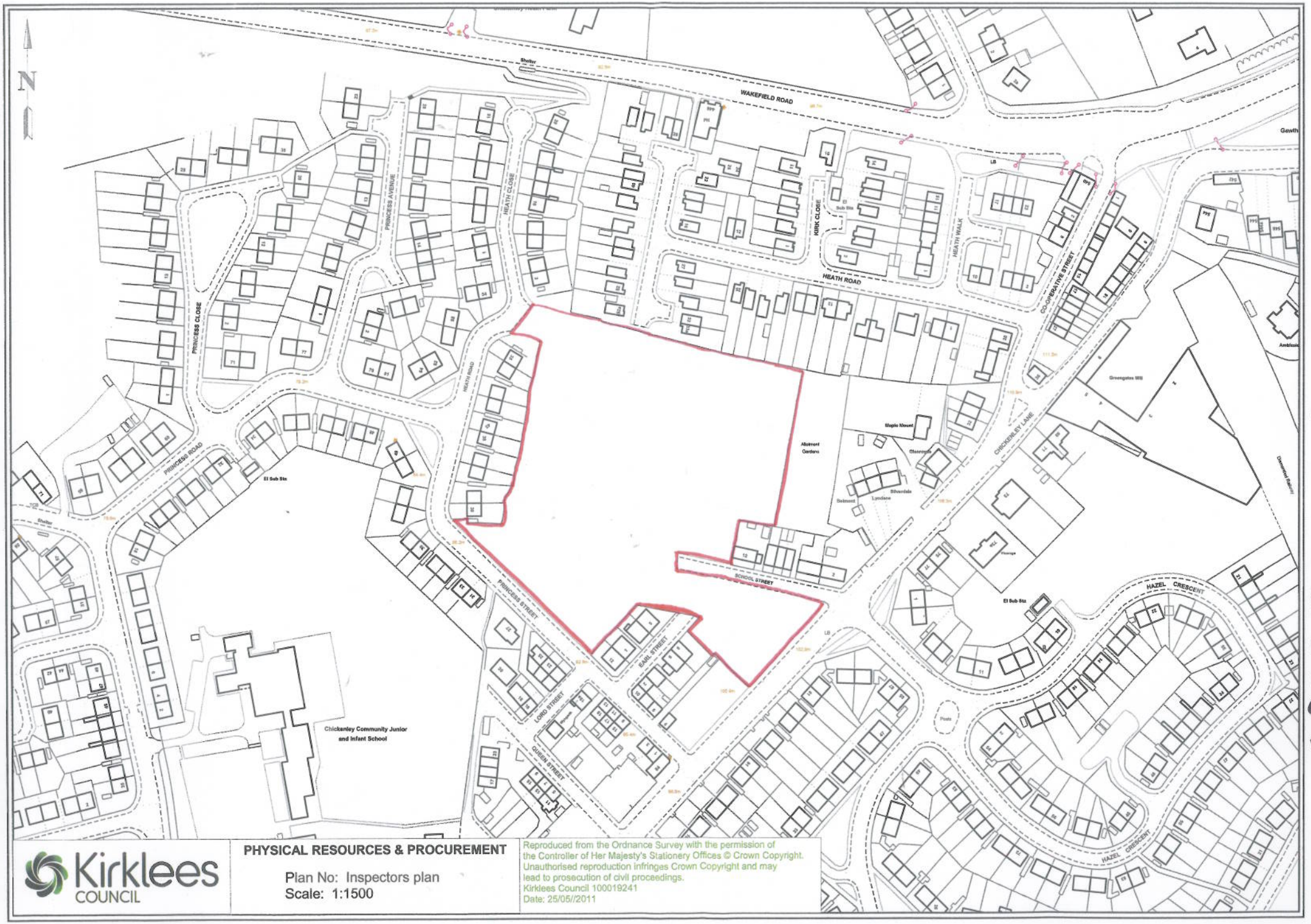

APPENDIX 1

PHYSICAL RESOURCES & PROCUREMENT

Plan No: Inspectors plan
Scale: 1:1500

APPLICATION TO REGISTER LAND OFF CHICKENLEY LANE, CHICKENLEY, DEWSBURY AS A TOWN OR VILLAGE GREEN
APPLICATION NUMBER KC/VG6

APPENDIX 2

REPORT

By
Alan Evans
Kings Chambers
36 Young Street
Manchester
M3 3FT

CONTENTS

REPORT

Summary of recommendation: the Application should be rejected.

Introduction

1. I am instructed in this case by Kirklees Council in its capacity as registration authority for town or village greens ("the Registration Authority") in order to assist it in determining the application of RAGE (Residents Against Greenbelt Exploitation) c/o Mrs Sally Mastronardi of 12 School Street, Chickenley, Dewsbury ("the Applicants") for the registration of land off Chickenley Lane, Chickenley, Dewsbury as a town or village green ("the Application").

2. My instructions were to hold a public inquiry to hear the evidence and submissions both for and against the Application and, after holding the inquiry, to prepare a written report to the Registration Authority containing my recommendation for the determination of the Application.

3. I held the inquiry at Dewsbury Town Hall on 29th, 30th June and 1st July 2011. An evening session was held on 30th June 2011 to accommodate any members of the public wishing to speak.

4. At the inquiry the Applicants were represented by Mr Chris Maile and Kirklees Council was represented in its capacity as objecting landowner by Ms Ross Crail of counsel. I thank both Mr Maile and Ms Crail for the valuable assistance which their advocacy at the inquiry provided. I also thank Ms Deborah Wilkes of the Registration Authority for the administrative support which she gave me at the inquiry.

5. On the third and final inquiry day, but before business began in Dewsbury Town Hall, I made a thorough inspection on foot of the land subject to the Application. With the agreement of the parties this inspection was carried out on an unaccompanied basis. After the site inspection I drove extensively around the surrounding area (again unaccompanied).

The Application

6. The Application was made on form 44 which is endorsed as having been received by the Registration Authority on 26th October 2010.

7. The members of RAGE identified as the Applicants, apart from Mrs Mastronardi, were Amanda Boulton of 23 Heath Road, Chickenly, Dewsbury, Jenny Evans[1] of 17 Heath Road, Chickenley, Dewsbury and Denise Hollas of 21 Heath Road, Chickenley, Dewsbury.

8. The Application sought the registration of land off Chickenley Lane, Chickenley, Dewsbury, said usually to be known by the name of Chickenley Heath, as a town or village green. I will refer hereafter to the land which is the subject of the Application as "the Application Land".

9. The Application was made under section 15(1) of the Commons Act 2006 ("the 2006 Act") on the basis that section 15(2) applied. Section 15(2) provides that it applies "*where –*

   (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes on the land for a period of at least 20 years; and

   (b) *they continue to do so at the time of the application.*"

10. Question 6 on the application form relating to the locality, or neighbourhood within a locality, in respect of which the Application was made was answered by reference to "Chickenley Heath bordered by School Street, Earl Street, Princess Road/Street, Heath Road & Chickenley Lane." Reference was also made to "Dewsbury East Ward". This answer left it unclear what the Applicants' case was on the issue of locality/neighbourhood and the plans which were initially supplied in this respect did not resolve matters. However, the issue was clarified by Mr Maile at the outset of the inquiry. Mr Maile made it clear that the Application was put forward on the basis of a neighbourhood within the locality of the Dewsbury East Ward and submitted a plan

[1] On Mrs Evans's witness statement her first name is spelt "Jennie" rather than "Jenny".

showing the boundaries of the neighbourhood marked with a green line. I will call this "the Neighbourhood Plan". The area lying within the green line was said to be called Chickenley Heath. The boundaries of the area so identified extended from Wakefield Road in the north to Ossett Lane/Pildacre Lane in the south and from Mill Lane and the Wakefield Road Recreation Ground in the west to Cedar Drive and Hazel Close and Hazel Crescent in the east. Mr Maile adopted a fall-back position in the event that the outstanding issue in *Leeds Group plc v Leeds City Council*[2] (*"Leeds Group plc"*) were to be decided adversely to the Applicants in the Court of Appeal by a finding that no reliance could be placed upon use by the inhabitants of a neighbourhood until 20 years from the coming into force of the amendment of section 22 of the Commons Registration Act 1965 ("the 1965 Act") by section 98 of the Countryside and Rights of Way Act 2000 ("CROWA") which introduced the notion of neighbourhood into this area of the law. Mr Maile said that, in this event, the Applicants would rely on the locality of the Dewsbury East Ward.

11. The Application was accompanied by a statutory declaration of Mrs Mastronardi of 7th September 2010, 35 completed evidence forms and a number of photographs.

12. The Council in its capacity as owner of the Application Land objected to the Application in writing on 11th February 2011.

13. RAGE in turn submitted a written response to the objection.[3]

The Application Land

14. In this section I provide a description of the Application Land as it stands now. However, there was general agreement at the inquiry that the Application Land has changed little over the years. The starting point for the description is that the Application Land can be divided into 2 areas. The first area, which forms the south eastern part of the Application Land, is regularly cut by the Council during the growing season and forms a piece of managed amenity grassland. I will refer to it as the Mown Area where appropriate to do so. The Mown Area forms a rough triangle in

[2] [2010] EWCA Civ 1438.
[3] My copy is undated.

shape. It is bordered by Chickenley Lane to its south east and by School Street to its north east. Earl Street is located to the west. The Mown Area slopes down away from Chickenley Lane. The Mown Area is the site of the former Chickenley Lane Council School which was demolished in the early 1960s when the land in question was appropriated for housing purposes according to minutes of the former Dewsbury Borough Council. To the south west of the Mown Area and fronting on to Chickenley Lane is another patch of managed amenity grassland which is roughly rectangular in shape and which is separated from the Mown Area by some shrubs. This patch of land does not form part of the Application Land.

15. The Mown Area is freely accessible from Chickenley Lane, School Street and Earl Street.

16. The second area of the Application Land consists of an area of rough, unmanaged grassland which is much larger than the Mown Area and lies to its west and north. I will call this area the Main Area to reflect its size in comparison to the Mown Area and will so refer to it where appropriate to do so. The south eastern boundary of the Main Area is marked by the end of School Street, adjacent to which the Main Area joins the Mown Area, and by the rear of properties on the north western side of Earl Street. The south western boundary of the Main Area is banked against Princess Street. The western boundary of the Main Area lies to the rear (east) of the gardens of houses on Princess Street and its continuation as Heath Road. The northern boundary of the Main Area abuts properties (to its north) on Heath Close and then another part of Heath Road. This part of Heath Road is not connected to that section of Heath Road first referred to. To the east the Main Area is bounded by a strip of former allotment gardens from which it is separated by a wooden fence. The southern part of the eastern boundary of the Main Area forms a right angle around number 12 School Street.

17. The edges of the Main Area are marked in large part by the presence of coarse vegetation, scrub and bushes. There is a line of trees on the western boundary of the Main Area to the rear (east) of the gardens of the houses on Princess Street and Heath Road. There is a small water body (approximately 1m by 2m) in the north eastern

corner of the Main Area (usually referred to in the evidence of those in support of the Application as a pond).

18. The Main Area lies on a pronounced slope with a fall in a general east to west direction.

19. There is a very distinct worn footpath which runs diagonally across more or less the centre of the Main Area from the end of School Street in the south east to Heath Road in the north west (where Heath Road leads into Heath Close). This path has a marked downward gradient from School Street at the top to Heath Road at the bottom. There are also other less well worn paths evident on the Main Area which include: one leading off the main diagonal path near the end of School Street to run roughly parallel with the eastern boundary of the Main Area; one which continues the last path but runs roughly along the northern boundary of the Main Area to join the bottom of the main diagonal path; one running from School Street to Princess Street; and one running from Princess Street to the rear of the houses on Princess Street and Heath Road to join the bottom of the main diagonal path.

20. There is free access to the Main Area from the end of School Street, from Princess Street and from Heath Road where it joins Heath Close. There is also access to it from the end of the cul-de-sac section of that part of Heath Road which lies to the north of the Main Area and some houses on this part of Heath Road have direct access from their back garden on to the Main Area.

21. In order to complete this survey of the Application Land, there are 3 other matters which I need to mention.

22. The first is that at least the northern part of the Main Area was previously let for grazing by the Council on annual licences which had lasted from 1982-1991 when it was decided not to re-let because of the possibility of developing the Application Land for residential purposes.[4]

[4] I say "at least" in the main body of the text above because, whilst the matter I refer to there is clearly documented, the Council's original objection of 11th February 2011 also suggested (paragraphs 103-111) that

23. The second is that in 2004 an application for a Definitive Map Modification Order ("DMMO") was made by Mrs Mastronardi to add various footpath routes across the Main Area. The routes consisted of: the diagonal route from School Street to Heath Road where the latter joins Heath Close (A-C); a route from School Street to Princess Street (A-D); a route to the rear of the houses on Princess Street and Heath Road (D-C); a route from the termination of route A-C from School Street to Heath Road at point C to the entrance to the Main Area from the cul-de-sac on that part of Heath Road to the north of the Main Area (C-B); and a route forming a short cut between the route from School Street to Heath Road (A-C) and the entrance to the Main Area from the last-mentioned cul-de-sac at point B. The DMMO application has not been determined.

24. The third concerns the planning position in respect of the Application Land. On 25th February 2008 the Council granted outline planning permission for a residential development of 44 units and associated access in respect of the Application Land. The subsequent reserved matters approval was granted to Wates Living Space on 21st October 2010 and authorised the erection of 36 flats with associated drainage, landscaping, car parking and services. In broad terms the proposals involve the construction of the majority of the flats on the north eastern part of the Main Area but with a block also to be built on the Mown Area facing Chickenley Lane. Access is to be via School Street. The remainder of the Main Area is proposed to become landscaped public open space with footpath provision across it. The planning proposals were subject to the usual consultation processes.

Evidence in support of the Application

25. I turn now to report the evidence in support of the Application and I provide a summary of the oral evidence which I heard at the inquiry. This summary does not purport by any means to be a verbatim account but is intended simply to convey the flavour of the main points which were made by the witnesses.

---

the rest of the Application Land was also let on grazing tenancy but there are no records for this apart from a faint marking on the relevant "Terrier" card.

