	£100

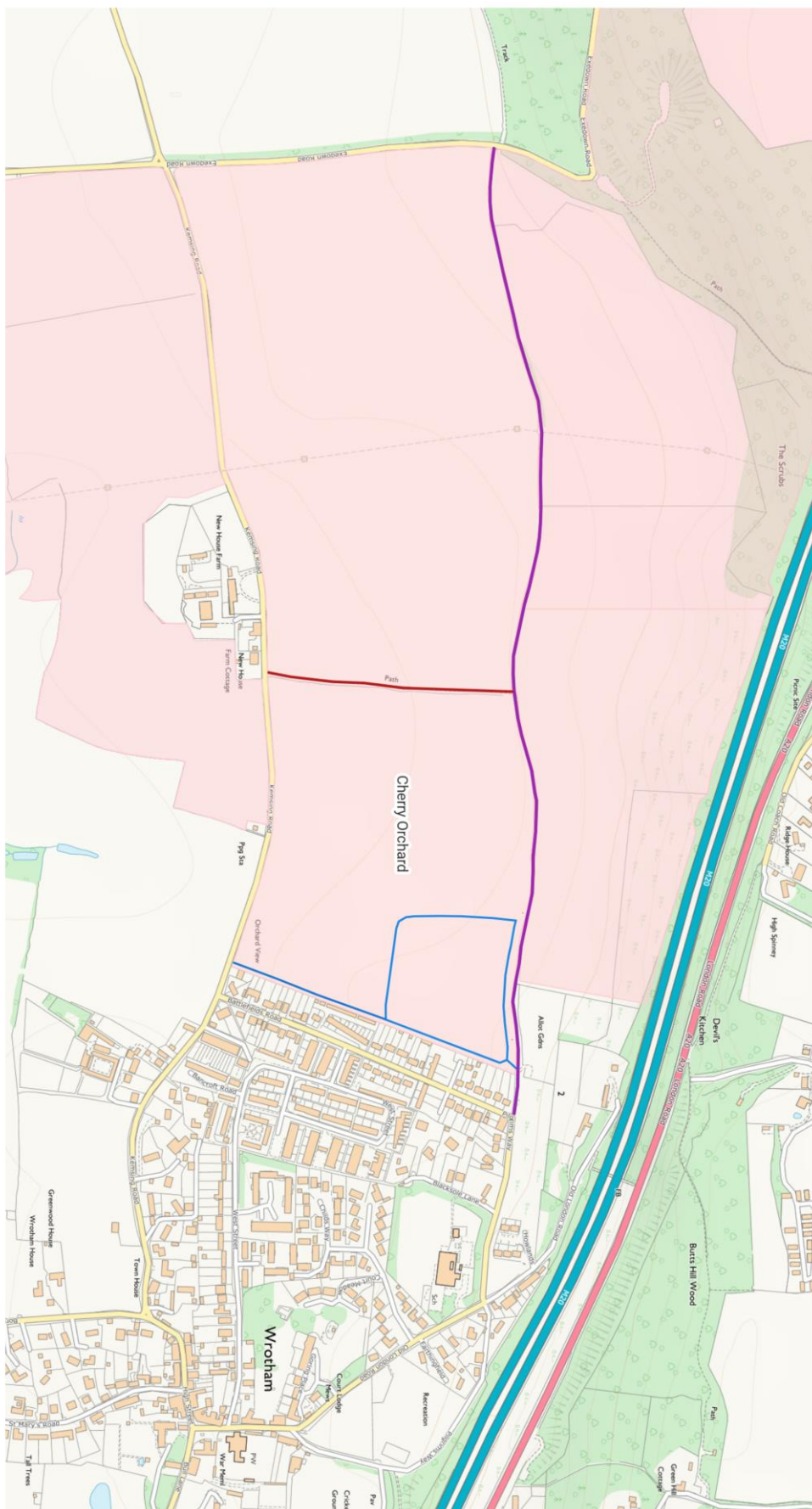
One off costs

Fencing	£4,000
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Case Study

Plans 1 & 2

btf





