APPLICATION TO REGISTER LAND KNOWN AS CHURCHFIELD, DENBY DALE AS A TOWN OR VILLAGE GREEN
APPLICATION KC/VG7

REPORT

By
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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 an application (hereafter "the Application") to register land known as Churchfield, Denby Dale ("the Application Land") as a town or village green.

2. The Application is dated 10th April 2011 and was made by Mrs Barbara Priest of 12 Bank Lane, Denby Dale ("the Applicant") on behalf of the Friends of Churchfield.

3. 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.

4. The inquiry sat for three days on 15th and 19th October and 12th November 2012, the venue for the first two days being Huddersfield Town Hall and, for the third day, Brian Jackson House, Huddersfield. In addition to the normal inquiry sitting hours an evening session was held on 15th October 2012 to accommodate a number of the Applicant's witnesses.

5. At the inquiry the Applicant represented herself and the objector, Kirklees Council in its capacity as landowner ("the Council"), was represented by Mr William Hanbury of counsel. I thank the Applicant and Mr Hanbury for their assistance at the inquiry. I also thank the Registration Authority (and, in particular, Ms Deborah Wilkes and Mrs Janet Wiltshire) for arranging the inquiry and providing all necessary administrative support.

6. I made unaccompanied visits to the Application Land before and after the inquiry. With the agreement of the parties I did not undertake an accompanied site visit.

7. I use the following abbreviations in this report: "the AB" for the Application Bundle; "the OB" for the Objection Bundle; "the RTO" for the Response to Objection; "the AIB" for the Applicant's Inquiry Bundle: and "the OIB" for the Objector's inquiry bundle. A number appearing after the abbreviation refers to the relevant page number.

The Application

8. The Application sought the registration of the Application Land under section 15(1) of the Commons Act 2006 ("the 2006 Act") on the basis that section 15(2) applied.

9. Section 15(2) of the 2006 Act applies where –
"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
(b) they continue to do so at the time of the application."

10. The Application was supported by 66 completed evidence questionnaires and other material (which now form the AB). It was objected to by the Council by way of letters with supporting material dated 29th June and 8th August 2011 (the OB). The objection was followed in turn by a detailed response from the Applicant in October/November 2011[1] which was accompanied by, *inter alia*, a further 15 evidence forms and a petition signed by some 700 people (the RTO). Thereafter the matter has proceeded to the inquiry which forms the subject of this report, each side having prepared a further bundle of material for the purposes of the inquiry (the AIB and the OIB).

11. The relevant 20 year period by which the Application falls to be assessed in this case runs from 1991 to 2011.

The Application Land

12. The Application Land is a green open space of about 1.09 hectares (2.7 acres) in area. Most of it is classified as "urban greenspace" in the Council's Unitary Development

[1] The RTO document itself is undated.

Plan. The Application Land slopes downwards from the south to the north and affords pleasing views of Denby Dale and its striking railway viaduct.

13. To the south the Application Land is bounded by Barnsley Road. To the west it is bounded by the rear gardens of properties (numbers 2-12) on Bank Lane. The evidence suggests that these properties were once (at a time long pre-dating the relevant 20 year period) associated with former mill operations carried on by the Kenyon family. The north western boundary of the Application Land abuts the grounds of a property on Bank Lane known as The Sycamores. The evidence suggests that the grounds of this property were once (again, well before the relevant 20 year period) part of the same parcel of land as the Application Land and contained a reservoir to serve mill operations. To the north of the Application Land lie (to the north of the western half of the northern boundary) the Holy Trinity Church, which is located on Trinity Drive, and (to the north of the eastern half of the northern boundary) the rear of properties on Kenyon Bank. Kenyon Bank is part of a housing estate built (during the relevant 20 year period) on the site of the former Dearneside Mills (to which had been relocated the original Bank Lane operations). To the eastern side of the Application Land lies a small area of private woodland which was referred to at the inquiry as Ash Well Wood (the name being taken from the nearby Ash Well Beck). The south eastern part of the Application Land is bounded by the grounds of Bridgewood House, a residential care home operated by Bridgewood Trust Limited which the evidence suggests was built in 1988 (on a site which would seem then to have been part of the same parcel of land as the Application Land).

14. An unfenced public footpath (recorded on the definitive map as DEN/68/20) which has a rough surface runs in a straight line across the Application Land from Barnsley Road in the south to Trinity Drive in the north and provides unimpeded access on foot to the Application Land. The access points on Barnsley Road and Trinity Drive are marked by stiles which take the form of restricted gaps in the boundary walls. An apparently permissive footpath runs from Barnsley Road through Ash Well Wood and, at the point where Ash Well Wood meets the Application Land, there is a wooden gate and step stile. A footpath with a stone flagged surface runs from the public footpath where it enters/leaves the Application Land at the end of Trinity Drive to the rear of the Bank Lane properties. This route is not a public footpath but would

appear to have served as the historical connection between the Bank Lane properties and Dearneside Mills. There is a wooden field gate into the Application Land from Barnsley Road close to the point where Bank Lane joins Barnsley Road but I need say no more about this as it did not feature in the evidence.

15. The Application Land is rough grassland. The issue of the condition of the Application Land over the relevant period was one which figured prominently in the evidence and I deal with this in more detail later on. There are a number of mature trees on the Barnsley Road frontage of the Application Land which have tree preservation order protection and there are also some trees which enjoy similar protection on the Holy Trinity Church boundary. Four trees were planted in the more central parts of the Application Land in 1997 as part of a programme of environmental improvement works which I refer to later in the report.

16. The Application Land was acquired by the Council on 24th March 1977 under the Education Act 1944 for the purposes of a new school.[2] The acquisition included the site of what is now Bridgewood House. In the event no school was ever built. The Application Land was subject to grazing arrangements with the Council from 1988 to 2005. I deal with this issue in greater detail later in the report. During the relevant 20 year period some small areas of the Application Land to the rear of the Bank Lane properties have been used as hanging grounds (for washing) by agreement with the Council. The hanging grounds have never been fenced or otherwise marked off from the rest of the Application Land and the areas used as such fell within the scope of the grazing rights.[3] After the cessation of the grazing arrangements the grass growing on the Application Land was not managed by the Council save for one episode of mowing which took place in the summer of 2012 (and thus after the end of the relevant 20 year period).

17. In 2009-2010 proposals were put forward by Denby Dale Parish Council and the Council for allotments on part of the Application Land. Those proposals served as the catalyst for the Application.

[2] The OB11.
[3] The OB11.

Neighbourhood and locality

18. In referring to the issue of neighbourhood and locality I use the conventional terminology of "limb (i)" and "limb (ii)" cases. A limb (i) case is one which is put on the basis that use has been by a significant number of the inhabitants of a locality. A limb (ii) case is one which is put on the basis that use has been a significant number of the inhabitants of a neighbourhood within a locality.

19. The answer to question 6 on the application form (form 44) which asks for the locality or neighbourhood within a locality in respect of which the application is made stated that the locality was Denby Dale village. The area so identified as the locality was shown edged red on Map B accompanying the Application. The Application was thus made on the basis that it was limb (i) case. At the inquiry (as foreshadowed in earlier correspondence) the Application was put on the basis that, while the physical extent of the qualifying area remained as identified on Map B and was still described as Denby Dale village, that area was to be regarded as a neighbourhood within a locality. The locality was identified as the civil parish of Denby Dale. No objection was made to this by Mr Hanbury on behalf of the Council and the inquiry proceeded accordingly. Insofar as may be necessary the matters recorded above may be treated as my formal allowance of amendment of the Application in this respect.

20. The rationale for the change was explained in the evidence given by Mr Robinson, reported in paragraphs 25-27 below.

The evidence in support of the Application

21. In the succeeding paragraphs under this section I set out a summary of the main features of the evidence given by the witnesses called by the Applicant in support of the Application. I heard from 11 "live" witnesses. I also make reference to the written evidence in support of the Application.