26. **Jennie Evans** said that she had lived at 17 Heath Road since 1998 and that she accessed the Application Land via a gate at the bottom of her garden which backed on to the Application Land. There was a view of some of the Application Land from her property. She used the Application Land herself on average about once a week, as did her husband, and had seen others using it for various recreational activities including walking, dog walking, fruit picking, children's play of various kinds (including den-building, tig, hide and seek, playing with balls and playing in the snow/having snowball fights). She had seen an annual bonfire on 5th November each year, which she had watched out of her window, and which took place close to the entrance to the Application Land from School Street. Mrs Mastronardi organised this but Mrs Evans did not know who went because she had not known Mrs Mastronardi very long. Mrs Evans's own use consisted of walking in the top part of the Application Land (that is, the north eastern part of the Main Area), picking loganberries (found on bushes behind her house) and blackberries and taking her young son on to the Application Land, particularly to view tadpoles in the pond. Use of the tracks on the Application Land was common but it was not the main use and her own use was not of the tracks. Horses used to be tethered on the Application Land. The level of use of the Application Land was now slightly higher than it had previously been. Mrs Evans felt that her neighbourhood was Chickenley. Chickenley Heath was at the top of Chickenley. If someone from the area asked where she lived she would say that she lived in Chickenley Heath. Her street was in Chickenley Heath but she was not able to say which other streets were.

27. **Amanda Boulton** said that she had lived at 23 Heath Road for about 10 years and that her garden backed on to the Application Land. She used the Application Land about once a month. She would walk to the end of Heath Road and enter via the access from its southern cul-de-sac and then follow a route parallel to the back of the houses on Heath Road before making a right angled turn to follow a route parallel with the eastern boundary of the Main Area leading to School Street. Her house overlooked the Application Land and she described seeing a number of dog walkers (about 4) using it on a daily basis and children building dens in the summer months near the Heath Road entrance referred to above and near the end of School Street. The activity which she saw was on the top part of the Application Land (being that part of the Main Area north of a notional line drawn west from the end of School Street to Princess Street).

Most dog walkers would often walk into the middle of this top part of the Application Land and let their dogs off the lead in a spot about half way between School Street and Heath Road so that they could run loose all over. The main use of the Application Land was for dog walking. She also saw people come in wellingtons and walk all over. She had on a few occasions seen a man a train a hawk or other bird of prey on the Application Land. She had also seen children riding bikes on the Application Land and playing there, fruit picking by groups of children (most notably over the last couple of years) and horses a few years ago. The main use of the diagonal path across the Application Land from the end of School Street to Heath Road was by children going to or coming from school. She had never been invited to the annual bonfire held near the end of School Street. If someone local asked her where she lived her answer would be that her house backed on to Chickenley Heath. Chickenley Heath meant to her the Application Land and the surrounding area. Mrs Boulton produced various documents showing the name Chicklenley Heath used as part of the address for her property. Mrs Boulton's explanation for the fact that, for the purposes of the inquiry, she had described additional activities on the Application Land (children playing, riding bikes and making dens) which had not been mentioned in her evidence form was that, in respect of the latter, she had simply put down what had come into her mind at the time.

28. **Julia Brown** said that she had lived at 8 Earl Street for 16 years before which she had lived at 91 Chickenley Lane. She and her family (her husband and 2 boys, who were 10 and 8 when the move to Earl Street took place) had used all of the Application Land. Her sons had played many games on the Application Land. They had always had dogs and used the Application Land daily with their dogs. They had 7 Jack Russells which they trained on the Application Land, using the area accessed by turning right at the end of School Street. Bonfires were held on the Application Land every year at the side of School Street and were attended by friends and neighbours. They had been going on for 15 years. Barbeques had been held on the Application Land (on the Mown area), waterslides had been set up there for the children, berries had been picked and activities had taken place in the snow. Children used the Mown Area for a variety of ball games such as football, cricket and rounders and did other things on the rest of the Application Land such as playing hide and seek, building dens or trying to catch tadpoles and frogs in the pond. Her husband used to ride off-

road bikes on the rough part of the Application Land, sometimes with her sons. Mrs Brown said that her neighbourhood consisted of Hazel Crescent, Princess Street, Chickenley Lane and Earl Street. She marked the area on a plan as a rough figure of eight shape. It was the vicinity in which she and all her family and friends lived. Chickenley was a larger area, which Mrs Brown also marked on a plan, extending from Wakefield Road in the north to Ossett Lane in the south and from Mill Lane in the west to Cedar Drive in the east.

29. **Sally Mastronardi** of 12 School Street said that she was a lifelong resident of Chickenley, having purchased her present house about 20 years ago,[5] but had always lived close by. She was part of the RAGE Group whose aim it was to keep the Application Land as it was. There was a good view of Application Land from 12 School Street. Mrs Mastronardi said that her own use of the Application Land varied depending on the season and weather but was at least 3 times a week. She had 2 children, now aged 22 and 16, who had both used the Application Land. Amongst other things they had learnt to ride their bikes there and her daughter had taken part in drum majorette activities on the Application Land. The family had walked a dog freely on the Application Land (not including the Mown Area) for some 15 years but the dog had died about 4 years ago. There had been an annual community bonfire for friends and neighbours near the end of School Street for approximately the last 20 years. Mrs Mastronardi had seen others taking part in various forms of recreation (in which she had also participated), including walking, dog walking, children's play, ball games (cricket, football and rounders), den building, pond activities, picnics, sunbathing, snowball fights, kite flying, playing with bows and arrows and toy guns and berry picking. She had organised waters slides and swing balls as family games. Ball games took place on the Mown Area but could be played on the rest of the Application Land. Various of the other activities (for example, picnics and sun-bathing) had also been confined to the Mown area. There was always some type of activity taking place and the whole of the Application Land, every last bit of it, was used. In relation to the question of neighbourhood Mrs Mastronardi said that the area

[5] The purchase of 12 School Street would appear to have been in 1992 as referred to in the statement of Ernesto Mastronardi. The 1992 date is consistent with a letter which Mrs Mastronardi wrote to Kirklees Council on 22nd July 1992 inquiring about the possibility of acquiring part of the Council's land to compensate for the loss of garden space brought about by the building of an extension to the property. The letter refers to 12 School Street as having been recently purchased.

known as Chickenley Heath (the case put on behalf of the Applicants being that this is the name by which the area edged green on the Neighbourhood Plan is known) extended to the north and south of Wakefield Road, including, to the north, the Heath Cottage Hotel and Chickenley Heath Farm and including, to the south, only the top end of Chickenley. The area edged green on the Neighbourhood Plan, however, represented the whole of Chickenley. Mrs Mastronardi said that she was seeking to explain where the name Chickenley Heath derived from. Heath Road was in Chickenley Heath. The pro-forma witness statements which were submitted in evidence for the purposes of the inquiry were available to be downloaded from RAGE's website. Mrs Mastronardi was not able satisfactorily to explain how what she had written by way of objection in the planning process in April 2010, namely that "no one uses bottom area of field", was consistent with her evidence to the inquiry.

30. **Adam Hutchinson** was not called as a witness by Mr Maile but spoke as a member of the public at the evening session of the inquiry held on 30th June 2011. He said that he was from Chickenley and that he had bought 31 Heath Road in 2008 and that he had had a vegetable patch on the Application Land for 2 years.[6] He had seen people jogging, dog walking and flying kites on the Application Land. He said that everyone was invited to Mrs Mastronardi's bonfires. He was concerned about the effect of the proposed development on wildlife on the Application Land, including great crested newts and shrill carder bees.

31. **Simon Wilson** also spoke as a member of the public at the evening session on 30th June 2011. He said that he lived at 27 Heath Road, having moved in 8 years ago, although he was presently dividing his time between there and York where his father, who had suffered a heart attack, lived. He had 3 children who used the Application Land daily because it was somewhere nice and safe. Residents had been told to get using the Application Land if they did not want the development to happen.

32. **Hannah Mastronardi**, Mrs Mastronardi's daughter, gave evidence at the evening session on 30th June 2011 but as a witness called by Mr Maile. She said that she was

[6] In a letter which he had written by way of objection in the planning process Mr Hutchinson, however, wrote that his vegetable patch was on the land which had been allotments not so long ago.

born at 12 School Street and had lived there all her 16 years. She had used the Application Land every single day of her life, either to get to school, walking with friends or activities. She had used it to learn to walk, run, play, ride bikes, ride motorbikes and ride scooters. She also used the Application Land to meet friends. Numerous parties had been held both opposite and behind her house. Her family and her street had held barbeques for the whole of Chickenley; they told people walking by that they were welcome to come. She had made dens in various areas on the rear part of the Application Land (that is, the Main Area), gone fishing in the pond and ridden horses up and down the hill. Loads of horses came up and down the Application Land; she saw them all the time. She could not remember how long the pond had been there. There had been waterslides and football games during the spring and summer on the Mown Area as well as rounders and she had picked blackberries and wild raspberries when in season whilst, in the winter, she had gone sledging and built snowmen with friends. She had taken part in drum majorette and baton twirling practice on the Application Land. She had gone out to play on the Application Land whatever the weather. She would have played with a group of anything from 2-12 children.

33. **Ernesto Mastronardi**, Mrs Mastronardi's husband, spoke briefly at the evening session on 30th June 2011 as a member of the public only to draw attention to a letter written on his behalf to Kirklees Council by a building consultant in 1992 dealing with the issue of the correct certification for the purposes of the planning application in respect of the then intended extension works to 12 School Street. The letter has no relevance to the issues at hand. However, I have taken into account so far as relevant Mr Mastronardi's evidence questionnaire and witness statement, which he did not otherwise refer to when he spoke, in writing this report.

34. **Timothy Fairfield** of 11 Kirk Close, Mrs Mastronardi's brother, also spoke briefly as a member of the public at the evening session on 30th June 2011 and said that his address was Chickenley Heath. It was absurd of the Council's witnesses to suggest that the Application Land was not used. Mr Fairfield had also completed a pro-forma witness statement which he did not refer to. I comment later on the weight which can be attached to these pro-forma witness statements.

35. **William Fairfield** of 12A School Street, Mrs Mastronardi's father, was the final person to speak as a member of the public at the evening session on 30th June 2011. He said that he had observed various activities on the Application Land: dog walking; horse riding; rugby and football (on the Mown Area); running; riding bikes and scooters; children going to the pond with buckets. His granddaughter had played there with batons and there had been water slides. I have also taken into account Mr Fairfield's witness statement.

36. In addition to the oral evidence I have also taken into account all the written and documentary evidence submitted in support of the Application and all the additional written and documentary evidence submitted thereafter. This evidence includes: the 35 original evidence forms which were submitted when the Application was originally made and any further written material provided by their authors for the purposes of the inquiry by way of supplementation of the original evidence forms; 11 additional evidence forms submitted for the purposes of the inquiry; 22 pro-forma witness statements submitted for the purposes of the inquiry; 1 additional letter submitted for the purposes of the inquiry; 9 supplementary evidence questionnaires from children under the age of 14 submitted for the purposes of the inquiry; 6 "visitor" documents (1 evidence form, 4 pro-forma witness statements and 1 letter); a helpful plan of the addresses of those providing evidence ("the Address Plan"); various tables categorising the evidence; and various photographs including some taken in 2011 after the Application had been made.

Evidence in opposition to the application

37. I turn now to report the evidence in opposition to the Application and, again, I provide a summary of the oral evidence which I heard at the inquiry which does not purport by any means to be a verbatim account but is intended simply to convey the flavour of the main points which were made by the witnesses.

38. **David Ashwell** said that he was senior design manager at Wates Living Space and, as such, had the role of managing the building design process and securing planning consent for the housing development proposed on the Application Land. He had visited the Application Land on 6 occasions between August 2009 and June 2010 in

connection with the housing proposals. All his visits had been on weekdays apart from the last which had been a quick (10-15 minute) visit on a Saturday morning before 8 o'clock prior to a public consultation event. The duration of his visits varied. The second visit had been for between 30-45 minutes. His assessment of the Application Land was that it was sloping, uneven, overgrown and unsuitable for recreational activities. He had observed a number of instances of fly tipping and considered the Application Land to be in a generally neglected state. He had not witnessed anyone using the Application Land for recreational activities but had occasionally seen someone cutting across it on the footpath from School Street to Heath Road. He himself had not ventured on to the Application Land beyond this footpath. Mr Ashwell produced various photographs of the Application Land.

39. **David Jones** said that he was a tractor driver employed by Kirklees Council and that he had cut the grass on the Mown Area with his tractor for the last 10 years. He never went on to the remainder of the Application Land (that is, the Main Area). The cutting took place once a fortnight from the beginning of April to the second week in October each year and it took 6 minutes "tops" to complete the operation. The cutting could take place on any day of the working week and could be in any part of the day depending on weather conditions, where his route took him on that occasion and traffic conditions. The cutting could take place in the wet. He had never seen anyone participating in recreational activities but had sometimes encountered parked cars on the Mown Area which residents moved when they saw that he had arrived and, if they did not do that, he would cut around them. He had sometimes seen bits of debris on the Mown Area.

40. **Clare Berry** said that she was a chargehand employed by Kirklees Council. She said that from 1995 to 2009 she cut the edges of the Mown Area with a rotary ride on mower after the tractor cutting operation had been completed. The cutting took place once a fortnight from the beginning of April to the second week in October each year and would usually take about 20 minutes to complete. As was the case with Mr Jones's tractor cutting work, Ms Berry's cutting could take place on any day of the working week and could be in any part of the day depending on weather conditions, where her route took her on that occasion and traffic conditions. Ms Berry occasionally saw a child kicking a ball on the Mown Area during school holiday

periods but this was infrequent. Other than that she did not encounter any other recreational activities taking place.

41. **Gail Frudd** said that she was an area housing manager employed by Kirklees Neighbourhood Housing ("KNH"), an "arms length management organisation" set up by Kirklees Council in 2002 to manage Council houses and associated land. She had been employed by the Council and then KNH as an estate management officer and then senior estate management officer from approximately 1992 until 2007 when she had been based at the Dewsbury East Housing Office in Chickenley (on Chickenley Lane) save for some 2 years from about mid/late 2003 to about mid 2005 when she was based at the Dewsbury West Office. Her work was area based and her area included the Princess Street/Heath Road/Heath Close area, including the Application Land. With the exception of the Mown Area, the Application Land was always overgrown and was often used for fly tipping. Estate caretakers often received requests and were given orders to clear the rubbish. Vegetation often grew out on to the Princess Street pavement and at times the caretakers had to cut this back. As well as visiting properties near the Application Land when responding to tenant contact, Ms Frudd also carried out formal quarterly inspections of the Application Land and at no time did she see it being used for recreational activities but only as a short cut between the various surrounding streets. The inspections took about 15 minutes, were during normal working hours and included walking up and down the path on the Application Land behind the properties on Heath Road. She also passed the Mown Area daily when driving to work and never witnessed any activities taking place on there. She did not recall the Application Land ever being used for any organised community activities and considered that its condition was such was that it would have been very difficult for any such activities to take place.