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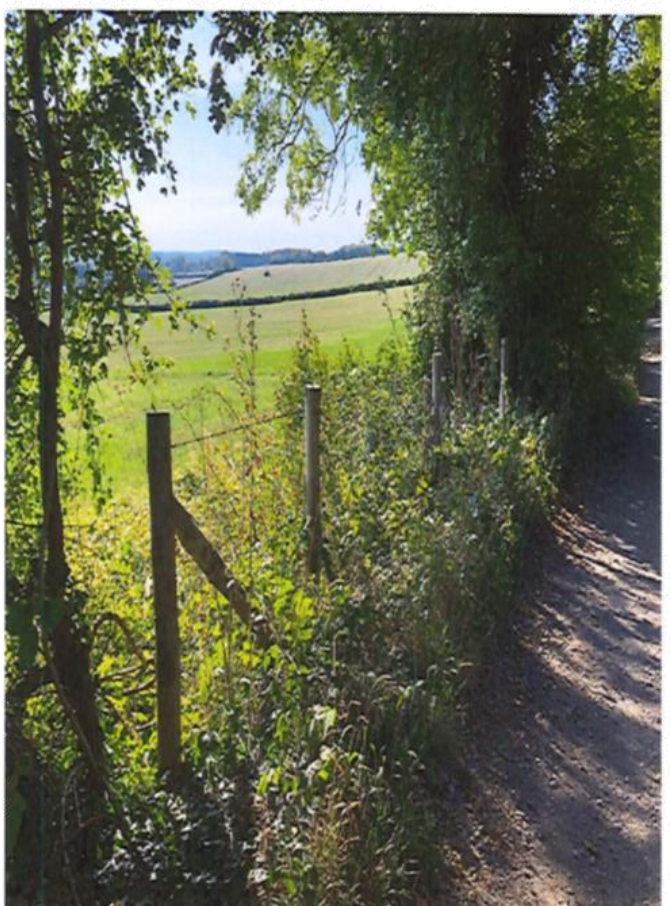
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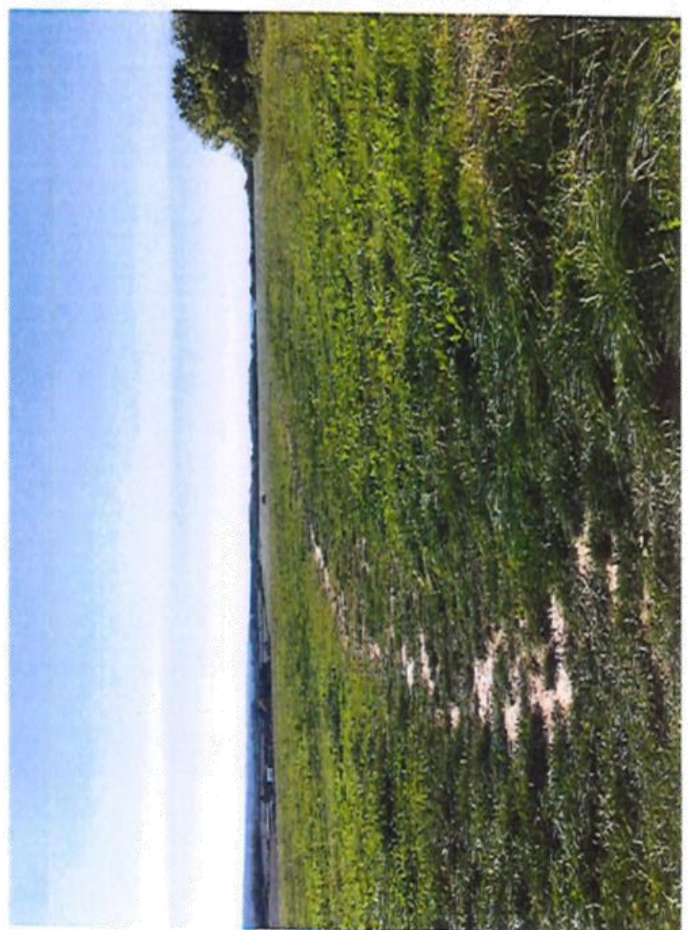