22. **Stephen Robinson** of 8 Cuckstool Road, Denby Dale said that he had lived at that address since 1986, having previously lived at 5 Woodland Close, Denby Dale between 1978 and 1986. He had known the Application Land for 34 years and had

regularly used it for walking and running. The Application Land was one of his many routes. Most often he had crossed the Application Land using the public footpath between Trinity Drive and Barnsley Road but, on many occasions, he had used the other route to and from the stone stile at the end of Trinity Drive across the north east corner of the Application Land to and from Ash Well Wood, which was not a public footpath and had no signs to indicate it was a permissive or concessionary route. This latter route had been used by local people for many years. The only sign he had seen on the Application Land was during the foot and mouth epidemic in 2001. Mr Robinson had never been challenged over his use of the Application Land. He was aware that the Application Land had been used for games and pastimes and his own children had played there in the mid-1990s when visiting friends on Bank Lane. His daughter recalled "hanging out", walking the dog and jogging there. His son recalled "playing there lots". His children had never made any reference to any conflict with horses on the Application Land. Mr Robinson had not witnessed his children playing on the Application Land.

23. Mr Robinson said that the Application Land had a special character and sense of place. He had taken a particular interest in the Application Land as a member of local environmental and conservation bodies. In the 1984 Denby Dale Village Plan produced by the Council the Application Land was identified as public open space. In the Council's Unitary Development Plan it was allocated as urban greenspace. Mr Robinson was aware that some environmental improvements, including tree planting, were carried out in 1997 by local volunteers via the Denby Dale Countryside Management Project. He thought that the project had arisen from the fact that local people had long used the Application Land and had affection for it. Grazing had always been an appropriate management "tool" for the grassland. It was common for grassland to be used for both grazing and public recreation. It was disappointing to note that, once this ceased in 2005, no alternative management was introduced with the result that the sward deteriorated and an invasion of coarse weeds took place. He had, along with others, lobbied ward councillors about this but no cutting had taken place except once this year (2012).

24. Mr Robinson also said that the Application Land was an important feature in the heritage of the village because of its association with the Kenyon family who first

operated from premises on Bank Lane in the 1850s but later developed the more substantial Dearneside Mills. The Application Land remained as an open area separating the original premises from the Mills. Production ceased at the Mills in 1977 and the buildings were subsequently demolished with the site being redeveloped for housing (on Kenyon Bank and associated streets). It was also in 1977 when the Council bought the Application Land from Jonas Kenyon and Son Ltd.

25. Mr Robinson also provided a detailed explanation of the case which was advanced on the issue of neighbourhood and locality. The Application had originally been made on the basis of a limb (i) case with the locality being the village of Denby Dale. However, in the light of perceived uncertainty about whether a locality had, for the purposes of an application under section 15 of the 2006 Act, to be an area *"known to the law"*[4] and to have *"legally significant boundaries"*[5] and, the consequent doubt as to whether Denby Dale village could so qualify, it had been decided to reformulate the Application as a limb (ii) case. Denby Dale village was now put forward as a neighbourhood within a locality. The locality was the civil parish of Denby Dale which came into being in 1974 upon local government reorganisation with the creation of Denby Dale Parish Council at the same time as the former Denby Dale Urban District Council was absorbed into Kirklees Council. The Denby Dale ward boundary was the same as the boundary of the civil parish. It was the smallest locality which could be found.

26. The boundaries of the neighbourhood of Denby Dale village which were relied on were those which were chosen to define the village envelope in the process of the preparation of the Kirklees Unitary Development Plan ("the UDP") by the 1992 Consultation Draft version of the UDP. The boundaries marked the village envelope off from the surrounding Green Belt. The same boundaries were shown on the 1984 Denby Dale Village Plan. The chosen boundaries were thus not randomly selected. Moreover they enclosed an area within which inhabitants had a clear sense of identity

[4] See, for example, the use of this expression in *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931 at 937b.
[5] See *Oxfordshire County Council v Oxford City Council* [2005] UKHL 25 per Lord Hoffman at paragraph 27 and *Adamson v Paddico (267) Limited* [2012] EWCA Civ 262, in particular at paragraph 27.

as residents of Denby Dale village. The village was a cohesive,[6] serviced and functioning unit as well as a social community. The boundaries distinguished between those living in the village and those living near the village. Kitchenroyd had been included because there was continuous development from there to the village centre, house numbers were consecutive along that length of Wakefield Road and postal addresses for Kitchenroyd clearly stated "Denby Dale".

27. There were some anomalies. To the east of the railway line the boundary on the 1999 adopted version of the UDP extended further north than shown on the 1992 Consultation Draft in that it took in the site of the former Bromley clay works of Naylor Bros which were the subject of planning consents for industrial development in 1995. The industrial consents were, in the event, never implemented and residential permissions followed, taking advantage of the acceptance of the principle of development in the Green Belt. The northern part of the housing development (Bluehills Lane) had only recently been completed and occupied. It had been excluded from the neighbourhood relied on in support of the Application because it did not exist at the beginning of the 20 year period predating the Application and had then been in the Green Belt, even though it was regarded now as part of the current village. Clusters of dwellings at Leak Hall Farm, Gilthwaites Farm and at Lower Putting Mill abutted or were in close proximity to the boundaries. However, they all remained in the Green Belt. The same was true of recent housing development at Putting Mill Walk. All such anomalies fell within the *"deliberate imprecision"* of the expression "neighbourhood" which Lord Hoffman had referred to in *Oxfordshire County Council v Oxford City Council.*[7]

28. When cross examined, Mr Robinson accepted that, by reference to the 2006 aerial photograph in the OIB, his route from Trinity Drive to Ash Well Wood would have been along the line of the path which could be seen on the photograph. This was after grazing had been abandoned on the Application Land and, before that, there had not

[6] See the well-known observation of Sullivan J in *Cheltenham Builders Limited v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) at paragraph 85 that a neighbourhood had to have *"a sufficient degree of cohesiveness"*.

[7] See, again, paragraph 27 where Lord Hoffman 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."*

been such pronounced lines; various routes might have been taken. Nevertheless, most of his journeys across the Application Land had been of an "A to B" nature. The Application Land quite quickly grew unchecked after grazing ceased. He did not claim to have run through overgrown areas. It was a matter of fact that there had been infestation with docks. Mr Robinson agreed that there was no access to Bank Lane from the west of the Application Land save by going through residential properties. The route from Bank Lane across the Application Land was part of the site's heritage; it was the route Mr Kenyon would have taken to Dearnside Mills. His recollection of horses on the Application Land was that there was occasionally more than one. It was unfortunately the case that some dog owners were more irresponsible than others and did not clear up after their dogs but the Application Land was not heavily fouled. His understanding was that some dog owners – the responsible ones – did take bags to remove dog mess notwithstanding that the Application Land had become overgrown. When it was put to him that people from Kitchenroyd would have no reason to use the Application Land, Mr Robinson accepted that the further away people lived from the Application Land, the less likely they were to use it for games and pastimes. The centre of Denby Dale was where the Post Office was but not all facilities were in the centre. The school was on the edge. There were no shops or pub round the Application Land but the community facility there was the church. There was some residential development south of Barnsley Road so there was residential development on three sides of the Application Land.

29. In re-examination Mr Robinson qualified what he had said in cross examination in relation to the weed infestation by stating that the main infestation was near mature trees. At the bottom of the Application Land it was not so bad.

30. **Cynthia Naylor** of 4 Wells Mount, Upper Cumberworth said that she had formerly lived at 188 Barnsley Road for 36 years from 1970 to 2006, when she moved to her present address. She had known the Application Land all her life as she had been born in Denby Dale and had got to know it more since moving to Barnsley Road when she started to use the Application Land in a recreational capacity with her late husband and then her son and daughter. They used the Application Land for recreational purposes on a regular basis, especially when the children were young when her husband would take their children and their friends on to the Application Land and

play football and other ball games and fly kites there. On many occasions she had seen others taking advantage of the Application Land and she instanced a Mr Riding from Barnsley Road who would practise golf shots there and local children who would use it for sledging in winter. Many local people had used the Application Land, including the Barton family and the Senior family along with her and her family for exercising their dogs there on a daily basis. Her family used the Application Land to exercise their dogs for 26 years before the move to Upper Cumberworth. She had spent many hours wandering around the Application Land, admiring and enjoying the freedom of being in such lovely surroundings. Many people walked the route from the village. After Mrs Naylor's children grew up, her grandchildren visited and they too were taken on to the Application Land for ball games, kite flying or play, all without permission or secrecy and with entry as and when liked. The horses on the Application Land had never been a source of concern. There was once one horse which was a bit more frisky than the others but it was moved. A horse had once tried to bite her daughter on the top of her head but that had not put her daughter off. Mrs Naylor's dog was not fazed by horses. If the horses were close by, Mrs Naylor would put the dog on a lead. In general, the horses did not approach them. Mrs Naylor did not now use the Application Land since having moved away. She was of the opinion that the nearby children's play area did not provide the same sort of experience at all for children as did the Application Land.