42. **Mike Pillinger** said that he was an area housing manager employed by KNH and that from approximately 1994 to 2008 he was employed by the Council and then KNH as a team leader and area housing manager based at the Dewsbury East Housing Office in Chickenley. The Application Land was visited quarterly by his staff and he personally visited it annually. His annual visit was during normal working hours and lasted about 15-20 minutes. It could take place in summer or winter. At no time did he see the Application Land being used for recreational activities and its only use was

as a short cut between various streets surrounding it. He had never witnessed the Application Land being used for community activities or organised events. The majority of the Application Land was overgrown but there was usually a trampled down path along the route of the short cut. Mr Pillinger saw for himself, and it was also reported to him by his staff, that the Application Land was used for fly tipping and dumped garden waste such as grass and hedge cuttings. Whilst the Mown Area was regularly cut, the rest of the Application Land was maintained only by the periodical removal of dumped items and, following complaints from local residents, the cutting back of vegetation growing over the pavement on Princess Street. Mr Pillinger specifically looked at areas where there had been reports of problems (such as dumping behind the gardens on Heath Road or where the vegetation affected the Princess Street pavement) but did also look at other areas of the Application Land as well.

43. **Mark Muller** said that he was an estate caretaker employed by KNH and between 2004 and 2008 he was employed in this role in respect of the Dewsbury East Ward which included the Chickenley area. He described his understanding of the Chickenley area in terms which corresponded broadly with the area edged green on the Neighbourhood Plan. As part of his duties he inspected the Application Land on average twice a week, all year round, including school holiday times. He could turn up at any time of the day during working hours. The inspections covered the whole of the Application Land. An average inspection (not including necessary work thereafter) lasted about 30 minutes. The longest he had ever been there was 5 hours. He clearly remembered that the Application Land, save for the Mown Area, was always overgrown and had rubbish dumped on it regularly. The rubbish ranged from the usual small types of fly tipping such as a bag of household or garden refuse to televisions, tyres and settees. It was not confined to the perimeter of the Application Land. There was even a small amount of fly tipping around the edges of the Mown Area such as litter and cans. It was difficult to access the rubbish in order to remove it because of the overgrown nature of the surroundings. Mr Muller did not recall encountering anyone using the Application Land for recreational activities although he did see people using the well-worn footpath crossing it from School Street to Heath Road. He once saw someone walking a dog. He occasionally saw kids on the Mown Area when driving past. He had never seen blackberries on bushes on the Application

Land because the bushes were not productive. He had never seen a pond on the Application Land.

44. **Chris Dows** said that he was a principal engineer employed by Kirklees Council in its transportation section and that he was the case officer who dealt with the highways aspects of the reserved matters application in respect of the housing proposals for the Application Land. In that connection he visited the Application Land on 5 occasions between October 2009 and October 2010. His visits were normally in working hours and lasted 20-30 minutes. His impression of the Application Land was that it was primarily an area of rough, uneven grassland with nettles, brambles, bushes and small trees and that some areas were used for fly tipping and the disposal of rubbish. At no time during his visits did he see the Application Land being used for recreational activities. He observed that there were informal footpaths across the Application Land, one from School Street to Heath Road and another off Princess Street which led to the first, but he did not see anyone using them. His interest was in the highway access and he did not pay much attention to the footpaths.

45. **Jeff Keenlyside** said that he was a biodiversity officer employed by Kirklees Council to advise on ecological matters. He had visited the Application Land in 2007 in connection with the outline planning application for the housing proposals there, in 2010 in connection with the reserved matters application and in January 2011 in connection with the present village green application. His visits lasted about 30-45 minutes and consisted of site walkovers, taking him off footpaths and tracks. His professional assessment of the Application Land was that it was of low ecological value and that it did not have any notable value for watching wildlife or nature study as contended for by the Applicants. A small water body had formed in a pit dug on the Application Land but it could not be referred to as a pond of any ecological significance. He thought that this feature was a recent addition to the Application Land. He did not consider that the Application Land supported either great crested newts or shrill carder bees as Mr Hutchinson had claimed. From his observations of the Application Land, he thought that its primary use appeared to be as a short cut from School Street to Heath Road. During his visits he did not see anyone using the Application Land for recreational purposes. General littering and fly tipping was apparent.

46. **Mick Kendall** said that he was a principal development officer employed in the Estates Department of Kirklees Council. Mr Kendall gave evidence in relation to a number of matters concerning the history of the Application Land and produced a body of documentary material to support his evidence. Mr Kendall stated that part of the Application Land (the northern part of the Main Area) had previously been let on grazing licence by the Council and referred to documentation which showed that annual licences had lasted from 1982-1991 when it was decided not to re-let because of the possibility of developing the Application Land for residential purposes.[7] A handwritten endorsement (dated 29th April 1991) on a letter from the Council to the graziers of 15th January 1991 recorded that the land subject to the licence was overgrown and unlevel. Mr Kendall said that he himself could recall the Application Land being let for grazing. Mr Kendal referred to 3 applications made to Kirklees Council to buy or rent small plots of land on the periphery of the Application Land next to houses bordering the Application Land. Mr Kendall also mentioned that there had been various householder encroachments on to land owned by the Council on the edge of the Application Land. He had instructed that no action should be taken in respect of these until the present application was determined. Mr Kendall said that the Application Land was allocated for housing in the Council's Unitary Development Plan which was adopted in 1999. The housing proposals in respect of the Application Land which had now received planning permission were part of a wider project known as Excellent Homes for Life. Mr Kendall produced a selection of representations made by some of the applicants' witnesses in respect of the various stages of consultation during the planning process for the current proposals from 2007 onwards. Mr Kendall also produced documents in connection with the application for the DMMO made by Mrs Mastronardi in 2004 to add various footpath routes across the Application Land as described above (23).[8] Mr Kendall explained that, for the purposes of research and statistical analysis, the Council divided its overall area into small geographical areas which were referred to internally within the Council as "settlements". He produced an accurate plan of the boundaries of the settlement of Chickenley.[9] The boundaries extend from Wakefield Road in the north to Pildacre

[7] As referred to in footnote 4 above, the Council's original objection of 11th February 2011 suggests (paragraphs 103-111) that the rest of the Application Land was also let on grazing tenancy but there are no records for this apart from a faint marking on the relevant "Terrier" card.
[8] Numbers in round bracket in this report refer to previous paragraph numbers in the report.
[9] Plan TVG2_New.

Lane/Ossett Lane in the south and from Mill Lane in the west to Cedar Drive in the east. The plan showed an area very similar to that shown on the Neighbourhood Plan. Mr Kendall had only ever known the area concerned as Chickenley. As for the Dewsbury East Ward, its boundaries had been subject to change over the last 20 years and Mr Kendall produced a plan to illustrate this. Other material produced by Mr Kendall included aerial photographs (from 2002, 2006 and 2009), a plan showing the Council's extensive housing estates in the area[10] and a selection of internet material generated by RAGE and by some of its members on Facebook. A screenshot of the RAGE website home page refers to the Council being urged to stop the development and to consider the needs of Chickenley residents "by changing the land use to much needed recreational use." In respect of the Mown Area, Mr Kendall said that this had been the site of the former Chickenley Lane Council School which had been demolished in the early 1960s when the land in question was appropriated for housing purposes according to minutes of the former Dewsbury Borough Council.

47. **Catherine Scott** said that she was a ward councillor for the Dewsbury East Ward and a centre development manager at Chickenley Community Centre. She had begun work there in October 2004. From 1984-1999 she had lived at 4 Co-operative Street which was close to the Application Land. She owned that property until 2003 when she sold it. She said that, when she lived in the area, she passed the Application Land and had the opportunity to observe it approximately 4 times a day. This occurred when she dropped her son off daily at his grandparents. The route she took was to walk down Co-operative Street, then down Chickenley Lane, turning right on to Princess Street and then on to Princess Road and Princess Lane towards Syke Lane. This route allowed her to observe both the Mown Area and the larger, unmaintained area of the Application Land. She could see the whole of the Mown Area but the view of the remainder of the Application Land was limited. She dropped her son off early in the morning and then went back to her house to get a lift to Leeds. She was dropped back off at 4pm and then went to collect her son. She also passed the Application Land when going to the local shops located at the bottom of the hill. She also visited family in the immediate area and often used the local bus which stopped near the Application Land just above School Street. She continued to see the

[10] The area south of Chickenley Lane is all council housing and there is also a significant area of council housing to the north of Chickenley Lane although there is also some private housing in this area.

Application Land approximately twice a day, and sometimes more frequently, when she travelled to work at the Community Centre. It was her clear recollection that at no stage during the last 26 years had the Application Land been anything other than overgrown and that it had rubbish dumped and burnt on it regularly. She had observed that part of the Application Land adjacent to the end of School Street had been used for parking and repairing a number of cars. She did not recall seeing anyone using the Application Land for recreational activities although she did see people using the well-worn footpath crossing the Application Land between School Street and Heath Road. The name Chickenley Heath did not mean anything to her. Her house had been at the top of Chickenley. Some people called this the Heath if they lived in a street with the word "heath" in its name. The area edged green on the Neighbourhood Plan was not known as Chickenley Heath; it was just Chickenley. The only complaints she had received about the Application Land in her role as a councillor were occasional ones in respect of the side of Princess Street.

48. **Nick Willock** said that he was a major developments planning officer employed by Kirklees Council in its Development Management Section. Mr Willock acted as the case officer for the 2010 reserved matters application for the present housing proposal affecting the Application Land. He also had a detailed knowledge of the outline planning application because he had supervised the planning officer who had handled that application. Mr Willock referred to a description of the Application Land which was recorded in a note prepared by the case officer following a site visit on 8th November 2007 in connection with the outline application. The note stated, inter alia, that part of the site was used as a short cut from Heath Road to Chickenley Lane and that it was used for dumping garden rubbish and was overgrown. Photographs taken by the case officer on that occasion were submitted as part of the Council's original objection of 11th February 2011. Mr Willock stated that he had visited the Application Land on 4 occasions during the period 2008-2010. When he met Mrs Mastronardi and other neighbours on one of the visits, he was there for an hour or two. Other visits were roughly 20-30 minutes. All visits were during normal working hours. He referred to the description which he had given of the Application Land in the report which he had prepared in connection with the reserved matters application and which was based on a visit undertaken in July 2010. The description refers to the Mown Area as comprising grass and a small number of shrubs and the rest of the Application

Land as rougher grassland, with a number of shrubs and small trees, crossed by a number of informal footpaths. Mr Willock produced 3 photographs taken on the occasion of his July 2010 site visit. He said that, based on his observations of the Application Land over a 3 year period, its character and appearance had remained unchanged other than in respect of the normally expected seasonal changes to vegetation. He had not witnessed any people or any evidence of human activity on the Application Land other than the worn appearance of the informal footpaths.

49. **Xanthe Quayle** said that she was a landscape architect and had been commissioned by Kirklees Council in May 2011 to undertake a site survey of the Application Land. The purpose of the survey was to assess the condition of the Application Land, to seek physical evidence of it either having been used for the kinds of sports and pastimes which were relied on by the Applicants or to establish whether any such activities could not have taken place because of the nature of the land. Ms Quayle undertook the survey personally on Friday 13th and Thursday 19th May 2011 between the hours of 1:00-3:00 pm and 4:30-5:30 pm respectively. Her findings (which were set out in a report) were that: the principal use of the Application Land was as a short cut between School Street and Heath Road; evidence of fires on the Application Land appeared to be linked to anti-social use – disposal of garden refuse and fly tipping – rather than community use; the Application Land was extensively used for fly tipping and there was evidence of under-age drinking in the form of numerous broken bottles, both of which made it unsuitable for children's play; there was a lack of evidence of children's play; the presence of football posts and evidence of a bonfire in the adjacent former allotments area combined with the available access to this area suggested that this area was used for these activities in preference to the Application Land; the scope for snow activities was limited by the undulating nature of the majority of the Application Land; it was very unlikely that the Application Land (with the possible exception of the main footpath between School Street and Heath Road) was used for cycling, picnicking or horse riding; and the presence of tall vegetation across the majority of the Application Land supported the view that it was predominantly unused. She saw young people and dog walkers on the main path but saw no children playing on the Application Land despite the fact that her second visit was on a warm and sunny afternoon after school hours.

50. As part of its objection the Council also produced witness statements from Steve Hopwood and Bronagh King, who were not called as witnesses. The former statement confirmed that the author had taken photographs of the Application Land in 1994 (which had been submitted with the Council's original objection) in connection with his work as a planning officer and a planning application for housing development on the Application Land which had been made at that time but which was subsequently withdrawn. The latter statement disputed points made by the Applicants about the accessibility of facilities at Chickenley Junior, Infant and Nursery School on Princess Road.

51. I have also taken into account the Council's original written objection of 11th February 2011.

Submissions on behalf of the Council as objecting landowner

52. Detailed submissions on behalf of the Council as objecting landowner were made in respect of a large number of issues. In reporting these submissions I will use what has become the conventional terminology to refer to limb (i) and limb (ii) cases, a limb (i) case being one where the application is put on the basis of use by a significant number of the inhabitants of a locality and a limb (ii) case being one where the application is put on the basis of use by a significant number of the inhabitants of any neighbourhood within a locality.

53. First, submissions were made in respect of the issue of locality/neighbourhood. It was submitted that no formal application had been made to amend the Application to rely on the area edged green on the Neighbourhood Plan and that it was too late to do so. Next, it was submitted that the Applicants' fall-back position of reliance on the Dewsbury East Ward (10) would not avail them because: (i) an electoral ward could not be a locality; (ii) there had been significant changes to the boundaries of the Dewsbury East Ward during the relevant 20 year period, especially in 2004, and this was fatal; and (iii) the ward was too big to support a finding of use by a significant number even if the Applicants' evidence were to be accepted in full; the users were all concentrated around the Application Land and were insufficient in number and distribution.