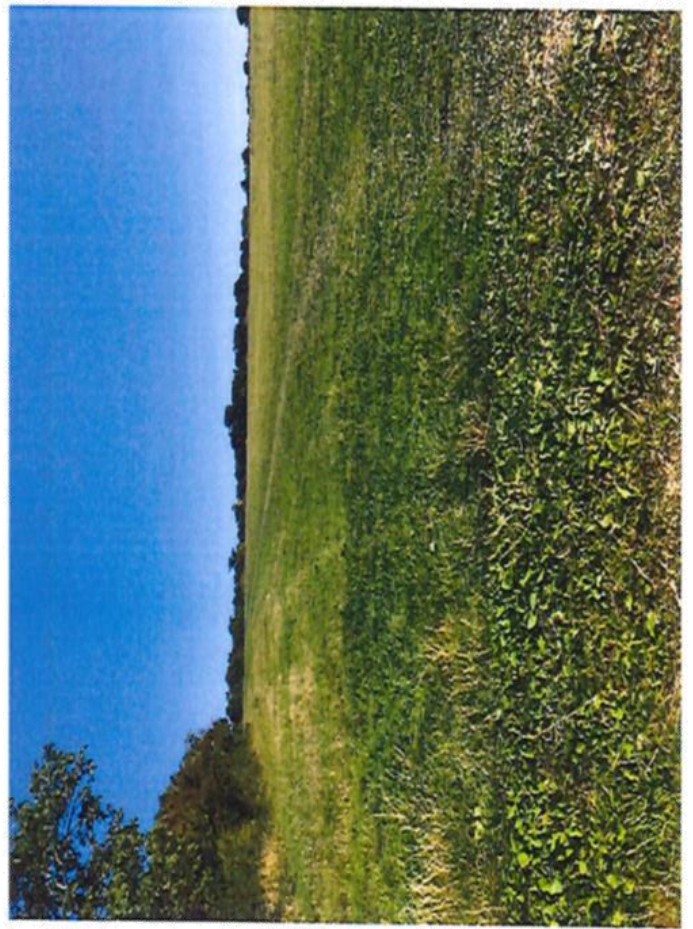
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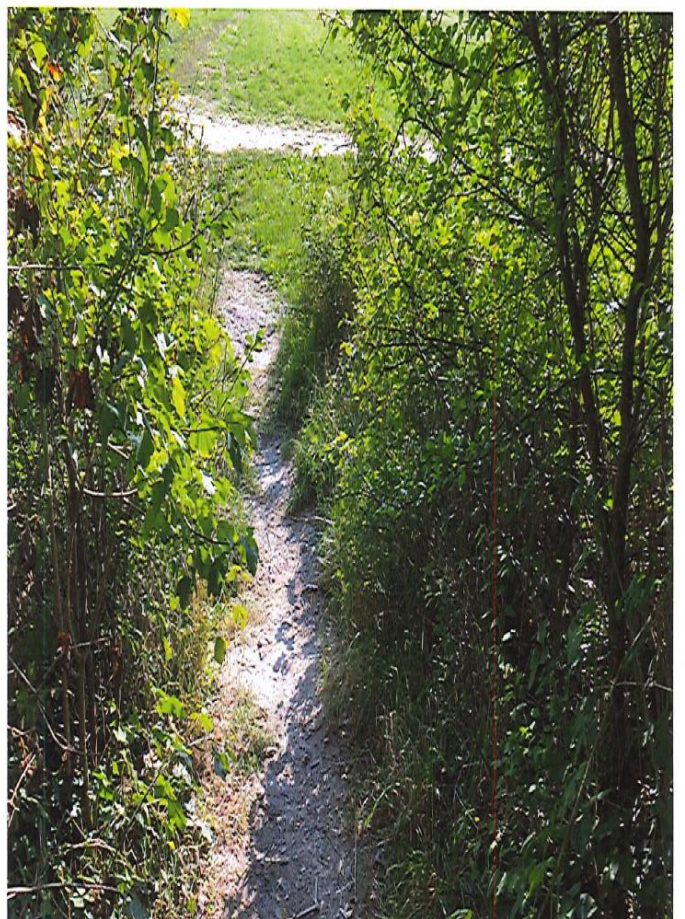