31. When cross examined, Mrs Naylor agreed that there were footpath routes into open countryside near her former address on Barnsley Road but pointed out that the tennis courts on Bank Lane were for members only and that people were not encouraged to go on to the cricket ground in Denby Dale. There was a small play area on Sunnybank with swings and the like. She had gone on to the Application Land when she lived on Barnsley Road because it was close by. As the dog got older it did not want to go so far. The Application Land was close for the children to play. It was also a convenient route to get to the centre of the village. Mrs Naylor could not remember horses on the Application Land in 1970. The Application Land was a rough area of ground then but not particularly overgrown. She would say it was the early 1980s when the horses came. It had become more difficult to use the Application Land since she left Barnsley Road in 2006 but children could still play there. She still attended Holy Trinity Church. She said by reference to some of the Council's photographs of the

Application Land from 2006 which were shown to her in the OIB that there would not be much reason to depart from the footpath unless one was walking the dog and had appropriate footwear but also said that, when she left Barnsley Road in that year, the Application Land was still quite usable if one was walking a dog there. It was only around 2005-2006 that the condition of the Application Land got worse. Her grandchildren had moved away by then. When shown photographs from 2005 in the OIB illustrating overgrown conditions on the Application Land, Mrs Naylor said that, before that time, the Application Land could still be used for ball games and one could still walk the dog there and children could still go into the long growth. It had been better when she had taken her grandchildren on to the Application Land. It had probably been around 1998-2000 that she had done that, when her grandchildren were small. It had been about 12-13 years since she had seen anyone play a ball game on the Application Land. Mrs Naylor agreed that there were better places in the village to play but, if the Application Land was only 50 yards away, it would be used because it was the closest. She agreed that use of the Application Land had become much less as it had become overgrown. Horse mess had never been a big issue. She could never remember children coming home with horse mess on their footwear.

32. When re-examined, Mrs Naylor said that, save for the last little bit of the period when it became overgrown, the Application Land had been grazed all the time when she had used it. She had wandered off the pathway nearly every time she went on to the Application Land; it was not possible to do that and go off the footpaths in the countryside on to farming land.

33. **Linda Hodgson** of 3 Garden Terrace, Denby Dale said that she had known the Application Land for around 40 years. She had lived in Lepton for a while but for the last 15 years she had lived either in Denby Dale or Upper Denby, where her parents lived. She had lived in Garden Terrace for two years and at 5 Briarfield for the six years before that. Prior thereto she had lived in Upper Denby. She had used the Application Land for dog walking since she moved to Briarfield, incorporating the Application Land into her nightly walk. She now walked her dog, Lily, daily and did her last walk of the day around Church Field. She went through Ash Well Wood and on to the Application Land by the gate and then wandered around. As the dog was not the sort of dog to chase a ball, Mrs Hodgson had to walk her round the Application

Land in order to exercise her. Mrs Hodgson also said that she often went on to the Application Land with her grandson. They would go out at dusk and listen out for the wildlife after dark. The Application Land offered something different to a child from a playground such as the one on Sunnybank. It was open grassland where one could wander at will. The Application Land was also a place where it felt safe. Other people were about at night as well. She used it during the day if she was going into Denby Dale, her route being via Ash Well Wood and then the public footpath. There were blackberries to pick at the top and bottom of the Application Land. People exercised their dogs on the Application Land but dog fouling was not a problem. She always cleared up after her dog. Mrs Hodgson said that a very conscious effort had been made to keep people off the cricket club's land but she had never been asked not to go on to the Application Land.

34. When cross examined, Mrs Hodgson said that she did go off the footpath notwithstanding the overgrown nature of the Application Land since 2005. She wore wellingtons and walking boots. It was a place where she could feel part of nature. The grassed area on Inkerman Way was in a housing estate. While there were no lights on the Application Land there was enough light around to be able to use it after dark. Mrs Hodgson said that she had lived at Upper Denby for about six years. She had not walked as regularly through the Application Land when she lived there but used it then if she came down to Denby Dale. She had wandered on the Application Land as a teenager, when she and a friend had had dogs, and had made dens there in a quiet corner near where Kenyon Bank now was (although it was not built then) when about 11-12 years old. There were some blackberry bushes at the top of the Application Land near the home (Bridgewood House) but the best fruit on the Application Land was on the boundary near the church. Mrs Hodgson agreed that, since the mid-2000s, the Application Land had got pretty overgrown. She said that she would not describe the Application Land as a "dog toilet" and could not recall standing in any dog mess there. In response to the question put to her that it was unlikely that dog owners would clear up after their dogs in an overgrown area, Mrs Hodgson said that she did see some people picking up dog mess. She also could not recall seeing any garden rubbish on the Application Land. It was surprising how well-worn the little paths on the Application Land were and how easy it was to find them.

35. In re-examination Mrs Hodgson said that there was not really anywhere in Denby Dale apart from the Application Land where a dog could be let off the lead. The Application Land was also somewhere where wildlife could be seen but there were still houses to be seen as well. It was open enough but not a place where one would feel uncomfortable. The Inkerman Way open space mentioned to her in cross examination was just like a giant grass verge next to the road and was more of a visual amenity.

36. **Barbara Priest** (the Applicant) of 12 Bank Lane said that she had lived at that address for 32 years. Her garden abutted the Application Land. She had used the Application Land in various ways over the 32 years. Her youngest child was under two when they moved to Bank Lane and she had two older children who were at primary school. The children played, on a supervised basis, on the Application Land, roaming across the entire area because the grazing horses kept the grass short. The children played the usual variety of games and often played with visiting friends from school. As the children grew up they used the Application Land and wood for unsupervised play. The family had had a dog for about 12 years until it died in 1994 and the children were able to take the dog out on to the Application Land on their own. Because of the protective walls they could play freely together without the dog's being on a lead. Mrs Priest's own use of the Application Land had initially been with her young children but also for quiet walks to get away from the busy household. She had taken photographs, talked to neighbours and other villagers with children or their dogs, picked buttercups (with which the Application Land was awash in the summer when it was grazed) and helped her children to find leaves, nuts and other nature specimens for school. Mrs Priest still wandered out on to the Application Land to see the progress of the young trees and the changing seasons and to get some fresh air. The views of the village with the churches in the valley and of the viaduct were the best in the village. Mrs Priest said that she was also a keen amateur photographer and loved to photograph the Application Land when it was first covered in a layer of snow.

37. When cross examined, Mrs Priest said that grazing had stopped possibly a little before August 2005. When she first knew the Application Land there was grazing by one or two horses and three on very odd occasions. She remembered hearing a complaint by

someone about a horse but could not recall the date and was not herself aware of a frisky horse. She did not go up to the horses but some people did. She did not think that Mrs Colley (the grazier) would put a horse which would cause problems on land which had a public footpath on it. The Application Land had only become overgrown in parts since the grazing ceased; the edges were difficult to go into because of brambles and nettles and there were clumps of docks in sections in the central part but there was plenty of grass around them. There was less scope to kick balls but balls could still be thrown and kites flown. It was perfectly possible to play in areas where there were fewer docks although she had not herself gone into such areas. There were areas where the grass was shorter with numerous green pathways. In more recent times Mrs Priest had strolled on the Application Land for peace and quiet, not primarily on the footpaths but on a circuit. The paths were only just emerging in 2006. When the horses were on the Application Land, people roamed everywhere. Mrs Priest said that she had a lot of photographs of the Application Land which were other than recent but had not had the time to go searching for them. As a family they had played rounders, kicked footballs around and played informal cricket on the Application Land. They had had a go at kite flying too and she had seen other people do the same. She had not done much blackberry picking as she was not a jam maker; she thought that her children had done it. The Application Land had not been rough; the grass had been very short. It was a natural thing to do to picnic there. Sledging and snowballs took place seasonally on the Application Land. Mrs Priest said she was not a birdwatcher but had seen others on the Application Land pointing up at birds. She had seen people lifting bikes over to cycle on the Application Land. Since grazing had come to an end in 2005 she had seen people walk on the footpath, children playing on the Application Land and dog walkers on a circuit or on little zig-zags, going off the path. People also came on to the Application Land to take wood.