54. In respect of point (i), reliance was placed on the doubt expressed by Sullivan J in *R (Laing Homes) v Buckinghamshire County Council*[11] (*"Laing Homes"*) whether an electoral ward could be a locality.[12]

55. In respect of point (ii), it was submitted that the relevant locality should have continuously existed as a distinct legal entity with the same boundaries. Any more than *de minimis* changes in the boundary before a complete 20 year period of use had expired would re-start the clock for the purposes of section 15 of the 2006 Act. There had to be identity between the locality relied on from the start of the period and the locality relied on at the end. If material changes in boundary and population were to be overlooked, by the end of the period one might be contemplating a very different set of inhabitants in terms of both number and geographical location than at the outset of, and/or at various times during, the period. Parliament could not have intended use by one set (or a series of sets) of inhabitants to lead to rights being acquired by another set which might have very little in common with the first (or subsequent) set(s). There should be equivalence between the nature of the use and the rights acquired. In this respect reliance was placed on the speech of Lord Hope in *R (Lewis) v Redcar and Cleveland Borough Council*[13] (*"Lewis"*) where he said that *"the theme that runs through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other."*[14] In elaboration of this point, Lord Hope said that it was the acts which had been acquiesced in, and not *"their enlargement in a way which made them more intrusive and objectionable"*, that a landowner could not afterwards interfere to stop.[15]

56. Turning to point (iii), it was submitted that the requirement for use by a significant number of the inhabitants of a locality, or of a neighbourhood within a locality, where the same point would apply, would not be satisfied unless the evidence showed that throughout the 20 (or more) year period relied on by the applicants, users came from

[11] [2003] EWHC 1578 (Admin).
[12] At paragraph 138.
[13] [2010] UKSC 11.
[14] At paragraph 71.
[15] Ibid.

all over the relevant locality/neighbourhood. It was submitted that, if it were sufficient that users came from just one part of the locality/neighbourhood, the locality/neighbourhood requirement would be rendered meaningless. In substance, one might just as well draw an arbitrary red line on a plan around the area from which users came which is just what Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire Council*[16] (*"Cheltenham Builders"*) had held a locality or neighbourhood not to be.[17] Moreover, it would create a mismatch between the persons whose user led to the acquisition of rights and the persons who enjoyed the benefit of them, which would be contrary to general prescriptive principles and impose a much greater burden on the land than the landowner had acquiesced in. Again, reliance was placed on the principle of equivalence referred to by Lord Hope in *Lewis.*

57. In respect of the way in which the case was put by reference to a neighbourhood, it was submitted that an electoral ward could not be a locality for a limb (ii) case as much as it could not be a locality for a limb (i) case, although it was conceded that, in a limb (ii) case, it might not matter that there had been changes to the boundaries of the locality over the relevant 20 year period given the relaxed stance taken to the issue of locality in the limb (ii) context in *Leeds Group plc* and the fact that, in a limb (ii) case, locality could mean localities.[18] It was recognised, however, that in a limb (ii) case, a locality did not have to be any particular size so (by reference again to *Leeds Group plc)* the ecclesiastical parish of Dewsbury All Saints or even the Borough of Kirklees could be a candidate locality for the area edged green on the Neighbourhood Plan.

58. It was harder to argue that formal amendment was required for a locality in a limb (ii) case because what really mattered and what had to be identified was the neighbourhood, the area the inhabitants of which had to have used the land in question in the requisite qualifying manner and who would acquire rights on registration. Nevertheless, it was maintained that formal amendment was required to alter the neighbourhood (or locality in limb (i) case) because form 44 required applicants to commit to a particular area and the substratum of the reasoning in *Laing*

[16] [2003] EWHC 2803 (Admin).
[17] At paragraph 43.
[18] See the speech of Lord Hoffman at paragraph 27 in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 (*"Oxfordshire"*).

Homes[19] (concurred in by Vos J in *Paddico (267) Limited v Kirklees Metropolitan Council*[20] (*"Paddico"*)) had gone. Further, a registration authority had no investigative duty to look for a means of improving an applicant's case nor any duty to reformulate such case (per Lord Hoffman in *Oxfordshire*).[21] It had to determine a section 15 application as presented or amended.

59. The area edged green on the Neighbourhood Plan was not the neighbourhood of Chickenley Heath. On the evidence, there was no discrete neighbourhood of that name, whether the whole of the area edged green or any part of it. Reference was made in particular to the evidence of Ms Scott, the fact that the evidence questionnaires and pro-forma witness statements relied upon by the Applicants did not mention Chickenley Heath and to Mr Hutchinson's having proclaimed himself to be from Chickenley. There were few documentary references to Chickenley Heath and there was no consistent evidence from the Applicants' witnesses as to what Chickenley Heath might comprise. A neighbourhood had to have defined boundaries established by objective evidence (as per HHJ Waksman QC in *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council*[22] (*"the Warneford Meadow case"*) and was not a state of mind. Reference was made to the differing accounts of the neighbourhood by, *inter alia*, Mrs Evans, Mrs Boulton, Mrs Brown and Mrs Mastronardi. Ms Crail accepted, however, that if I were to think that the area edged green on the Neighbourhood Plan was a neighbourhood, albeit one called Chickenley rather than Chickenley Heath, it would be hard to contend that there was anything to prevent the matter being considered on the basis of the correct name, Chickenley, being ascribed to that neighbourhood. No submissions were made that the area edged green lacked cohesiveness or did not have appropriate boundaries.

60. If the view were to be taken that the area edged green on the Neighbourhood Plan (which was Chickenly and not Chickenley Heath) met the criteria for a neighbourhood, then the Applicants had not shown use by a significant number of its inhabitants for lawful sports and pastimes throughout 20 years. What was a significant

[19] See paragraphs 135-137 and 142-143.
[20] [2011] EWHC 1606 (Ch) at paragraph 81.
[21] At paragraph 61.
[22] [2010] EWHC 530 (Admin) at paragraph 79.

number was to be viewed relative to the size of the area and its population. "General use by the local community"[23] connoted both numbers and distribution. The argument on distribution was developed by reference to matters set out above (56) where the same point is explained by reference to a locality. Here the witnesses were from the immediately surrounding streets and only a handful had given oral evidence.

61. I invited Ms Crail to consider the remarks of Vos J in *Paddico* where the judge did not accept an argument based on "spread" or "distribution". In paragraph 106 i) of the judgment Vos J said that he *"was not impressed with Mr Laurence's suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives to me such an illogical and unfair conclusion."* These observations were made in the context of consideration of the unamended definition of a town or village green in section 22(1) of the 1965 Act. Vos J returned to the matter in paragraph 111 where, in the context of considering the amended definition in section 22(1A) introduced by section 98 of CROWA, he said again that he did *"not accept Mr Laurence's spread or distribution point."* Ms Crail submitted that the present case was in any event different on the facts from *Paddico* in that here there was no scattering of users from further away. She also submitted that Vos J had primarily had to consider the unamended definition of town or village green in section 22(1) of the 1965 Act and thus had not primarily had to consider the effect of the introduction of the requirement for a significant number of inhabitants by CROWA. Ms Crail also submitted that Vos J's remarks in respect of the amended definition were obiter and reminded me that Carnwath J had said in the case of *R v Suffolk County Council, ex parte Steed*[24] that he did *"not think that a piece of land used only by the inhabitants of two or three streets would naturally be regarded as a 'town or village green.'"*[25] Overall it was, therefore, submitted that Vos J's remarks were to be distinguished.

[23] See Sullivan J in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC (Admin) (*"McAlpine Homes"*) at paragraph 71.
[24] (1996) 76 P & CR 487.
[25] At page 502.

62. Submissions were then made in respect of the written evidence relied on by the Applicants. It was argued that no weight could be placed on this evidence which could at best only be corroborative (*McAlpine Homes*[26]). The written evidence had not been subject to cross examination. In a case such as this, where there were 3 distinct categories of land (the Mown Area, the footpaths and the remainder), the failure to identify what area was allegedly used for what activity made the evidence valueless. This was not a case of a field which was the same all over. Many of the original evidence questionnaires did not even give dates of alleged use, let alone frequency. The pro-forma witness statements did not give addresses and contained obvious mis-statements, for example, as to spectating at sporting events; there was no evidence of what a reasonable person would call sporting events. The content of the pro-forma witness statements and the circumstances in which they were elicited made it likely that people filled them in without properly reading and understanding them. Some people had adapted them but some had not. There was a large question mark over whether every statement in them was true; some such as those in relation to sporting events plainly were not.

63. It was next submitted that there was in any event little for the written evidence to corroborate. It was argued that the evidence of Mrs Evans, Mrs Boulton and Mrs Brown described only limited use of the Application Land. It was suspicious that Mrs Boulton had added, in providing evidence to the inquiry, mention of activities which she had not referred to in her evidence form: children playing, riding bikes and making dens. The evidence of Mrs Mastronardi and her daughter, Hannah Mastronardi, was exaggerated. Mrs Mastronardi's evidence was severely dented by the contradiction between her evidence to the inquiry that every last bit of the Application Land was used and what she had written by way of objection in the planning process in April 2010, namely that "no one uses bottom area of field". It was also to be noted that in her application for the DMMO in 2004 Mrs Mastronardi had written the description of "wasteland" on a plan showing the routes to be added and that on a screenshot of the RAGE website homepage the Council was urged to stop the development and consider the need of Chickenley residents "by changing the land use to much needed recreational land" while a Facebook page referred to the fact

[26] See paragraphs 52 and 75.

that residents "want a park". It was surprising that Miss Mastronardi could not say how long the pond had been there; either she did not use the Application Land as often as she claimed or she did not want to admit that the pond was recent. There were unsatisfactory features of the evidence given by other witnesses. For instance, Mr Hutchinson's written evidence gave the impression that his vegetable patch was on the former allotments land and not on the Application Land as he stated orally at the inquiry. The suspicion was that use had geared up recently once the bid for village green status had been conceived. In effect, only 2 families, the Mastronardis and the Browns, had given evidence of 20 years' use. That was a very small amount of evidence in relation to the whole of Chickenley. Both families felt themselves very disadvantaged by the development the Application, if successful, would prevent. This was clear from Mrs Mastronardi's and Mrs Brown's correspondence in respect of the development during the planning process.

64. It was also submitted that: many activities could only have taken place on the Mown Area; the evidence in relation to bonfires did not help the Application because the main bonfire event was only once a year, was confined to one place, was not lawful because it caused injury and damage to the land by way of scorching and scarring and was not open to all the community (because Mrs Evans and Mrs Boulton had not gone to the events); berry picking was seasonal and, according to Mr Muller, there were few blackberries; wildlife watching was not claimed as a prominent activity in the evidence but there was not much wildlife of particular interest anyway; and riding motorcycles was not lawful under section 34 of the Road Traffic Act 1988. In relation to the issue of use not being lawful if it caused injury or damage to the land, I was referred to Lord Hope's statement to this effect in *Lewis*[27] (and the further reference to this effect in *the Warneford Meadow Case*.)[28] With reference to the specific issue of the annual bonfire, my attention was also drawn to the remarks of Lord Walker in *Lewis* that a right to hold an annual bonfire might be established as a stand-alone custom but would *"be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds)."*[29]

[27] At paragraph 67.
[28] At paragraph 90.
[29] At paragraph 47.

65. The photographs submitted in support of the Application did not prove frequent all-over use of the Application Land. The 2011 photographs post-dated the Application and the relevant period. They were plainly self-serving and were taken to bolster the Application. They followed an increase in use and could have been staged. In any event, they proved no more than at a particular moment in time at a particular place one or more people did something. That did not prove that at other times and/or in other places people did the same or similar things. That was true of the older photographs as well. No one in fact produced or spoke to the photographs in evidence and so no cross examination was possible.

66. The evidence of the witnesses called on behalf of the Council in its capacity as objecting landowner was consistent with what could be seen on earlier photographs, including aerial photographs, and with what could now be seen on the ground. There was a limited number of defined footpaths to which people kept. The rest of the Main Area was undisturbed. Everyone was agreed that the Application Land had not changed much over the last 20 years. The case was not one where use of the paths could be viewed as use of the whole. People could trample down the long grass and go all over but they evidently did not do this and had not done it. The evidence of use apart from use of the footpaths was insufficient to justify registration. The objector's witness evidence was not inconsistent with a minimal amount of use but was inconsistent with a level of use which would warrant registration. The objector's witness evidence was not challenged in the sense of its veracity being impugned. If it were to be said that the witnesses attended infrequently and by coincidence never met anyone, it was nevertheless surprising that, taken collectively, the witnesses did not see users or physical signs of use. Of particular significance was the evidence of Ms Frudd and Mr Muller who went frequently to the Application Land, and in the case of the latter, throughout the seasons, in school holidays and for prolonged periods.

67. In relation to a point of law, it was submitted that the matter of use should be approached on the basis which had been indicated by Lord Hope in *Lewis*, that is, that it had to be *"of such amount and in such manner as would reasonably be regarded as*

being the assertion of a public right".[30] This was linked to the requirement that use had to be by a significant number.

68. Any use of the Mown Area would not in any event have been as of right. The submission made in this respect, set out in the Council's statement of case and pursued by Ms Crail in closing, was first developed by reference to a series of propositions said to be derived from *R (Beresford) v Sunderland City Council*[31] ("*Beresford"*). It was submitted that *Beresford* established that:

- there are statutory provisions the effect of which is to confer a right or licence to recreate on land to which they apply;
- the class of such provisions is not limited to section 10 of the Open Spaces Act 1906, or otherwise closed;
- where such a statutory provision applies, the persons with the benefit of the right or licence recreate on the land not as of right, but by right; they are not trespassers;
- that is so whether or not the fact of applicability of the statutory provision in question, and/or its effect, are communicated or otherwise known to the users.

69. It was further submitted that the Mown Area was appropriated from educational purposes to housing purposes in 1962 following the closure of the Chickenley Lane Council School. It could be inferred that the subsequent grassing over of that area and the establishment of a regular maintenance regime was an exercise of the power conferred by section 107 of the Housing Act 1957[32] ("the 1957 Act") to *"lay out and construct public streets or roads and open spaces on land acquired by them for the purposes of this Part of this Act ..."* The argument which then followed was that, as a matter of law, for so long as land is kept laid out as "public open space" under this provision by a local authority, it was land on which the public had a statutory right or licence to recreate, and public recreational use of it was not as of right. On that footing, any use for lawful sports and pastimes of the Mown Area as there had been had not been as of right.