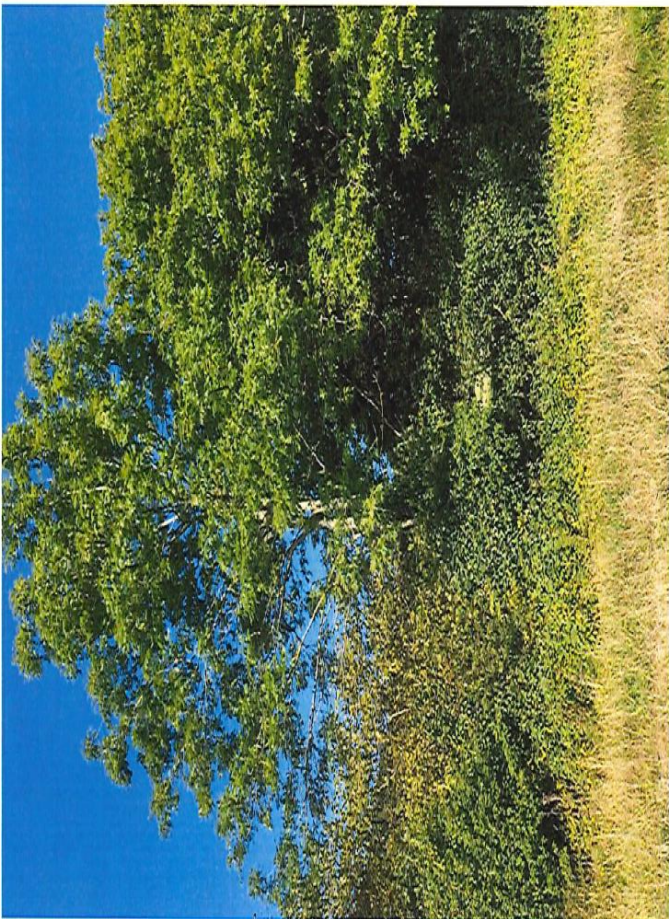
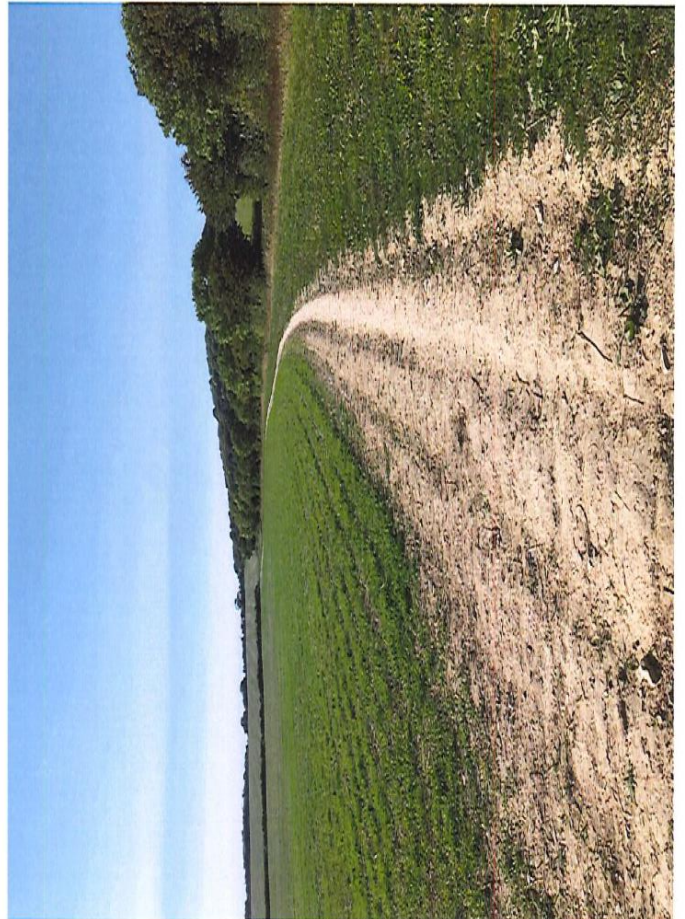
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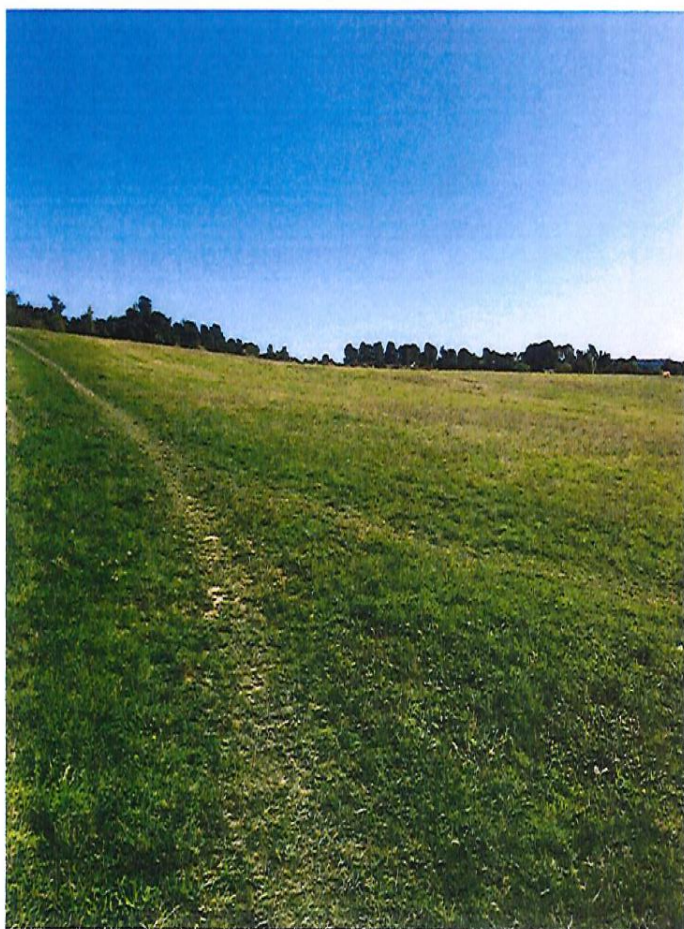