38. **Lorraine Fletcher** of 154 Barnsley Road, Denby Dale said that she had lived at that address since 1981. Both her children grew up there. As a family they had many picnics on the Application Land, they collected conkers there, they used it in winter for sledging and rolling snowballs down the slope and her son, who is deaf, used it as a safe area to ride his mountain bike with friends off the roads. Her son also played there with his friends on the way home from Cubs. He was now losing his sight and was reluctant to walk on the rough ground of the public footpaths behind their house

but the Application Land was still accessible to him. Mrs Fletcher's daughter met her friends on the Application Land when she was growing up. The family had trained all their dogs there to come back when called. There had always been one horse on the Application Land and sometimes two but the horses had never bothered them. They would choose their picnic spots to avoid the horses. Mrs Fletcher produced some 1988 photographs of the Application Land showing, amongst other things, her son on a bike there, her daughter with friends, their dog and a horse grazing. The photographs also show short grass and a profusion of buttercups. Mrs Fletcher mentioned other children who gave evidence of playing on the Application Land. More recently Mrs Fletcher would stand on the Application Land and talk to other local residents as their dogs chased each other round. She regularly took her dog there and let the dog off the lead for exercise. This took place when she went down to the village five times a week and two-three times a week when she would go to the Application Land specifically to exercise the dog. Mrs Fletcher said, in explanation of the fact that she had written, in a document describing some memories of the Application Land, that it was "used by many as a sort of unofficial dog toilet" that there were areas of the Application Land where it was overgrown with weeds in respect of which some people did not do the right thing and did not clear up after their dogs. She would collect wood (having first checked with the Council that it was all right to do so) when there were fallen branches after a storm. Mrs Fletcher said that she was also a keen photographer and had taken many photographs in, and of, the Application Land and the viaduct.

39. When cross examined, Mrs Fletcher said that she did various walks on the public rights of way available from her house but also used the Application Land because she liked it. She had said in her evidence questionnaire that the Application Land had become "messy and overgrown" and "therefore used less". That was her opinion. She was referring to the time since grazing stopped. There had not been a problem before then. It might be true to say that her primary use of the Application Land had been going across it but children did not work in straight lines and her deaf son did not do paths. She was able to date the photographs she produced to 1988 because they came out of an album for that year. The horses grazed the grass very short but did not like the buttercups. The horses were always well behaved and they had never had a bad experience with them. She had heard only rumours and hearsay about a horse

frightening footpath users. She had told her children not to go too close to the horses but had not said to stay on the footpath. The Application Land was the space for them to play. She did not believe that there were other recreational areas available at that time. As to her use of the phrase “dog toilet”, it need only take one person to take a dog to the Application Land and not clear up after it. Since 2005 children came through the Application Land on their way home from school, chasing each other there and there were 10-20 dog walkers who used it, not on the path. Photography still went on. Sledging and snowballing continued; sledging could be done on the Application Land at a push. Mrs Fletcher herself watched birds on the Application Land; she had seen kestrels there and baby kestrels in a hole in a tree. She had seen picnics on the Application Land recently and had heard of bike riding there since 2005. Her son had moved away in 2004. He did go on to the Application Land and she followed him where he wanted to go.

40. In re-examination Mrs Fletcher said that she could not say what the numbers were for those dog owners who allowed their dogs to foul the Application Land. The majority now picked up the mess but there was some left in the areas which were overgrown. She had never got dog mess on her shoes.

41. **Sally Campbell** of 2 Bank Lane, Denby Dale said that, since moving to that address with her husband in the summer of 2003, they had openly accessed and used the Application Land without ever seeking permission to do so or having their presence there challenged or queried by anyone. They had made the assumption that the Application Land was freely available for the public to enter, roam freely over and enjoy outdoor leisure activities thereon. Their property had a gate on to the Application Land. When they moved in 2003 their daughter was only a baby so the extent of their use of the Application Land was mainly to meet up with neighbours for a chat and to access the various footpaths. They also hung their washing out in a small area of the Application Land for which they paid a ground rent to Kirklees Council. Residents on Bank Lane took it in turns to mow an area around the hanging grounds. Some residents had also done some gardening in that area. As their children had grown up (their daughter now being nine and their son seven) they had increasingly accessed the Application Land for family leisure purposes such as sledging and snowman building in the winter and tennis, French cricket, frisbee and kite flying in

the summer. More recently the children often wandered off into the Application Land alone, which was allowing them their first taste of independence while remaining in an area in which there were no cars. The children could be told not to venture beyond the boundaries of the Application Land as it was a defined area. How often the Application Land was used depended on the time of year; their daughter probably went there daily. There were often other people on the Application Land, primarily dog walkers taking advantage of the whole area to allow their pets a good run around off the lead. There were perhaps a couple of dozen of such users. They had also seen people enjoying photography and bird watching and a local resident from across the road (Mr Bright) there with his children. She had been told that children from Kenyon Bank played at the bottom end of the Application Land. The Application Land provided a number of important short cuts and more scenic alternatives than walking or running on the surrounding roads, including access to the woods, Barnsley Road, the church and the village centre. Ramblers, runners and dog walkers did not just use the marked footpaths but tended to take advantage of the full space. Mrs Campbell believed that the use of the Application Land by local children was likely to increase in the future as there were a huge number of young children who lived on Kenyon Bank and the Application Land provided an ideal place for them to play ball games, etc. while being safe from cars.

42. When cross examined, Mrs Campbell said that she could not remember a horse on the Application Land much when they moved in. Since 2005 the Application Land had become more overgrown, certainly in patches. The grass had been shorter when they moved in but the Application Land was definitely wilder now and there were areas where the grass was long. The children, as they had got older, had not restricted their play to the mown area around the hanging grounds. The Application Land was not ideal for ball games but one made the best of what one had. Most of the overgrown areas were just long grass and nothing that would do any harm. Snowman building had taken place in the washing line area; sledging had been further over where it was steeper. They had flown a kite there but not hugely regularly. It was not an ideal place for the children to go on bikes or scooters but that had not stopped them having a go. Her children had been on the Application Land on bikes although not regularly and probably on the flatter area or lower down. Use of the Application Land had increased as the children had got older. The Sunnybank play area was not good for children over

five. She had not seen that much dog mess on the Application Land and had not trodden in it.

43. **John Shone** of 19 Inkerman Way, Denby Dale said that he had lived on Inkerman Way for 32 years, first at number 15 and then at his current address for 20 years. From 1990 to 2005 he had been involved with the Scouts in Denby Dale as a uniformed leader, mostly with the Cubs. In the summer months the preference was to spend time outdoors when the (once-weekly) evening meetings took place. There was limited access to the Denby Dale cricket field and the football fields at Skelmanthorpe but these facilities were not always available and, when this was the case, the Application Land was used. Depending on the availability of the other facilities, the Application Land could be used two-three times a year; it was variable. He was aware of Mrs Colley but never felt that it was necessary formally to ask for permission to use the Application Land. The leaders were trained in risk assessment. They would not go into areas where there was a horse and he could not remember any incidents with a horse. Various activities and play games took place on the Application Land. The Application Land was also used for the annual snowman building competition in the winter. Mr Shone said that he could also remember spending time sledging and snowballing in winter. He had taken his sons (who were now aged 30 and 22) to the Application Land when younger and one had been taught to ride his bike on the footpath there. He did not know if his sons had been there on their own. The Denby Dale Travellers running club, of which he was presently the chairman, regularly ran through the Application Land and had an annual race which went through it. He and his wife walked the dog on a daily basis across the Application Land from the wood. Mr Shone said that he could remember (as part of a group) objecting to the building of the Bridgewood Trust premises at the time on the basis of not wanting to lose the piece of open space on which it was to be constructed.