[30] At paragraph 67.
[31] [2003] UKHL 60.
[32] Substantially re-enacted in section 13(1) of the Housing Act 1985.

Submissions on behalf of the Applicants

70. On behalf of the Applicants Mr Maile first addressed his submissions to the issue of locality and neighbourhood. The case was put on the basis of it being a limb (ii) case, the neighbourhood in question being that of Chickenley Heath in the locality of the Dewsbury East Ward. The Applicants did not invite any other neighbourhood or locality to be considered save for the fall-back position were the Court of Appeal to decide on the outstanding point in *Leeds Group plc* that a neighbourhood claim could not be brought until 20 years had elapsed from the amendment of the 1965 Act by section 98 of CROWA, in which event the case was put as a limb (i) case with the locality being the Dewsbury East Ward.

71. As to the issue of neighbourhood, Mr Maile reminded me that Lord Hoffman had said in *Oxfordshire* that *"any neighbourhood within a locality"* was *"obviously drafted with a deliberate imprecision"*.[33] It was not to be approached as strictly as a locality, it was sufficient if there was some cohesiveness to the claimed neighbourhood and the borders did not have to be strict, as explained by HHJ Behrens at first instance in *Leeds Group plc*.[34] The area identified by green edging on the Neighbourhood Plan was a classic neighbourhood with cohesiveness (demonstrated by there being a clearly recognised community, clear community spirit and the existence of various facilities within the area) and defined borders. It was referred to by its residents as Chickenley Heath. That name appeared on maps and plans and was used as part of postal addresses and in property deeds. The area in question, whilst referred to by the applicants as Chickenley Heath and by the objector as Chickenley, was nevertheless one and the same area and there was no difference between the parties in this respect.

72. Turning to the issue of locality, Mr Maile submitted that this required there to be a defined area known to the law. That requirement was satisfied in the present case. It was submitted that an electoral ward could be a locality as recognised by HHJ Waksman QC in *the Warneford Meadow Case*.[35] It would be strange if an electoral ward could not be a relevant locality given the specific reference to electoral ward in

[33] At paragraph 27.
[34] [2010] EWHC 810 (Ch) at paragraph 105.
[35] See paragraph 69 of the judgment where HHJ Waksman QC said that "a locality had to be some form of administrative unit, like a town or parish or ward."

note 6 on form 44. The boundary changes which had occurred in this case in respect of the Dewsbury East Ward did not invalidate the Applicants' case. There might be cases in which fundamental changes to administrative boundaries could lead to the destruction of a locality but the present case was not such a case. Even in such a case it could not automatically be assumed that the locality had been lost for the purposes of town or village green registration under the 2006 Act and the issue would have to be looked at on a case by case basis. Here it was also the case that the ward had not been changed by being placed in some other administrative authority within the relevant 20 year period. Mr Maile said that reliance on an ecclesiastical parish had been expressly discounted. He also made the general point that, in a limb (ii) case, the locality requirement was much looser anyway than in a limb (i) case.

73. Mr Maile then dealt with the issue of use of the Application Land. His submissions were to the effect that there was a considerable amount of use on a regular basis which was sufficient to satisfy the requirements of the 2006 Act. The primary activity was that of children's play (which would sustain the case on its own) although there were also other activities such as walking with and without dogs. There was sufficient evidence of use even when footpath only use was discounted. The only such footpath use which should in fact be discounted was in any event the use of the main diagonal track from School Street to Heath Road. The other tracks should be considered in the same way that Lord Hoffman had suggested in *Oxfordshire*.[36] It was not surprising that the objector's witnesses (whose credibility was not questioned) had not seen use of the Application Land or had seen use by only the occasional walkers or the occasional child because such witnesses had visited the Application Land few times (perhaps with the exception of Mr Muller) and during working hours. The objector's witnesses' evidence did not amount to very much. Most of the Application Land was not overgrown for all of the year but, even when it was overgrown, the long grass was inviting for children to explore and play.

[36] Lord Hoffman there said at paragraph 67 that *"if the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk."*

74. Mr Maile submitted that the evidence demonstrated there had been use of the Application Land by a significant number of the inhabitants of the neighbourhood in line with how, according to Sullivan J in *McAlpine Homes*, the notion of use by a significant number was to be understood[37] and to be related to the number of witnesses who gave evidence. In terms of the "spread" issue, Mr Maile said that there was a sufficient spread of users on the evidence. It might have been different if the users had been confined to a single street but provided that there was some greater spread than that, then that was sufficient without there having to be a full spread across the neighbourhood. One would not expect to find more users coming from the periphery than from close by. There was a greater need to have a spread of users in a limb (i) case but, even so, there did not have to be users from every part of the locality. It was a question of degree.

75. In relation to the submissions made on behalf of the objector with reference to the bearing of the 1957 Act on the Mown Area and whether use of it was as of right, Mr Maile made a number of points. First, he argued that there was no evidence of appropriation under any statutory provision, including the 1957 Act. Secondly, Mr Maile argued that there was no evidence of the requisite ministerial consent under section 93(1) of the 1957 Act. This section provided that *"the powers of a local authority under this Part of this Act to provide housing accommodation shall include a power (either by themselves or jointly with any other person) to provide and maintain with the consent of the Minister in connection with any such housing accommodation any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided."* Thirdly, also relying on section 93(1), Mr Maile argued that the power in that section to provide a recreation ground was so to provide it for only those for whom the housing accommodation was provided by the local authority. It would thus not apply to those using it who lived in private housing like 12 School Street. A case in Whitby where this issue had been decided by an inspector[38] contrary to Mr Maile's submission, was subject to judicial review. There had been no

[37] See, in particular, paragraph 71.
[38] In the matter of an application to register land at Helredale Playing Field, Whitby, North Yorkshire as a town or village green: report of Vivian Chapman QC of 28th July 2010 and further report of 22nd September 2010.

exploration in the evidence of the question of what local authority housing the provision of the Mown Area applied to nor of the question of which users came from local authority housing and which from private housing. In sum, the objection had not been made out on the 1957 Act ground.

Findings and analysis

Locality and neighbourhood

76. As I have already indicated (10, 70), the Application was advanced at the inquiry on the basis of a limb (ii) case, that is, on the basis of a neighbourhood within a locality. The neighbourhood relied on was that edged green on the Neighbourhood Plan, referred to by applicants as Chickenley Heath; the locality relied on was the electoral ward of Dewsbury East.

77. The first matter which I need to consider here is the submission made on behalf of the Council as objector that no formal application had been made to amend the Application to rely on the area edged green on the Neighbourhood Plan and that it was too late to do so. The submission was based on the proposition that formal amendment was required to alter the neighbourhood (or locality in a limb (i) case) because form 44 required applicants to commit to a particular area and the substratum of the reasoning in *Laing Homes* (concurred in by Vos J in *Paddico*) had gone (53, 58).

78. Regulation 3(2)(a) of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 provides that an application for registration of land as a town or village green must be made in form 44. The heading to question 6 on form 44 is "locality or neighbourhood within a locality in respect of which the application is made." The form then continues by asking the applicant to "show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked." I agree, therefore, that form 44 requires the applicant to specify the locality or neighbourhood within the locality to which the claimed green relates. I also agree that this differs from the

position which obtained under the old form 30. It was held in this connection by Sullivan J in *Laing Homes*, in rejecting a submission that it was not possible to amend the qualifying locality, that the reference in part 3 of form 30 to locality did not require the applicant to identify, or commit himself to, the locality from which the inhabitants claiming to have indulged in lawful sports and pastimes came but related merely to the correct location and extent of the claimed land.[39] It was also held that the question of what was the relevant locality (or, if appropriate, neighbourhood within a locality) for the purposes of section 22 of the 1965 Act was, subject to consideration of fairness, one of fact for the registration authority to determine in the light of all the evidence.[40] Sullivan J further held that form 30 was not to be treated as though it was a pleading in private litigation.[41] Sullivan J's reasoning in respect of this matter was endorsed by Vos J in *Paddico.*[42] I agree with the objector's submission that so much of Sullivan J's reasoning as was founded on the lack in form 30 of any requirement to identify or commit to any locality for the purposes of section 22 of the 1965 Act has now had its foundation removed by the fact that form 44 does require that the relevant locality or neighbourhood is identified for the purposes of section 15 of the 2006 Act. However, I consider that Sullivan J's observation that form 30 was not to be treated as though it were a pleading in private litigation continues to hold good for form 44.

79. As a matter of logic I can accept that, if an applicant has committed to a particular qualifying area for the purposes of question 6 on form 44, then an application to amend may be required if a different qualifying area is to be pursued. I can also accept that, in this particular case, the neighbourhood shown edged green on the Neighbourhood Plan is different from any qualifying area put forward in connection with the Application when first made which, as I have said above (10), was unclear in this respect. However, I regard the submission that no application to amend to rely on the neighbourhood edged green on the Neighbourhood Plan was made and that it was too late to do so as having no merit. The Neighbourhood Plan was submitted at the beginning of the inquiry by Mr Maile who made it plain that the area edged green on that plan was the neighbourhood upon which he relied. If and to the extent that an

[39] See paragraphs 135-137 and 142-143.
[40] See paragraphs 142-143.
[41] See paragraph 143.
[42] At paragraph 81.

application to amend was necessary it was made by the submission of the Neighbourhood Plan. There was no necessity for anything more. After the submission of the Neighbourhood Plan the inquiry proceeded thereafter throughout by reference to it without objection by the Council. No possible misunderstanding as to what was relied on could have arisen and no conceivable prejudice to the Council could have occurred, nor was any advanced by Ms Crail. No issue is raised here as to the reformulation of the Applicants' case in a way in which it was not presented. In all the circumstances, to the extent that any application to amend was necessary, it can be treated as having been made and to the extent that it is necessary for me to allow the application to amend (or to recommend to the Registration Authority that the application to amend is allowed), I do so now. This occasions no unfairness to the Council. I did not understand any submission to be made by the Council that there was no power to amend.[43]

80. The next matter which I consider is the question of the name to be attached to the area edged green on the Neighbourhood Plan. There is simply no evidence that this area is called Chickenley Heath. All the evidence is that this area bears the name Chickenley[44] and I so find. The fact that the Application was advanced at the inquiry on behalf of the Applicants on the basis that the area edged green on the Neighbourhood Plan was called Chickenley Heath is curious and it indicates some degree of confusion in the case presented.[45] However, ultimately it seems to me that the question of the name which is attached to the area edged green on the Neighbourhood Plan is not determinative. If I were to conclude that the area edged green on the Neighbourhood Plan was a neighbourhood for the purposes of section 15(2) of the 2006 Act, that conclusion would not be altered by the fact that the area has been labelled wrongly at the inquiry as Chickenley Heath when it is actually called Chickenley. I have already mentioned above (59) that Ms Crail accepted that, if I were to think that the area edged green on the Neighbourhood Plan was a neighbourhood, albeit one called Chickenley rather than Chickenley Heath, it would

[43] For my part I see no reason why amendment should not be possible under The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 just as it was possible under The Commons Registration (New Land) Regulations 1969 made under the 1965 Act.
[44] See, for example, the evidence of the following witnesses reported above: Mrs Brown (28); Mrs Mastronardi (29); Mr Muller (43); Mr Kendall (46); and Ms Scott (47).
[45] I return to consider the name Chickenley Heath further in paragraph 105 below.

be hard to contend that there was anything to prevent the matter being considered on the basis of the correct name, Chickenley, being ascribed to that neighbourhood.

81. I turn, therefore, to consider whether the area edged green on the Neighbourhood Plan does constitute a neighbourhood. The word neighbourhood is undefined in the 2006 Act as was also the case under section 22(1A) of the 1965 Act when amended by section 98 of CROWA. However, there are various judicial observations which need to be taken into account.

82. In *Cheltenham Builders* Sullivan J said that *"it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under 'locality', I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of <u>any</u> area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."*[46]

83. As already mentioned above (71), Lord Hoffman in *Oxfordshire* pointed out that the expression *"any neighbourhood within a locality"* was *"obviously drafted with a deliberate degree of imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."*[47]

84. In *the Warneford Meadow case* HHJ Waksman QC said that *"the area from which users must come now includes a neighbourhood as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a locality."*[48] In the same case HHJ Waksman QC also made the following

[46] At paragraph 85.
[47] At paragraph 27.
[48] At paragraph 69.

observations: "*while Lord Hoffman said that the expression* [sc., neighbourhood within a locality] *was drafted with deliberate imprecision, that was to be contrasted with the locality whose boundaries had to be legally significant – see paragraph 27 of his judgment in Oxfordshire (supra). He was not saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality … but, as Sullivan J stated in R (Cheltenham Builders Ltd) v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way."*[49]

85. In *Leeds Group plc* at first instance HHJ Behrens said that *"I shall not myself attempt a definition of the word 'neighbourhood'. It is, as the inspector said, an ordinary English word and I have set out part of the Oxford English Dictionary definition.* [Sc., "A district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity"]. *I take into account the guidance given by Lord Hoffman in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TVGs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."*[50]

86. The words of the judge which I have quoted in the previous paragraph seem to me to be a reflection of the views of the inspector in the case who had said that it seemed to him *"that the 'cohesiveness' point cannot in reality mean much more, in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of making a town or village green claim."*[51] The judge pointed out that the inspector had expressed concern over the requirement (expressed in the dicta of Sullivan J in *Cheltenham Builders*) that a

[49] At paragraph 79.
[50] At paragraph 103.
[51] Paragraph 13.32 of the inspector's report quoted at paragraph 36 of the case report (first instance).

neighbourhood must have a sufficient degree of cohesiveness and had indicated that there was a possible conflict between these dicta and Lord Hoffman's reference to the "*deliberate imprecision*"[52] of the term neighbourhood.[53]

87. HHJ Behrens, however, rejected the view of the inspector that a neighbourhood could be defined simply by reference to the area from which were drawn those who used the land in question. He thought that this would *"denude the word 'neighbourhood' of any real meaning"* and would be *"an argument trying to pull itself up by its own bootstraps."*[54]

88. In relation to the question of the need for a neighbourhood to have boundaries, HHJ Behrens said *"I agree with Miss Ellis QC that boundaries of districts are often not logical and that it is not necessary to look too hard for reasons for the boundaries."*[55]

89. The key issue argued in the Court of Appeal in *Leeds Group plc* in relation to neighbourhood was whether HHJ Behrens was right to uphold the inspector's view that neighbourhood did not have to be limited to a single neighbourhood and could include 2 or more neighbourhoods. The Court of Appeal upheld the judge on this point and held (by a majority)[56] that there was no reason why neighbourhood should not include 2 or more neighbourhoods. I need not say any more about this particular issue because it is not one which arises on the facts of the present case. Sullivan and Arden LJJ endorsed Lord Hoffman's dicta in *Oxfordshire* in relation to the "*deliberate degree of imprecision"* in the drafting of the expression any neighbourhood within a locality which I quote above (83).[57] All the judges in the Court of Appeal also recognised that Parliament's intention in enacting the neighbourhood provision (originally introduced by section 98 of CROWA and now incorporated in section 15 of the 2006 Act) was to make easier the task of those seeking to register new greens and to avoid technicality by loosening the links with historic forms of green.[58] Interestingly, Tomlinson LJ considered that *"it may not be*

[52] See paragraph 83 above.
[53] See paragraph 36 of the report of the first instance decision in *Leeds Group plc.*
[54] At paragraph 106.
[55] At paragraph 105.
[56] Sullivan and Arden LJJ, Tomlinson LJ dissenting.
[57] See paragraphs 26 and 52 of the judgment.
[58] See, for example, paragraphs 24, 25, 26, 44 and 52.

difficult to define the relevant neighbourhood by reference to the green and the area in which those who habitually use it for recreational purposes reside. The Inspector was prepared to adopt this approach here … The judge's rejection of that approach has not been challenged before us but I am not myself convinced by the judge's view, at paragraph 106 of his judgment, that the Inspector's conclusion denuded the word 'neighbourhood' of any real meaning."[59] This view would not, however, appear to represent the present law.