Case Study Photographs









Appendix 1

Summary of Liabilities and Costs

Liability	Management actions required to reduce liability	Risk level	Availability of Insurance	Costs per Annum
Health and safety – a public liability claim or even public prosecution for injury or death to a member of the public Occupiers Liability Act 1957 Occupiers Liability Act 1984 Animals Act 1971 Health and Safety at Work Act 1974	1) Management of livestock and potentially excluding certain stock from fields with new access routes 2) Upgrading stiles and gates to control livestock in fields 3) Managing stiles and gates to enable safe use 4) Monitoring routes for new hazards 5) Inspecting trees and making safe where defects observed 6) Moving, fencing off or adding signs to hazards such as water bodies, vehicle routes etc 7) Adjusting working practices particularly during educational visits 8) Undertaking risk assessments before educational visits	Medium for access routes, high for educational visits	Yes (excepting a criminal penalty)	Public liability insurance costs likely to be already incurred by landowners. Increase in premiums possible. Additional cost likely to be no more than £500 for permissive access routes, or £1500 for group visits. Staff cost and materials for maintenance of gates and stiles - £150 Tree survey costs - £0 - £250 Up to £750 in addition for wooded camping areas Tree remedial costs - £0 - £750 Difficult to quantify for camping areas but could be up to £2,500 for first batch of remedial work, and less thereafter Management time to assess risks and mitigate accordingly £0-£50 for permissive routes, or £150 - £300 for guided visits (range allows for professional input)
Accessibility – a request for adaptations to allow better access to users with disabilities Equalities Act 2010	1) Response to requests for reasonable adjustments to remove substantial disadvantages to individuals with physical or mental impairments	Low	No	Adaptations to structures where reasonable £0 <i>Could apply to multi-user paths – say £750</i>

Establishment of New Land Rights Highways Act 1980 Wildlife and Countryside Act 1981 Commons Act 2006	1) Installation and maintenance of correct signage 2) Statutory deposits of deemed dedication of PROWs and town or village greens	High if not managed, low if managed	- No	Signage £50 Professional advice to prevent rights being established in advance £300 Significant legal cost in defending against an application £5000 plus
Environmental Liabilities – increased risks of a pollution incident such as flytipping Environmental Protection Act 1990	1) Physical barriers to prevent increased flytipping	Medium	- Yes – after an excess	Costs of clearing flytipped material or insurance excess £500 plus Likely increased premiums if insurance claims made £500 Dog waste bins £250 (estimated as unknown)
Tenanted liabilities – a tenant being in breach of a tenancy agreement by granting access, or being denied consent to proceed by a landlord Agricultural Holdings Act 1986 Agricultural Tenancies Act 1995	1) Check terms of tenancy agreement to ensure not in breach/requirements for applying for consent 2) Apply for formal written consent from Landlord prior to entering into any scheme	Low if managed	- No	Professional costs £0 - £750 (parties unlikely to pursue discussions that cannot be resolved without cost)

While the estimated costs are realistic for many scenarios, it should be noted that each case would be different and in many cases a number of these additional costs would be exceeded, or not be applicable at all.