44. When cross examined, Mr Shone said that he used the Application Land when he ran; this was down the footpath. His wife used the Application Land, probably once a week, as part of a circular walking route and twice a day for dog walking. He thought that it was 2005 when grazing stopped but it could have been 2003 or 2004. It was correct to say that the Application Land then became unsuitable for games. The vegetation became thicker.

45. **Lisa Siuda** of 34 Kenyon Bank, Denby Dale said that she and her husband had moved to Denby Dale in October 2000. At that time the Application Land was used for grazing horses. This kept the grass at a reasonable level and made the Application Land accessible for many people. She had fed the horses. Walkers, dog walkers and children used it regularly for different activities. Their daughter was born in 2004 and their son in 2006, by which time the Application Land was no longer used for grazing horses and the grass had become longer. However, it was still used by dog owners and by children for playing on their way home from school. As Mrs Siuda's own children became older they loved to play in the long grass on the Application Land and they had played hide and seek there many times. They also loved using the Application Land to sledge down in winter and fly kites on windy days. The family had also picked blackberries in the autumn. Now that the children were older and could play without as much parental supervision the Application Land was the perfect safe haven for them and their friends from the estate to play in. They were able to run around and play football, particularly since the grass had been cut, frisbee and other games without the fear of traffic, knocking balls into gardens or being told that they could not play there. When the grass was long, the children played more creative games. They had never returned with dog mess on them. Kenyon Bank had many children all the same age. There was nowhere else for them to play safely close to their homes. Every day Mrs Siuda saw people of all ages freely using the Application Land for their pleasure and leisure. She had a view from her house. There were several dog walkers on the Application Land each morning from 7-7:30 am. Mrs Shone said that there was no other area in Denby Dale comparable to the Application Land.

46. When cross examined, Mrs Siuda said that she had always seen people on the Application Land not keeping to a path. Her children got on to the Application Land by going through their friend's, Billy Ward's, back garden next door but one at number 36. That was not the way she went herself. There was also access from her house via Dearneside Road and Trinity Drive. Her children had used other areas apart from the Application Land; she had taken them to the playground at Sunnybank when they were younger but would not want them to go down there on their own. Apart from playing with her children on the Application Land, Mrs Siuda had practised golf chipping there.

47. **Stanley Ward** of Treacle Cottage, 24 Dearneside Road, Denby Dale said that he had been familiar with the Application Land for some 32 years since moving to the area from Leeds in 1980. At that time he lived five minutes' walk from the Application Land in what was then a cottage adjoining the Dunkirk Inn on Barnsley Road. He later purchased and moved into the property on Dearneside Road in 1982 where he now lived. When his children were young (their ages being seven, five and three in 1980), they used to come to stay with him at weekends and in the holidays. They would walk to the village shops by way of the Application Land, regularly spending time there to play, pick wild flowers and blackberries, collect conkers, play tag, catching a ball and so forth. His property at Dearneside Road had only a steep, sloping rockery garden so the play area for the children was limited. It was a great advantage to have the Application Land close by for the children's recreation. Mr Ward could remember building a sledge for them to use on the Application Land in the snow in the winter. They would often fly a kite there as well. As the children grew older, he allowed them to go out to play on the Application Land and the adjacent wood on their own. Now that his children were adults living in other parts of Yorkshire, his use of the Application Land had changed. Nowadays he used it for walking and exercising his Labrador. It was a convenient area to let the dog off the lead to run around safely. In addition he regularly met and chatted with other local dog owners there. He saw the same faces. He might just do a circular walk. Mr Ward said that he sometimes saw a new generation of local children using the Application Land. He had seen groups of children doing what appeared to be nature trails. He had also seen students photographing wild flowers and butterflies. The Application Land was now the only area in the village of any reasonable size that residents could use for recreation.

48. When cross examined Mr Ward said in relation to the dates he had put on his evidence questionnaire in respect of his use of the land – from 1985 to approximately 1993 and then from 2004 to the present – that he had said when completing the form that he was not 100% sure about the dates. In 1993 he had started to work abroad a lot. He could not recall grazing on the Application Land when he used it with his children. Since grazing had ceased it had become a little bit more wild. Since 2004 the main thing that he had used the Application Land for was for exercise for his dog and himself. He had seen groups of ramblers on the Application Land with binoculars. He

presumed they were looking at birds. He had also seen youngsters up there with sheets of paper. He had not seen kite flying in recent years.

49. **Edward Hill** of 10 Dearneside Road, Denby Dale said that he had lived at that address with his wife for the last six years. Before their house purchase they had been aware of, and had used, the Application Land, having taken the dogs up there after they had viewed various properties. They had enjoyed standing in the middle of the green and the feeling of space looking across the valley. Since moving into the village they had used the Application Land as an area to relax on an almost daily basis. From the beginning they had walked their dogs around the Application Land but, within weeks, they had begun to form friendships. The Application Land was like a doggy kindergarten. Both Mr Hill and his wife had stood and chatted on the Application Land with a regular group of other dog walkers while the dogs played. They had got to know people and felt themselves to be part of the community. They knew the names of all the dogs but not their owners but that did not matter. The Application Land was also invaluable when Mr Hill's wife broke her leg some years back because it allowed her to exercise the dogs in a place she could walk to on her crutches and where she could throw a ball for the dogs in an open space. The Application Land was also essential when one of their dogs severed one of her back leg ligaments and required controlled exercise in not too big a space but somewhere different from the back garden. Mr Hill said that some days he found himself walking alone around the Application Land, ordering his thoughts, watching nature and allowing the weight of the world to slip away. He found it important to step away from the hustle and bustle and to slow down; the Application Land was perfect for his mental wellbeing in that respect. It was also a place where he had an opportunity to feel part of the Denby Dale community. The times of the day that he visited the Application Land depended on his shifts at work (on the railways). He might meet two or three people if he went in the afternoon but that would not be the case if he went in the early morning. He both used the beaten tracks and followed his dogs where they went. The Application Land was far from overgrown and impenetrable. It changed through the seasons and the grass was higher in the summer. He had picked blackberries there, near the home, and had seen children collecting conkers. He would not say that the Application Land was a "dog toilet".

50. When cross examined Mr Hill said that he accessed the Application Land via Trinity Drive. He thought that his reference on his evidence questionnaire to having known the land from 2007 was a mistake; it must have been 2006 to give the six years he had referred to earlier. The Application Land was better than a lot of places with regard to dog mess; people were quite disciplined about it. The litter there frustrated him more. Mr Hill was not sure whether grazing took place on the Application Land when he moved to Denby Dale. There were times when the Application Land was very overgrown and wild and times when it was less so. Some of the photographs of the Application Land in the OIB taken in August 2006 did not typically show the condition of the Application Land in the summer. It was not pretty inaccessible away from the paths. One had to go off the paths if following dogs. The obvious thing to do was to stick to the paths but sometimes it was nice to step into nature and it was therapeutic to walk through the grass. There were plenty of rural walks around the village but he could just step out and be on the Application Land in a few minutes. Apart from taking his dogs to the Application Land, Mr Hill said that he also used it for exercise for himself in the form of running, which was down the footpath, and as part of his warm down. He had seen children run on to the Application Land, play football there (but not this year) and, some years ago, play with a bat near the washing line area. He had also seen kids bouncing a ball on the path with the flags, near the hedge. He had seen kestrels and woodpeckers on the Application Land in the last few years. He had seen people drawing and painting on the Application Land and had done a few sketches there himself, of the old oak tree when it came down and of fungus.