90. I next consider the question of whether the area edged green on the Neighbourhood Plan in the present case constitutes a neighbourhood in the light of the above. In approaching that task I bear firmly in mind that the enactment of the neighbourhood provision for the registration of new greens was intended to make the task of proving registration easier and that the expression any neighbourhood within a locality was drafted with a deliberate degree of imprecision.

91. I have no difficulty in coming to the conclusion that the area edged green on the Neighbourhood Plan does constitute a neighbourhood for the purposes of section 15 of the 2006 Act. However the matter of cohesiveness is approached, I consider that the area edged green on the Neighbourhood Plan has a sufficient degree of cohesiveness. This is manifested in the fact that it clearly represents a self-contained portion of the wider urban area of Dewsbury which has a separate geographical and community identity as Chickenley. On the evidence it is plainly an area where people might reasonably regard themselves as living in the same part of the town of Dewsbury. It is served by its own facilities such as the Chickenley Community Centre and the Chickenley Junior, Infant and Nursery School which I have already referred to in my report of the evidence above (47, 50). On my inspection of the area I saw that it also has other facilities such as the Chickenley Medical Centre,[60] shops,[61] a public house[62] and a church.[63] There is an homogeneity to much of the housing in the area derived from the extensive council estates[64] although there is also private housing.

[59] At paragraph 42.
[60] On Walnut Lane.
[61] Apart from other separate facilities, there is a parade of shops at the bottom (south) of Chickenley Lane opposite its junction with Short Street.
[62] The Crown on Chickenley Lane.
[63] St Thomas Moore Catholic Church at the junction of Chickenley Lane with Maple Road.
[64] See footnote 10 above.

The whole area is capable of meaningful description and is so described as Chickenley. The area also has appropriate boundaries and the area edged green on the Neighbourhood Plan effectively corresponds to the Council's settlement of Chickenley as referred to by Mr Kendall (46). As I have already noted (59), Ms Crail did not submit that the area edged green on the Neighbourhood Plan lacked cohesiveness or did not have appropriate boundaries.

92. Next I consider the locality within which the neighbourhood lies. The question of what constitutes a locality for the purposes of registration of a new green has been considered in a number of cases. In *Ministry of Defence v Wiltshire County Council*[65] Harman J said the following: "*other points were argued. In particular, Mr Drabble QC argued that it was impossible for a village green to be created by the exercise of rights save on behalf of some recognisable unit of this country – and when I say recognisable I mean recognisable by the law. Such units have in the past been occasionally boroughs, frequently parishes, both ecclesiastical and civil, and occasionally manors, all of which are entities known to the law, and where there is a defined body of persons capable of exercising the rights or granting the rights.*

The idea that one can have the creation of a village green for the benefit of an unknown area – and when I say unknown I mean unknown to the law, not undefined by a boundary on a plan, but unknown in the sense of unrecognised by the law – then one has, says Mr Drabble, no precedent for any such claim and no proper basis in theory for making any such assertion. In my belief that is also a correct analysis."

93. In *Cheltenham Builders* Sullivan J expressed the view that, for the purposes of "class c" greens in section 22(1A) of the 1965 Act, the word locality could not mean "*any area that just happens to have been delineated in however arbitrary a fashion on a plan"* since that would deprive the word of any meaning.[66] The word was used in the sense of "*some legally recognised administrative division of the county."*[67]

94. In *Oxfordshire* Lord Hoffman took issue with the view, also expressed by Sullivan J in *Cheltenham Builders,* that locality when used in the phrase neighbourhood within a

[65] [1995] 4 All ER 931 at 937.
[66] At paragraph 43.
[67] At paragraph 81.

locality must mean a single locality. He said that *"the fact that the word 'locality' when it first appears in subsection (1A) must mean a single locality is no reason why the context of 'neighbourhood within a locality' should not lead to the conclusion that it means 'within a locality or localities'."*[68] Lord Hoffman did, however, confirm that it had been *"the insistence of the old law"* that a locality should be *"defined by legally significant boundaries."* [69]

95. In *the Warneford Meadow case* HHJ Waksman QC stated that "*it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward."*[70]

96. In *Leeds Group plc* at first instance HHJ Behrens upheld the view of an inspector that a place called Yeadon on the outskirts of Leeds, which had lost its separate administrative status in 1937 and was now part of the Leeds City Council area, was a locality for the purposes of limb (ii) of section 22(1A) of the 1965 Act. The judge accepted the submission that, in relation to limb (ii) of the definition, there was *"no reason to import all the technical difficulties in the word 'locality' that have arisen in relation to common law greens"* and stated that he shared the view of the inspector *"that a place like Yeadon would not have lost its right to a town or village green because of the events of 1937."*[71] This point was originally made the subject of a ground of appeal when the case was appealed to the Court of Appeal but this particular ground was not pursued at the appeal hearing.

97. There is a divergence of reported views on the question of whether an electoral ward can constitute a locality for the purposes of the registration of a new green. In a dictum in *Laing Homes* Sullivan J said that the objectors there would have had a good prospect of persuading an inspector that there was no qualifying locality if the case had been advanced on the basis of electoral wards *"either because electoral wards are not localities or, if they are, because the wards constituted two localities and the inhabitants of one would not be the inhabitants of the other."*[72] Likewise, the inspector who reported on the Yeadon case which became the subject of the litigation

[68] At paragraph 27.
[69] Ibid. See also paragraph 83 of this report above.
[70] At paragraph 69.
[71] At paragraph 89.
[72] At paragraph 138.

in *Leeds Group plc* doubted that an electoral ward could be a locality for the purposes of the registration of a new green.[73]

98. To the contrary is the view apparently taken by HHJ Waksman QC in *the Warneford Meadow case* quoted above (95). It may also be the case that HHJ Behrens took the view in *Leeds Group plc* that an electoral ward could be a locality for the purposes of limb (ii) cases. One of the submissions made on behalf of the defendant in that case was that, in that limb of the definition, there was no reason why a locality could not consist of an electoral ward. The judge expressed a general preference for the defendant's submissions and may thus have endorsed this particular submission although ultimately he based his decision either on Yeadon or an ecclesiastical parish (St Andrew) being the relevant locality without expressing a specific view on the electoral ward issue.[74]

99. There is no real doubt that an ecclesiastical parish can be a locality for the purposes of the registration of a new green. This was recognised by Harman J in the *Ministry of Defence case* in the passage which I quote above (92). The matter was also expressly considered in *Laing Homes* where Sullivan J said that "*in 1965 Parliament was trying to make it less, not more difficult to establish the existence of village green rights. Ecclesiastical parishes are entities known to the law, they have defined boundaries, and since they have frequently been used in the past as qualifying localities for customary village greens it is difficult to see on what basis Parliament could have intended that they should not be so used for the purpose of establishing the existence of new class [c] village greens.*"[75] Further, as is apparent above (98), an ecclesiastical parish was held to be a relevant "locality" in *Leeds Group plc* at first instance. However, in the present case I do not need to consider this matter further because Mr Maile expressly did not put the case on the basis of any ecclesiastical parish (72) and I heard no particular evidence on this topic.

100. As I have already indicated (10, 70, 76), in the present case the claim for registration is put on the basis that the claimed neighbourhood falls within the locality

[73] At paragraph 13.23 of the inspector's report referred to in paragraph 86 of the first instance decision in *Leeds Group plc.*
[74] See paragraphs 87-90 of the judgment as reported at first instance.
[75] At paragraph 151.

of the Dewsbury East Ward. In the light of my above survey of the relevant law, I consider that the Dewsbury East Ward does represent an appropriate locality for the purposes of a case put on a limb (ii) basis. In approaching this issue I remind myself that the phrase "any neighbourhood within a locality" was, according to Lord Hoffman in *Oxfordshire,* drafted with a "*deliberate degree of imprecision"* (83) and that in this context, locality can mean localities (94). I also remind myself that all the judges in the Court of Appeal in *Leeds Group plc* recognised that Parliament's intention in enacting the neighbourhood provision was to make easier the task of those seeking to register new greens and to avoid technicality by loosening the links with historic forms of green (89). This liberal approach to the question of what may constitute a locality for the purposes of a limb (ii) case was exemplified in the judgment of HHJ Behrens at first instance in *Leeds Group plc* where the judge commented as set out above (96) that, for such a case, there was *"no reason to import all the technical difficulties in the word 'locality' that have arisen in relation to common law greens"* and found that an area which had long since ceased to have legal status was an appropriate locality. In the light of all of the foregoing I do not see why an electoral ward should not be a locality for limb (ii) purposes notwithstanding the conflicting views (not all expressed in connection with limb (ii) cases) which I refer to above (97, 98). No argument was put to me by Ms Crail that the locality relied upon in a limb (ii) case must be of a size that it might have been capable of accommodating a proper spread of qualifying users. An argument to this effect was rejected by HHJ Behrens in *Leeds Group plc.* The judge there stated that *"if … Yeadon cannot be a locality for the purpose of limb (ii), I would hold that the parish of St Andrew is the relevant locality. I see no reason to limit the meaning of 'locality' in limb (ii) in the manner suggested in paragraph 37 of Mr Laurence QC's skeleton argument* [which had contended that in limb (ii) a locality had to be of a size and situation such that, given the particular activities which had in fact taken place, it might reasonably have been capable of accommodating a proper spread of qualifying users undertaking activities of that type]. *There is nothing in the wording of the 2000 Act which refers to the size of the 'locality'. Furthermore one of the main purposes of the amendment, as it seems to me, was to allow inhabitants in a neighbourhood to qualify in a situation where the locality itself was too big. It cannot, in my view, have*

been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users."[76]

101. If Dewsbury East Ward can be an appropriate locality for limb (ii) purposes, Ms Crail did not press any submission that the changes to the boundaries of the ward over the relevant 20 year period would defeat the Application. I consider that she was right not to do so. The submissions she made in respect of the difficulties caused by the lack of a consistent user group over the relevant 20 year period (55) do not arise if the claim is based on a neighbourhood which has itself remained the same over that period.

102. In the final analysis, however, it does matter whether I am wrong in my view that Dewsbury East Ward is an appropriate locality for limb (ii) purposes. Ms Crail recognised (57) that in a limb (ii) case a locality did not have to be any particular size so (by reference to *Leeds Group plc* (100)) the ecclesiastical parish of Dewsbury All Saints or even the Borough of Kirklees could be a candidate locality for the area edged green on the Neighbourhood Plan. I do not rely on any ecclesiastical parish given Mr Maile's express disclaimer of putting the case in this way (72, 99) but, in common with Ms Crail, I do not see why the Borough of Kirklees could not be an appropriate locality were the Dewsbury East Ward not. There would not be any need for a formal amendment in this respect as also recognised by Ms Crail (58).

103. I thus conclude overall that the Applicants have established that the area edged green on the Neighbourhood Plan is an appropriate neighbourhood and that it is within an appropriate locality for the purposes of section 15 of the 2006 Act.

104. I consider the issues of whether there has been use of the Application Land by a significant number of the inhabitants of the neighbourhood and an appropriate spread or distribution of users across the neighbourhood later in this report.

105. Finally in relation to the issue of neighbourhood, I should say that no area was suggested as an alternative neighbourhood to that edged green on the Neighbourhood

[76] At paragraph 90.

Plan. In those circumstances it would not be appropriate for me to seek to reformulate the case by suggesting some other neighbourhood but the position on the evidence is that no such alternative neighbourhood suggests itself in any event. There is a body of evidence that the name Chickenley Heath, as well as being the name given by some to the Application Land itself, applies to an area in the north of the area edged green on the Neighbourhood Plan[77] rather than to the whole of the area edged green but that is about as far as it goes. There is no clear evidence which would allow the identification of a neighbourhood of Chickenley Heath in this restricted sense let alone where the boundaries of any such neighbourhood might lie.

Sufficiency of use

106. I turn at this point to my assessment of the use evidence. In approaching this assessment I remind myself of a number of substantive principles which need to be borne in mind. First, the requisite use which is required to be shown is, as Lord Hope indicated in *Lewis*, "*use for at least 20 years of such amount and in such manner as would reasonably be regarded as being the assertion of a public right*."[78] Secondly, as Sullivan J stated in *Cheltenham Builders*, the applicants have to "*demonstrate that the whole, and not merely a part or parts, of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years.*"[79] Thirdly, it is necessary to consider whether the use of footpaths on the Main Area would appear to the reasonable landowner to be referable to their use as footpaths or as use for more general recreational purposes which would sustain a claim to a new green: see the

[77] For instance: Mrs Evans said that Chickenley Heath was the top of Chickenley and that Heath Road was in it but she was not able to say which other streets were (26); Mrs Boulton said that Chickenley Heath meant the Application Land and surrounding area whilst she also produced documents bearing the name Chickenley Heath as part of the address of her property (27); Mrs Mastronardi described Chickenley Heath as an area to both the north and south of Wakefield Road (29); and Ms Scott said that some people referred to an area known as the Heath if they lived in a street with the word "heath" in its name (47). It is also the case that the name Chickenley Heath is found on many maps and plans somewhere in the general area around the northern end of Chickenley Lane and sometimes also to the north of Wakefield Road.
[78] At paragraph 67.
[79] At paragraph 29.

observations of Sullivan J in *Laing Homes*[80] and of Lightman J in *Oxfordshire*[81] at first instance.