51. **Emma Oldroyd** of 1 Albert Grove, Headingley, Leeds said that she was born in Denby Dale in 1980 on Woodland Close. When she was four years old her family moved away from the village to the Midlands but they returned in 1992 when they moved into 4 Bank Lane. She left to go to university in 2000 but came home regularly throughout until 2003, partly because she had a job in The Pie Hall in Denby Dale. Sometimes she came home two or three times a month, sometimes just once. Her family moved away in 2006. Mrs Oldroyd said that she had many happy memories of the Application Land or “The Field” as it was known to her family. Her family used to use the Application Land on an almost daily basis. There was a gate from their house on to the Application Land. The stone flag path between their house and the

church provided a good short cut into the village and it was also used by their neighbours and their visitors. Mrs Oldroyd loving walking on it and knew every stone like the back of her hand. When she was a teenager she used to develop her night vision skills by walking through the Application Land late at night. She remembered always being on high alert for hedgehogs. As children, Mrs Oldroyd and her sister used the Application Land and the woods next to it as a shortcut to Broomfield Close[8] where friends lived. They and their friends used to wander between their houses and the Application Land and the adjacent woods provided a wonderful diversion and place to play. They played there with other children. They had a swing on the Application Land near the washing lines. They had built snowmen and had snowball and water fights there. Sometimes they had picnics there in the summer. When she was at school she made a sculpture from some of the timber from the cherry tree at the corner of the Application Land which got hit by lightning. They used to go to see the horses when the horses were out although one of them bit her once because it wanted her apple, which put her off, but the horses were approachable and not intimidating. They would call the horses over and had seen other people do the same thing. Grazing was a normal management "tool" for grassland and compatible with recreational use. When they got dogs they walked them around and through the Application Land at least three times a day. Usually the dogs had one long walk and a couple of short loops around the Application Land and the woods. She and her sister used to take the dogs out to play on the Application Land. They would run with them and laugh as they bounded through the buttercups and snow. Often, taking the dogs out was just an excuse to get outside and get some time to think. The Application Land was a good place for that. There was not a problem with dog fouling. The washing line area was a place to bump into and have a quick chat with the neighbours and spy on other people using the Application Land. The Application Land itself was a place to meet other people from the village. They would often recognise friends and wave at them. Their parents met other people there. The Application Land had its own distinctive character which was an important part of the character of the wider village.

52. They used to watch other people walking through the Application Land. There was an old man who lived a couple of doors down from them who used to whack the

[8] The reference should perhaps have been to Broombank.

buttercups down by the side of the path on his Sunday outing to the club and sweep the snow off it in winter. There were those who regularly used the path to get to work or school and the dog walkers who used the Application Land as a destination as part of their walk as it was a good place to stop and throw a ball around. There were the runners who jogged up the Application Land and the shoppers who would nip through to the village and come back more heavily laden. Children used to play there on their way home from school and at other times also, sometimes coming there to throw or kick a ball or throw a frisbee around. People would stop to talk to each other there.

53. When cross examined Mrs Oldroyd said that she had used the Application Land regularly between 2000 and 2003. She helped walk the dogs, cut through it to get to the village and also used it recreationally. Desire lines had always been part of the Application Land and it was not correct that they did not exist as paths in 2002. She had ceased to use the Application Land on a regular basis in 2003. From 2003 to 2006 she lived in London and used the Application Land less regularly then. Her family moved away from Denby Dale in 2006. The horses were sometimes taken off in the coldest weather in the winter. She had memories of times when they were not there. Mrs Oldroyd said that, when her evidence questionnaire stated that her use of the Application Land for recreation had been at least once a week (as opposed to daily use of the footpaths), that reflected the position when she lived away; when she was at home her use was daily. She had done art on the Application Land, sometimes sitting outside their gate, sometimes outside the church and sometimes in the woodland. She could remember having picnics on a few occasions in the summer, on the mown bit outside the garden and also under the trees. Horse mess was not a problem; it could be seen and just avoided. The trees had been planted in 1997; her step father had helped with this.

54. In terms of the other evidence in support of the Application, I have already mentioned that 66 evidence questionnaires were submitted with the Application. The questionnaires were in the format prepared by the Open Spaces Society. A number of the questionnaires had short supporting statements or letters with them. This written evidence records a variety of activities (both in terms of participation and observation of others) over the relevant 20 year period and beyond, including, in no particular order and without seeking to be exhaustive: children's play; walking; dog walking;

running; football; bike riding; kite flying; picnicking; snow activities (including sledging and snowballing); photography; drawing and painting; bird watching; wildlife observation; blackberry picking; and conker collecting. It was made clear at the outset by the Applicant in her opening remarks that no reliance was placed on any activities which had been referred to but would be unlawful (motorcycling and bonfires).

55. The RTO included, *inter alia*: a detailed response to the Council's objection; some photographs of the Application Land including some in winter and early spring 2011 showing less overgrown conditions; a petition; and 15 further evidence questionnaires.

56. The AIB included over 50 witness statements (including the statements of those who gave "live" evidence). Most of those providing statements had also previously completed an evidence questionnaire. One of the statements provided was from the grazier, Mrs Jean Colley, who appears to speak of recreational use of the Application Land by others when she had a tenancy, which she dates (in both her statement and evidence questionnaire) as being between 1980 and 1991.[9] Mrs Colley's statement says that did not give permission to anyone to come on to the Application Land nor ask them not to; there was enough space for the one or two horses she grazed and for children and adults to use the Application Land as well. A statement was also provided from a Mrs Averil Farrar which said that for several years she rented the Application Land for grazing her horses. Mrs Farrar's evidence questionnaire says that she used the Application Land from 1980 to 1991 for grazing with the Council's permission.[10]

The Council's evidence

57. **Graham Turner** of 20 Beechfield Avenue, Skelmanthorpe said that he was a ward councillor for Denby Dale (since 2012) and a parish councillor for the same ward (which he had been for 20 years). From approximately 1967 to 1986 he lived at 29

[9] These dates do not correspond with the documentary evidence. I deal with this matter in more detail later.
[10] Again, this does not square with the documentary evidence and I deal with this matter also in more detail later.

Bank Lane with his parents (who still lived there) until he got married when he moved out. When he moved away his regular contact with the Application Land became limited but he did pass it on a regular basis and noticed that it was used for some time to graze horses. When the grazing stopped the Application Land became overgrown and was not used at all by anyone other than people who walked their dogs and let them foul there. It had become a large dog toilet. It also had garden rubbish dumped on it. When he had observed the Application Land he did not recall seeing anyone using it for recreational activities although he did see people using the well-worn footpath crossing the Application Land between Barnsley Road and Trinity Drive. Mr Turner produced photographs of the Application Land taken by him between May and August 2012. At the request of residents (through a meeting with the Friends of Churchfield) he asked the Council to cut the grass, which they then did. The photographs showed the Application Land before the mowing, after it had been mown and then its subsequent regrowth. If the Application Land had been in regular use, it would have been expected that the newly cut grass would, when growing again, have been trampled down and kept low. This was not the case however and the Application Land was returning to the same state as before. He had regularly inspected the Application Land this year, usually on a Saturday morning, and could confirm that it was not used. Over the last six weeks he had only seen one man walking two Dalmatians. He considered that those residents objecting to allotments on the Application Land had not been interested in it before the allotments plans were put forward and that their sole motivation was to prevent the allotments being laid out. Mr Turner also said that when the Application Land was under the direct control of the Kenyon family it was not used by anyone as the Kenyon family did not allow it, in keeping with the tradition of mill owners. Mr Turner had played football in many parts of the village as a child and teenager but the Application Land was out of bounds and never used.

58. When cross examined Mr Turner said that he did not use the Application Land as a child. The mill owners did not allow it. His brother's (Alan Turner's) statement (the AIB305) mentioned playing there as a child but he and his brother had different groups of friends and the Robert Holmes mentioned in his brother's statement was the

son of Mr Kenyon's housekeeper.[11] Mr Turner accepted that Mrs Shaw, who had supplied a photograph (the RTO16), showing herself with him and Mr Alan Turner when they were children posing with a football, was his sister. Mrs Shaw had stated that the photograph was on the Application Land but Mr Turner said that the photograph did not look like the Application Land and maintained his stance that he did not play football there as a child. The Application Land was nothing outstanding; it was just an overgrown patch of grass. The grass would surely have been trampled down when it grew again after the mowing had there been use of the Application Land but there was no evidence of trampling down. Mr Turner did not, however, dispute that there were paths on the Application Land; the residents of Bank Lane made them. There was probably no space comparable to the Application Land in Denby Dale but he could remember there being lots of green spaces. It had never been the intention to develop the whole of the Application Land for allotments.

59. **Giles Chappell** of Kirklees Council, Kirkgate Buildings, Byram Street, Huddersfield said that he was a Land Management Officer employed by the Council in the Corporate Landlord, Land and Buildings Section of Physical Resources and Procurement having been employed in various other posts by the Council since 1986. He had held the position of Land Management Officer since 1993 and, as such, was responsible for the letting and management of Council owned land, including agricultural holdings and horse grazing. When he was appointed in 1993 he was allocated responsibility for the letting and management of Council owned land in the Denby Dale Ward and that responsibility had continued to date. He was familiar with the Application Land having, since 1993, dealt with its management and the administration of the grazing letting and the agreements in respect of the hanging grounds at the rear of the Bank Lane properties. Mr Chappell said that he had made a number of visits to the Application Land to inspect the land let on a grazing tenancy and the hanging grounds area. During these visits he had witnessed members of the public using the footpath from Barnsley Road through to Trinity Drive. On occasions he had also witnessed dog walkers on the route between the path and the neighbouring privately owned woodland. He had not witnessed any other activities. He doubted whether a number of the activities said to have taken place on the Application Land

[11] Mr Alan Turner's evidence questionnaire contains a suggestion that his use as a child with Robert Holmes may have been permissive – see answers 28, 28a, 29 and 29a (at page 309 of the AIB).

such as children's play, picnics, ball games and dogs being allowed to run freely around could have taken place when the Application Land was used to graze horses.

60. He had corresponded and spoken with the last grazing tenant (Mrs Colley) on a number of occasions since 1995. His file did not record, and he did not recall, the tenant's ever making reference to the Application Land being used by members of the public for the recreational activities claimed in the Application. The Council managed over 100 grazing lettings. A large number of these incorporated public rights of way. The tenancy was personal to the tenant and under the terms of the agreement tenants were responsible for the maintenance of boundary walls and fences so as to ensure that stock did not stray. The tenancy also included an obligation on the tenant not to permit any trespass on the land. In his experience tenants would not fence boundaries to exclude a public right of way as often it was impractical to do so. It was his experience, however, that tenants would take all reasonable steps to police the use of the footpath and challenge any members of the public deviating from it or engaging in any activities on the land which was the subject of the letting. The objective of letting land for grazing was twofold. The letting generated a modest rental income for the Council but, secondly and more importantly, responsibility for the day to day management of the land passed to the tenant under the terms of the tenancy so that the Council did not have to expend officer time and resources in visiting the site more than a couple of times a year to ensure that there were no encroachments or other unauthorised activity taking place on any of its assets. Mr Chappell said that Mrs Colley's evidence questionnaire stated (the AB403) that she had rented the Application Land for grazing from the Council from 1980 to 1991. However, he was aware, and the Council's records confirmed, that she was in fact the tenant from 1988 to 2005. No record could be found of any previous grazing agreement with Mrs Farrar (as appeared to be suggested by Mrs Farrar's evidence questionnaire (the AB339)). The Application Land was originally part of a larger site which included the land on which the Bridgewood Trust premises at 165 Barnsley Road now stood. The correspondence between the Council and Mrs Colley at the time she took the grazing tenancy in 1988 started with a letter (dated 29th January 1988) from Mrs Colley asking to buy the Application Land and showed that the Bridgewood Trust development was then nearing completion. Mrs Colley's letter to the Council of 11th February 1988 asking to be considered for the grazing licence did refer to the latter

"having proved invaluable in the past" which did suggest some use before 1988. In July 2000 Mrs Colley had brought to the Council's attention that a gateway had been made from a property in Kenyon Bank (number 36) on to the Application Land and had asked the Council to investigate and take appropriate action. The matter was then the subject of an exchange of correspondence between the Council and the owners of 36 Kenyon Bank. Mr Chappell dealt with one other point relating to historical matters which was that the millpond or reservoir which was referred to in some of the material in support of the Application had not been on the Application Land and was where the garden of 12A Bank Lane was now located. Mr Chappell also referred to various photographs which he had taken of the Application Land.

61. When cross examined Mr Chappell said that he would generally go to sites which were the subject of a grazing agreement twice a year but he could not say that he had been to the Application Land twice every year. He visited when Mrs Colley raised issues and also visited in connection with the hanging grounds. The maximum number of times he had been to the Application Land would probably be 20. His visits to the Application Land were in office hours, generally before five o'clock, and he had not done any weekend visits. He had seen people using the footpath. When he saw (and spoke to) dog walkers on the Application Land on the occasion when he took photographs there in August 2011 they were on the worn path leading from the woodland to the main path. That was not something he would have challenged. Had they been elsewhere he would have challenged them. Mrs Colley should have been challenging use and he would have expected her to do so if people deviated from the footpath.[12] She never mentioned any activities taking place on the Application Land. All the Council's grazing agreements contained a "no trespass" clause. It was difficult for a tenant to ensure that people kept to paths but it was their duty to do that. There had been one occasion when a horse had chewed trees[13] and another occasion when a horse had alarmed people on the footpath.[14] He continued to question whether any

[12] A suggestion was made to Mr Chappell in cross examination that Mrs Colley owned Ash Well Wood and she therefore let people go into that area. Mr Chappell confirmed in re-examination that he did not know who owned Ash Well Wood.

[13] This is referred to in a Council file note of 21st March 1996 which records a complaint from a Mr Callender of Bank Lane about horses eating his conifers.

[14] This is documented in two Council file notes. The first is undated but records a telephone call from a resident to the Council about the erratic behaviour of a horse which had newly arrived on the Application Land and which had been frightening users of the footpath. The second file note is dated 12th March 2004 and records Mrs

activities such as picnics could have gone on given the presence of horses. He found it inconsistent to think there had been public use of the Application Land allowed to go unchallenged by Mrs Colley given that Mrs Colley had asked to buy it, had then let it and had later complained about an access to it having been made from a neighbouring property. The photographs of the Application Land taken in 2006 by his colleague Jean Coburn in connection with the surrender of the grazing agreement showed that nettles, docks and noxious weeds were quite prolific on the Application Land and not simply on the margins only. He agreed that his August 2011 photographs showed that on some parts of the Application Land the height of the growth and the extent of the weed infestation were not as great as on others. Mr Chappell had not been able to check the planning records to see whether there had been opposition to the Bridgewood Trust development at the time.

62. In re-examination Mr Chappell drew attention to a letter which he had written to Mrs Colley in 2001 which stated that "large areas of the land" were now "infested with weeds."[15] He also referred in some detail to the correspondence from the Council to Mrs Colley in connection with the surrender of the grazing tenancy in 2005 to 2006. Mrs Colley first indicated in April 2005 that she did not want to carry on with the arrangement. A letter from the Council to Mrs Colley of 19th May 2005 thanks her for a communication received on 28th April and notes that she wishes to vacate the land. The communication in question takes the form of a handwritten note by Mrs Colley on the Council's invoice (dated 4th April 2005) for the period of 1st April 2005-31st March 2006 stating that she no longer wishes "to rent this field". The annotated invoice is date-stamped as having been received by the Council on 28th April 2005. After this a Council inspection of the Application Land took place on 24th May 2005 which revealed that it was "very overgrown with thistles docks and motherdie" and looked like it had "not been grazed for a long time".[16] There followed several letters from the Council to Mrs Colley[17] in relation to the overgrown nature of the

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Colley's having telephoned to inform the Council that she had removed a young horse from the Application Land.

[15] Mr Chappell's letter to Mrs Colley of 20th August 2001.

[16] Handwritten note on a copy of the letter from Jean Coburn on behalf of the Council to Mrs Colley of 19th May 2005.

[17] There is a gap in the correspondence from September 2005 to August 2006 (which would appear to be explicable by Mr Chappell's evidence that he was off work from October 2005 to August 2006).