107. Against that background I start my consideration of the evidence with the written evidence which has been submitted in support of the Application. I can give only the most limited weight to the written evidence in this case. By definition, none of the written evidence has been able to be tested by cross examination and this very significantly restricts the ability to rely on it. Moreover, the vast majority of the written evidence does not identify which areas were used for which activities. This is a substantial shortcoming in a case of this nature where the Mown Area and the Main Area are very different in character and where an obvious footpath route crosses the Main Area. A further deficiency is that a number of the original evidence questionnaires were lacking in any indication of frequency of use and, in some cases where periods of use were lacking, it has been sought to address this with supplementary information which is directed to the different question of the user's length of residence at a particular address. The pro-forma witness statements are all but valueless. Although not all the pro-forma statements are identical in terms of their standard content, they all contain a battery of leading statements. Some persons have adapted the statements by crossing some parts of them out and/or marking them to indicate that they have knowledge of some activities having occurred but not others; other persons have not adapted the statements at all. It is quite impossible in any given case to make any reliable assessment of the extent to which the person completing such statement did or did not properly consider its contents. One of the standard sentences in the majority of the pro-forma statements indicates that the person completing the form is a regular spectator at sporting events held on the playing fields/open space. I agree with Ms Crail's submission (62) that this is an obvious mis-statement as there is no evidence of what a reasonable person would call sporting events having taken place on the Application Land yet few persons have deleted this part of the pro-forma.

108. The photographs submitted in support of the Application provide a snapshot at certain points. As Ms Crail submitted (65), they prove no more than at a particular

[80] At paragraphs 98-110.
[81] At paragraphs 96-105.

moment in time at a particular place one or more people did something on the Application Land. That does not prove that at other times and/or in other places people did the same or similar things. The probative value of the photographs is reduced further because no one produced or spoke to them in evidence. I also consider that the 2011 photographs must be treated with a very great deal of caution as they post-date the Application and have clear potential to be self-serving.

109. Turning to the "live" evidence which I heard at the inquiry in support of the Application, I have substantial reservations over significant parts of this. I agree with the submissions that Ms Crail made in relation to Mrs Mastronardi's evidence being exaggerated (63). I consider in particular that the reliability of Mrs Mastronardi's evidence is adversely affected by the contradiction between her evidence to the inquiry that all of the Application Land was used and what she had written by way of objection in the planning process in April 2010, namely that "no one uses bottom area of field" (29). I also agree with Ms Crail's submission (63) that Miss Mastronardi's evidence was exaggerated. The whole tenor of Miss Mastronardi's evidence (32) was exaggerated: she used the Application Land *every single day of her life*; barbecues were held for *the whole of Chickenley*; and *loads* of horses came up and down. In common with Ms Crail, I also found it surprising that Miss Mastronardi was not able to say how long the pond had been present, indicating either lesser use of the Application Land than claimed or a reluctance to acknowledge that the pond was a recent feature (as I find it to be on the strength of Mr Muller's and Mr Keenlyside's evidence (43, 45)). Mr Hutchinson's evidence in relation to his vegetable patch on the land was inconsistent with what he had written by way of objection during the planning process which gave the impression that this was on the former allotments land (30).[82] I also share the concern of Ms Crail (63) in relation to a feature of Mrs Boulton's evidence and find it unsatisfactory that, for the purposes of the inquiry, Mrs Boulton described additional activities on the Application Land (children playing, riding bikes and making dens) which had not been mentioned in her evidence form (27). If the activities in question had been a significant feature of what had been seen on the Application Land, one might have expected them to have been referred to in the first place. More generally in relation to the question of RAGE and the reliability

[82] I leave aside the question of whether any lawful sport or pastime was involved here but simply concentrate on the unsatisfactory inconsistency in the evidence.

of the evidence given by their members as witnesses, I consider that Ms Crail was right (63) to attach significance to the fact that a screenshot of the RAGE website home page refers to the Council being urged to stop the development and to consider the needs of Chickenley residents "by changing the land use to much needed recreational use" (46). It is rather hard to see why, had there been the level of recreational use which it was sought to portray at the inquiry, the reference would not have been to retaining recreational use. I find generally that there has been a significant degree of exaggeration in the oral evidence in support of the Application and that there has been much less use than claimed.

110. Whilst not a matter going to the reliability of the oral evidence, I also accept the point made by Ms Crail (63) that, in effect, only 2 families, the Mastronardis and the Browns, had given evidence of 20 years' use. For instance, Mrs Evans was able to speak to use since 1998 only (26) and Mrs Boulton for only the last 10 years or so (27).

111. The broad thrust of the evidence I heard from the objector's witnesses was that virtually no use of the Application Land for recreational activities had been observed nor had any signs of such use been seen. Mr Maile did not challenge the credibility of the objectors' witnesses (73) and I have no difficulty with the reliability of their evidence. The real question is the extent to which such evidence casts doubt on the evidence in support of the Application. Mr Maile understandably took the point (73) that the objector's witnesses for the most part did not go often to the Application Land and, when they did go there, went during working hours, did not stay long and were not there at weekends. One would not, therefore, necessarily expect such witnesses to see much in the way of use of the Application Land so no inconsistency arose. I think that there is some force in this and I am not inclined generally to regard the objector's witnesses' evidence in relation to lack of use/signs of use as undermining the evidence in support of the Application to any significant degree. However, this does not assist the case for the Application given my finding above (109) that there has been a significant degree of exaggeration in the oral evidence in support of the Application. Moreover, I said that I was not inclined "generally" to regard the objector's witnesses' evidence as undermining the evidence in support of the Application because I consider that it is difficult to reconcile the evidence of 3 of the

objector's witnesses with the evidence in support of the Application. First, there is Mr Muller's evidence. Mr Muller inspected the Application Land on average twice a week, all year round, including school holiday times; he could turn up at any time of the day during working hours; the inspections covered the whole of the Application Land; an average inspection (not including necessary work thereafter) lasted about 30 minutes; and the longest he had ever been there was 5 hours (43). Mr Muller did not recall encountering anyone using the Application Land for recreational activities although he did see people using the well-worn footpath crossing it from School Street to Heath Road, once saw someone walking a dog and occasionally saw kids on the Mown Area when driving past (43). I found Mr Muller to be a credible witness and I accept his evidence. It is hard to square this evidence, particularly in relation to the absence of observation of children's play in holiday periods, with the general picture sought to be painted by the evidence in support of the Application. Mr Maile put children's play at the forefront of the case for registration (73). Accepting, as I do, Mr Muller's evidence it seems to me to be another pointer to exaggeration in the case for the Application. Secondly, there is the evidence of Mr Jones and Ms Berry in relation to the Mown Area (39, 40). It is true that neither spent very long on the Mown Area when carrying out their grass cutting duties there but the grass cutting was carried out once a fortnight throughout the grass growing season (encompassing the school holiday period) so these witnesses regularly visited the Mown Area. Between them all that these witnesses could recall in relation to use of the Mown Area was Ms Berry's occasionally having seen a child kicking a ball there during school holiday periods but this was infrequent (40). I found both Mr Jones and Ms Berry to be straightforward and reliable witnesses whose evidence, which I accept, does undermine claims of extensive use of the Mown Area.

112. I also consider that there is substance in Ms Crail's point (63) that it is likely that such use as there had been had geared up recently in connection with the Application. There are a number of clues in the evidence to this being the case. Mrs Evans said that the level of use of the Application Land was now slightly higher than it had previously been (26). The fruit picking by groups of children which Mrs Boulton had seen had been most notable over the last couple of years (27). Mr Wilson made the notable comment that residents had been told to get using the Application Land if they did not want the development to happen (31). The pond features in much

of the evidence in support of the Application[83] but, as I state above (109), my finding (on the strength of the evidence of Mr Muller (43) and Mr Keenlyside (45)) is that it is only a recent feature.

113. My own impression of the Main Area derived from my site visit was that there was a limited number of defined footpaths and that the rest of this area was substantially undisturbed and overgrown, suggesting that use was concentrated on the footpaths. The well-worn nature of the diagonal footpath from School Street to Heath Road suggests that this route receives a significant volume of use but the function of this route is plainly as a short cut and use of it in my view is overwhelmingly referable to footpath use rather than use of the Main Area as a village green. I also saw other, much less prominent, footpaths and I describe the main ones next. There was a route from School Street proceeding north towards Heath Road parallel with the eastern boundary of the Main Area before turning through a right angle in the north east of the Main Area to run west behind the houses on Heath Road and then ultimately joining with the diagonal footpath from School Street to Heath Road where the latter joins Heath Road. This route corresponds with the route which Mrs Boulton said she walked (although she described it in the reverse direction(27)). There was a route from Princess Street behind the houses on Princess Street and Heath Road which joined the Heath Road end of the main diagonal route from School Street to Heath Road. There was also a route from School Street to Princess Street. The broad picture is of routes forming a rectangle towards the perimeter of the Main Area with the main diagonal path from School Street to Heath Road cutting through the middle of the rectangle. The paths which can be seen on the ground at present broadly correspond in my view with what can be seen on the aerial photographs which Mr Kendall produced (46) and broadly reflect the paths which were the subject of routes claimed by way of Mrs Mastronardi's DMMO application in 2004 (23) save that that application did not cover the route Mrs Boulton described. My impression from what I saw in terms of the defined nature of the paths and the general absence of disturbance or trampling of grass or other vegetation elsewhere was very much that people who used the Main Area kept to the paths.

[83] See the accounts of Mrs Evans's evidence (26), Mrs Brown's evidence (28), Mrs Mastronardi's evidence (29), Miss Mastronardi's evidence (32) and Mr Fairfield's evidence (35).

114. I do not think that the annual bonfire assists the case for registration. I accept the submissions which were made to me by Ms Crail (64) that, as stated by Lord Hope in *Lewis*, an activity causing injury or damage to the owner's property would not be lawful and that the bonfire would fall into this category because it would cause injury or damage to the land by way of scorching and scarring. I also accept, as Ms Crail also submitted (64), that the remark of Lord Walker in *Lewis* that a right to hold an annual bonfire might be established as a stand-alone custom but would "*be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds)*" causes difficulty in placing reliance on the bonfire.

115. In the light of all of the above I come to my main overall findings in relation to use. I deal with the Main Area first. I find the following:

(a) The predominant use of the Main Area has been for walking on defined footpath routes. Of this use, the vast bulk has been walking on the main diagonal path from School Street to Heath Road.

(b) Walking on the main diagonal path from School Street to Heath Road has been overwhelmingly referable to footpath use as a short cut between defined points.

(c) There has been a much lesser degree of walking, with and without dogs, on a limited number of other defined paths on the Main Area. The number of these paths, their broadly perimeter nature and the general absence of physical evidence that people had left them to wander all over the Main Area means that use of these paths by themselves could not be considered to amount to use of the whole of the Main Area.

(d) There has been little use made of those parts of the Main Area apart from the footpaths described above (that is, the bulk of the Main Area) in terms of the parts used, the numbers involved and the frequency of use. Occasionally children will have played in non-footpath areas and occasionally walkers (with or without dogs) will have gone into such areas; there may have been other infrequent uses of such areas such as picking berries; any use associated with the pond has only been very recent. Over the relevant 20 year qualifying period the amount of use of non-footpath areas falls far short of what would be required to establish a case for registration.

(e) Placed in the context of the limited amount of use of non-footpath areas referred to in (d) above and viewed in combination with it, the footpath use referred to in (c) above would have appeared to a reasonable landowner to be no more than that and not referable to the exercise of a right to indulge in lawful sports and pastimes across the across the whole of the Main Area.

(f) On the totality of the evidence it could not sensibly be said that the whole of the Main Area had been used for lawful sports and pastimes over the relevant 20 year qualifying period.

(g) It is likely that there has been some increase in use of the Main Area recently but that does not affect the overall findings described above.

(h) Annual bonfires have been held on the edge of the Main Area close to the end of School Street (in more or less the same spot) for 15-20 years[84] but these have not been a lawful sport or pastime.

116. In short, I consider that there has simply been insufficient use of the Main Area in amount and manner to justify its registration.

117. As to the Mown Area, my overall impression, and I so find, is that the only significant use of this part of the Application Land over the relevant 20 year period has been by the Mastronardi and Brown families who have utilised it for various activities, sporting and social, such as ball games, water slides, picnics and barbecues which have been enjoyed as family affairs and with friends. This is not to say that there will not have been some use of the Mown Area over the relevant 20 year period by others for activities such as children's ball games which might be suited to the short grass but the amount and level of use by others will have been occasional and infrequent and the number of other users limited (as suggested by the evidence of Mr Jones and Ms Berry). This is as one might expect. The Mown Area is a relatively small, sloping area of maintained grass which would hold no particular attraction other than for those who might live immediately next to it. Given that I find that the only significant use of the Mown Area has been by the Mastronardi and Brown families, I find that the Mown Area has not been used by a significant number of the

[84] Mrs Brown mentioned 15 years (28) and Mrs Mastronardi referred to approximately 20 (29).

inhabitants of the area edged green on the Neighbourhood Plan and that registration of the Mown Area is not justified either.

118. The Application, therefore, fails at this juncture in my consideration of it.

119. However, out of deference to the fullness of the submissions to me, I go on to consider 2 other main issues which have been raised.

Use as of right

120. The first of these issues concerns the submission made on behalf of the Council that use of the Mown Area would not in any event be use as of right. I have set out in detail Ms Crail's submissions on this issue above (68, 69). I consider that, as a matter of principle, it is correct that a distinction is to be drawn between use as of right and use which is pursuant to a statutory right. This is apparent from *Beresford.*[85]An example of such use would be use of land held by a local authority on trust for public enjoyment under section 10 of the Open Spaces Act 1906.[86] Another example would be use of land provided by a local authority as "public walks or pleasure grounds" under section 164 of the Public Health Act 1875.[87] I consider that these examples illustrate a wider general principle that where land is provided by a local authority under statutory powers for the purposes of public recreation use of the land by the public is pursuant to a statutory right and not use which is as of right.

121. The question which, therefore, arises in this case is whether that principle is engaged in respect of the Mown Area. The Mown Area is the site of the former Chickenley Lane Council School which was demolished in the early 1960s when the land in question was appropriated for housing purposes according to minutes of the former Dewsbury Borough Council (14, 46).

[85] See Lord Bingham at paragraphs 3 and 9, Lord Hutton at paragraph 11, Lord Scott at paragraphs 29-30, Lord Rodger at paragraph 62 and Lord Walker at paragraphs 72, 86-88. The point was strictly *obiter* but is nevertheless as persuasive as can be.
[86] See, in particular, Lord Scott in *Beresford* at paragraphs 29-30 and Lord Walker at paragraphs 86-88.
[87] See *Hall v Beckenham Corporation* [1949] 1 KB 716 at 728. See also section 123(2B) of the Local Government Act 1972.

122. Ms Crail relies on section 107 of the 1957 Act. This provides that "*a local authority may lay out and construct public streets or roads and open spaces on land acquired or appropriated by them for the purposes of this Part of this Act*". She submits that it could be inferred that, after the appropriation of the former school site for housing purposes, the subsequent grassing over of that area and the establishment of a regular maintenance regime was an exercise of the power conferred by section 107. I think that it is reasonable to conclude that the former school site was, when appropriated for housing, appropriated for the purposes of that part of the 1957 Act within which section 107 lies (Part V dealing with the provision of housing accommodation). I also think that it is reasonable to infer that its grassing over was thereafter an exercise of the power conferred by section 107. However, notwithstanding that, I do not think that the exercise of the power under section 107 of the 1957 Act was sufficient to confer any right on the public to use the land so laid out as open space under the power.

123. It seems to me that section 107 of the 1957 Act should be compared with section 93(1). That section provides that "*the powers of a local authority under this Part of this Act to provide housing accommodation shall include a power (either by themselves or jointly with any other person) to provide and maintain with the consent of the Minister in connection with any such housing accommodation any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.*" It is to be noted that this section includes a power to provide and maintain recreation grounds. The exercise of the power is subject to ministerial consent and the minister's having formed the opinion that the provision and maintenance of the recreation ground will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. It seems to me that, if the Mown Area were provided under section 93(1) of the 1957 Act, it would be land which is provided by a local authority under statutory powers for the purposes of public recreation. In accordance with the principle which I referred to above (120) its use would, therefore, be pursuant to a statutory right. There might be an issue, as suggested by Mr Maile (75), whether those who had such a right were the public at large or simply those for whom the housing accommodation was provided and whose

requirements were the subject of the minister's opinion.[88] However, Ms Crail does not rely on section 93(1) and there is no evidence in relation to the question of ministerial consent. Ms Crail relies on section 107, where there is no requirement of ministerial consent. In circumstances where there is no evidence of the ministerial consent necessary for one power to have been used but another power was available which would provide an explanation for what was done without any requirement for such consent, I consider that the inference to be drawn as to which power was used should be that it was the latter power. I thus infer that the Mown Area was provided pursuant to section 107 of the 1957 Act (as Ms Crail submitted) and not section 93(1).

124. I do not consider that the fact that the Mown Area was provided under the power in section 107 to lay out an open space engages the principle that where land is provided by a local authority under statutory powers for the purposes of public recreation use of the land by the public is pursuant to a statutory right and not use which is as of right. To my mind, the power in section 107 is not a power to provide land for the purposes of public recreation. I say this for the following reasons. First, there is no definition of "open space" in the 1957 Act and the term "open spaces" in section 107 does not therefore embody the definition found in section 20 of the Open Spaces Act 1906 of land "*used for purposes of recreation*". Secondly, on the basis that different words used in the same part of a statute may be expected to have different meanings, the fact that section 93(1) specifically refers to "recreation grounds" suggests to me that the term "open spaces" in section 107 is being used in a way which does not encompass use for recreation. Thirdly, the power in section 93(1) to provide "recreation grounds" is, as I have already set out in the preceding paragraph, subject to ministerial consent and to the minister's having formed the opinion that the provision and maintenance of the recreation ground will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. It would seem to me odd that land could be provided for recreational purposes under section 107 without these conditions being observed. If section 107 were to be construed as allowing this it would make the conditions in section 93(1) redundant. Fourthly, the term "open spaces" under section

[88] The decision in *HE Green and Sons v The Minister of Health (No. 2)* [1948] 1 KB 34 might tend to suggest that, as long as the recreation ground benefited the persons for whom the housing accommodation was provided, it would not matter that others were benefited also.

107 can have a sensible meaning without having to include any notion that it is land for recreational use. It could, for example, be simply land which is not built upon.

125. I do not, therefore, consider that the Application in respect of the Mown Area should be rejected on the basis that use of the Mown Area was not as of right but pursuant to a statutory right. As it is, this does not assist the case for registration given that I have already concluded that the Mown Area has not been used by a significant number of the inhabitants of the area edged green on the Neighbourhood Plan.

Spread or distribution of users

126. The final question I need to deal with out of deference to the submissions made to me (53, 56, 60, 74) is the question of spread or distribution of users. The first issue here is whether there is any requirement for a spread or distribution of users across the qualifying area. It is frequently argued on behalf objectors that there is such a requirement but the matter has received little specific judicial attention. The principled argument for the requirement is that which was put forward by Ms Crail in that part of her submissions which I report above (56). Ms Crail there argued that it was necessary that users came from all over the relevant locality/neighbourhood. It was submitted that, if it were sufficient that users came from just one part of the locality/neighbourhood, the locality/neighbourhood requirement would be rendered meaningless. In substance, one might just as well draw an arbitrary red line on a plan around the area from which users came (which is just what Sullivan J in *Cheltenham Builders* held a locality or neighbourhood not to be). Moreover it would create a mismatch between the persons whose user led to the acquisition of rights and the persons who enjoyed the benefit of them, which would be contrary to general prescriptive principles, would impose a much greater burden on the land than the landowner had acquiesced in and would infringe the principle of equivalence referred to by Lord Hope in *Lewis.*

127. I consider that the submission which I set out in the previous paragraph has a good deal of force to it. In my view it has a logic to it which it is difficult to fault. I also think that it is consistent with the way in which Sullivan J dealt with the issue of "significant number" in *McAlpine Homes* where he said that "*the number of people*

using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers".[89] If the local community is taken to be that making up the locality or neighbourhood in question then it does not seem to me that *general* use by the local community is established if that use comes from only part of that locality or neighbourhood. On the facts of *McAlpine Homes* it is notable that the inspector had found that users had come from all parts of the relevant locality.[90]

128. I also refer to that passage in the judgment of HHJ Behrens in *Leeds Group plc* which I have quoted above (100) and which I repeat here for the sake of convenience. The judge there stated that"*if … Yeadon cannot be a locality for the purpose of limb (ii), I would hold that the parish of St Andrew is the relevant locality. I see no reason to limit the meaning of 'locality' in limb (ii) in the manner suggested in paragraph 37 of Mr Laurence QC's skeleton argument* [which had contended that in limb (ii) a locality had to be of a size and situation such that, given the particular activities which had in fact taken place, it might reasonably have been capable of accommodating a proper spread of qualifying users undertaking activities of that type]. *There is nothing in the wording of the 2000 Act which refers to the size of the 'locality'. Furthermore one of the main purposes of the amendment, as it seems to me, was to allow inhabitants in a neighbourhood to qualify in a situation where the locality itself was too big. It cannot, in my view, have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users."* [91] In rejecting the submission that, in a limb (ii) case, the locality within which the relevant neighbourhood lay had to be small enough to accommodate a proper spread of qualifying users, HHJ Behrens appears to have accepted that there was such a requirement in respect of the neighbourhood itself.

129. I thus come to the conclusion that there is a requirement for a proper spread of qualifying users.

[89] At paragraph 71.
[90] See paragraph 38 of the judgment. The locality in question was the town of Leek.
[91] At paragraph 90.

130. In arriving at that conclusion, I have not lost sight of what Vos J said in the *Paddico* case. I have already mentioned this above (61) but again repeat it here for the sake of convenience. In paragraph 106 i) of the judgment Vos J said that he *"was not impressed with Mr Laurence's suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives to me such an illogical and unfair conclusion."* These observations were made in the context of consideration of the unamended definition of a town or village green in section 22(1) of the 1965 Act. Vos J returned to the matter in paragraph 111 where, in the context of considering the amended definition in section 22(1A), he said again that he did *"not accept Mr Laurence's spread or distribution point."* It is not wholly clear whether Vos J was rejecting the principle that some kind of spread was required or whether he was simply rejecting the submission made to him on the facts that the particular spread was inadequate but the more natural reading of what he was saying would appear to suggest the latter rather than the former and I consider that the need for some kind of spread of users is necessary for the reasons which I set out above (126, 127) and is supported by the judgment of HHJ Behrens in the *Leeds Group plc* case as also referred to above (128). I should say that I do not think that Vos J's remarks can necessarily be satisfactorily distinguished on the basis put forward by Ms Crail that the judge was dealing with the unamended definition of a town or village green which encompassed only locality and had no requirement of significant number (61). The argument for there to be a spread of users as a matter of principle (126) seems to me to apply equally in the case of the original definition of a town or village green as the amended definition and thus it cannot be said to be simply a product of the latter's introduction of the significant number requirement, notwithstanding that it fits well with Sullivan J's explanation of that requirement (127). In any event, Vos J's remarks were also directed towards the amended definition in paragraph 111 of the judgment.

131. In arriving as I do at the conclusion that a proper spread of users is required I do not consider that this is placing an unwarranted gloss on the statutory definition of a town or village green or that it places an obstacle in the way of registration which

cannot have been Parliament's intention. On the contrary, the requirement is in my view an inevitable consequence of the statutory definition in section 15 of the 2006 Act for the reasons of principle set out above (126).

132. The next question is how the requirement for a proper spread of users is to be interpreted. It is here that the remarks of Vos J are, to my mind, particularly helpful. I consider that the requirement should be interpreted in the light of the pattern of residence of the users one would expect to see. That might well be that one would expect to see most users of the claimed green coming from those houses closest to it and I consider that it would be wrong to suggest that there should be an equal spread or distribution of users from all over the qualifying area. However, in my view the requirement for a spread of users does involve the proposition that if there is simply an absence of use by inhabitants of large parts of the qualifying area the requirement is not made out.

133. In the present case I have already concluded, quite apart from any issue of spread of users, that there has been insufficient use of the Main Area in amount and manner to justify its registration (116) and that the Mown Area has only been used significantly by the Mastronardi and Brown families and thus has not been used by a significant number of the inhabitants of the area edged green on the Neighbourhood Plan (117). Were these conclusions to be wrong, the Application would still fail in my view on the issue of spread of users. This is because, taking the evidence in support of the Application at its very highest, an insufficient spread of users has been demonstrated. I say this because the Address Plan,[92] the addresses on the evidence forms and those which may be gleaned in relation to the pro-forma witness statements[93] demonstrate that there have been no users of the Application Land from large parts of the area edged green on the Neighbourhood Plan. The majority of addresses are close to the Application Land, concentrated in Heath Road, School Street, Princess Street, Earl Street and Chickenley Lane. However, there are no user addresses in the large, western part of the area edged green on the Neighbourhood Plan which extends from (and includes) Princess Road and Cedar Road to the eastern

[92] A plan of the addresses of those providing evidence (36).
[93] The pro-forma witness statements do not always include addresses but the relevant addresses can usually be worked out by looking at the markings on the plans accompanying the statements or from the Address Plan.

boundary of the area.[94] In the eastern part of the area edged green on the Neighbourhood Plan it is possible to trace only one user address in the area south of Hazel Avenue and Hazel Drive, this latter area again making up a large part of the neighbourhood.[95] The areas I describe in the preceding 2 sentences comprise, in my estimation, over half of the area edged green on the Neighbourhood Plan. There is therefore an almost total absence of any evidence of users coming from areas which make up over half of the neighbourhood. This is not a case where the majority of users live close to the Application Land but it could accurately be said that there is a scattering across the rest of the neighbourhood. In my view the facts of the present case do not meet the requirement for a proper spread or distribution of users and there has thereby been a failure to establish that use has been by a significant number of the inhabitants of the neighbourhood. The Application would, therefore, fail on this basis in any event were it not to fail for the more specific reasons which I have already set out above in relation to the Main Area and Mown Area (116, 117).

134. So far as concerns the fall-back position put forward by Mr Maile – reliance on limb (i) and on use by a significant number of the inhabitants of Dewsbury East Ward – it follows *a fortiori* from my conclusion that there has not a proper spread of users across the smaller neighbourhood that there cannot have been a proper spread of users across, and use by a significant number of the inhabitants of, the much larger area of the Dewsbury East Ward. The Application cannot therefore succeed on the fall-back position. For this reason it is unnecessary for me to express a conclusion in relation to the question of whether an electoral ward could constitute a locality for the purposes of a limb (i) case. Equally, I do not need to express a view on the question whether, if an electoral ward could constitute a locality for limb (i) purposes, reliance on the Dewsbury East Ward would be defeated by the changes in the ward boundaries which have occurred over the relevant 20 year period.

[94] There is one user address in Syke Ing Close which lies on the eastern boundary of the area edged green on the Neighbourhood Plan but Syke Ing Close seems to have been excluded from the area edged green. Nothing turns on whether this one address lies within or outside the claimed neighbourhood.

[95] The address in question is in Walnut Road. Of the children's evidence forms, 4 give addresses in the area I describe in the text above south of Hazel Avenue and Hazel Drive. Two give the same address in Walnut Road, one gives an address in Walnut Crescent and one in Boldgrove Street. The eldest of these children is 13 and these forms cannot therefore demonstrate use of the Application Land from the area I refer to over the 20 year period.

Overall conclusions and recommendation

135. My overall conclusions are as follows:

(a) there has been insufficient use of the Main Area in amount and manner to justify its registration (116);

(b) the Mown Area has not been used by a significant number of the inhabitants of the neighbourhood (117);

(c) there has in any event been an insufficient spread of users over the neighbourhood to establish the case for registration on a limb (ii) basis (133) and an insufficient spread of users over the locality to establish the case for registration on a limb (i) basis (134).

136. I recommend to the Registration Authority that it reject the Application.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
3rd October 2011