Application Land ("with a variety of weeds, thistles and docks"[18]) and the need for Mrs Colley to clear the weeds from it so as to comply with her obligations under the grazing agreement and thus allow the Council to terminate it. A file note dated 24th August 2006 records that it was finally agreed that the tenancy would be cancelled from 3rd August 2005. One other matter worthy of note in the correspondence is a letter from Mrs Colley to Mr Chappell in 2005 in which she asked for advice on the type of weedkiller considered "safe to use in a field used by the public and their dogs."[19]

63. **Andy Wickham** of Kirklees Council, Skelmanthorpe Council Offices, 24 Commercial Road, Skelmanthorpe, Huddersfield said that he was a Countryside Officer employed by the Council in the Parks, Open Spaces and Street Cleaning Section of the Streetscene and Housing Service. He had been employed in various posts with the Council since 2000. He had visited the Application Land on numerous occasions since being employed by the Council but the only written records he had showed the following visits: on 11th October 2010; on 13th December 2010; on 12th January 2011; and on 3rd March 2011. On his numerous visits he had never seen the Application Land being used for any form of recreational activity other than pedestrians traversing the public right of way to and from the village and people walking on the footpath while exercising their dogs. Mr Wickham explained that the Council's plans for the Application Land involved the creation of allotment plots and making improvements to the rest of it to increase biodiversity and to allow more recreational use to be made of it by the public. He had met with the Applicant on 12th January 2011 but, contrary to what was alleged by the Applicant (the RTO41), had not on that occasion acknowledged any recreational use of the Application Land. He had stressed that, apart from the use of the footpath, the Application Land was used only for dog exercising. It was his opinion, which he had voiced to the Applicant, that this use was actually preventing any recreational use as using the Application Land away from the path inevitably meant stepping in dog mess. Throughout the conversation the Applicant had referred to recreational use of the Application Land

[18] Letter from the Council to Mrs Colley of 25th May 2005.
[19] Mrs Colley's letter to Mr Chappell of 4th August 2005. An earlier letter (dated 23rd June 2005) from Jean Coburn of the Council to Mrs Colley recorded the latter's concern expressed in a telephone call at the effect that spray treating the land "may have on animals being walked across the land via the public footpath".

but Mr Wickham said that he had said that there was no such use other than use of the footpath and dog exercising.

64. When cross examined Mr Wickham said, in response to the suggestion that it was an exaggeration to say that his visits had been "numerous", that, since 2000, he had visited the Application Land reasonably regularly. There were desire lines on the Application Land. The meeting on 12th January 2011 had also involved a walk on the Application Land. He had wanted to get the message through that what was proposed was not a stand-alone allotment project. Mr Wickham accepted that it was being said to him at the meeting that there more activities on the Application Land than simply walking on the footpath and dog walking and that the Applicant had said that it was being used recreationally for a wide variety of things. Every time he had been to the Application Land there had been an incredibly large amount of dog mess there. Mr Wickham told me that he had visited the Application Land at weekends and outside working hours. He said in re-examination that he had first noticed desire lines on the Application Land after the allotment proposals had emerged. Most dog walkers tended to do a kind of circular route around the perimeter of the Application Land. He could not recall whether any specific activities had been put to him at the meeting on 12th January 2011 but they probably had been.

65. **Andrew Hoyle** of Kirklees Council, Fourth Floor South, Civic Centre 1, Huddersfield said that he was a Senior Legal Officer in the Contracts, Commercial, Property, Employment and Education Section of the Legal, Governance and Monitoring Service, having been employed by the Council in various posts since 1982. He had passed the Application Land regularly for many years, travelling (in a vehicle) on Barnsley Road. He could remember the Application Land being grazed and could remember it becoming overgrown in recent years. Since the Application had been submitted he had paid particular attention to the Application Land when travelling past and had stopped on occasion (quantified in cross examination as two or three times),when time permitted, to observe its use from the pavement on Barnsley Road. Mr Hoyle accepted in cross examination that he had not had any particular interest in the Application Land until the Application came in. Mr Hoyle accepted that the full extent of the Application Land could not readily be seen from Barnsley Road but said that the only use he had seen was of the public footpath across the Application Land.

He had not seen any recreational activity. He said in cross examination that he thought that he would have seen it had it been taking place (and pointed out that he was often a passenger in his wife's car rather than a driver and that he had passed the Application Land at weekends) although he accepted in cross examination that the fact that he had not seen such activity did not mean that it did not take place. Mr Hoyle produced various plans showing the addresses of those who said they had used the Application Land. He accepted in cross examination that the addresses he used for this exercise were the current addresses in the evidence questionnaires.

66. The Council also relied on a written witness statement from John Fletcher of Kirklees Council, Flint Street, Huddersfield. Mr Fletcher was not called as a witness. Mr Fletcher is the Council's Head of Parks and Landscapes in the Streetscene and Housing Service. His statement detailed the origin in 2009 of the proposal for allotments to be created on part of the Application Land.

67. I turn next to providing a summary of the documentary evidence submitted by the Council. I deal first with the documents in respect of the grazing of the Application Land which I deal with in chronological order. I have already touched on some of this material in the summary of the evidence given by Mr Chappell above. The Council's documents show that the Application Land was licensed or let by the Council to Mrs Jean Colley for grazing from 1st April 1998 to 3rd August 2005. This position is summarised on a record card produced by the Council and is confirmed by the contemporaneous correspondence. The latter starts with a letter from Mrs Colley to the Council dated 29th January 1988 which referred to the almost completed development on Barnsley Road and inquired if the Council would consider the sale of the remaining land for grazing. The Council replied on 8th February 1988 stating that the land was not for sale but that, on completion of the hostel, it would become available on licence for grazing. In turn Mrs Colley wrote on 11th February 1988 stating that she would very much like to be considered for the grazing licence which had proved invaluable in the past. On 15th April 1988 the Council offered a licence to Mrs Colley. A plan accompanying the letter containing the offer identifies the land offered as the Application Land and shows its area to be approximately 2.7 acres. On 29th April 1988 Mrs Colley accepted the offer. A letter from the Council of 10th May 1988 sent Mrs Colley the agreement for signature. There is a handwritten

endorsement on the letter recording that the counterpart was returned on 1st June 1988. The 1998 agreement itself is not available.

68. A letter from the Council to Mrs Colley of 16th March 1995 explained that, following an overall review of the Council's grazing licences, a new licence was being sent. A further letter from the Council to Mrs Colley of 25th July 1995 enclosed the counterpart licence signed on behalf of the Council for Mrs Colley to retain. There is no copy of the licence itself in evidence. The letter of 25th July 1995 also informed Mrs Colley that the Council had received two complaints in relation to trees/bushes along the Barnsley Road frontage overhanging the footpath and causing an obstruction and that the public footpath across the land was becoming overgrown with nettles and weeds. Mrs Colley was asked to confirm that she would put the necessary work in hand.

69. A Council file note of 21st March 1996 records a complaint from a Mr Callender of Bank Lane that horses had been eating his conifers. The note also records a telephone call from Mrs Colley which had advised that she had removed the horse believed to be the culprit. A letter from the Council to Mrs Colley of 2nd April 1996 refers to the agreement of a further proposal to resolve the matter by way of the erection of additional fencing.

70. In 1998 there was an exchange of correspondence (on 18th March and 13th May) between the Council and a Mr Ibbotson about renting the Application Land for grazing. The Council told Mr Ibbotson that the land had not been surrendered.

71. A letter from the Council to Mrs Colley of 13th May 1998 records the Council's agreement to reduce the rent for the coming year in view of the tree planting carried out on the Application Land by the Countryside Unit in 1997. A tenancy agreement (not in evidence) was enclosed for signature by Mrs Colley. The revised area of the site was now said to be 2.4 acres.

72. On 16th March 1999 the Council wrote to Mrs Colley, enclosing what was said to be a licence for her signature, and on 22nd April 1999 the Council wrote to Mrs Colley to acknowledge return, duly signed, of her counterpart of what was described this time

as the grazing tenancy. This agreement is in evidence. It is dated 19th April 1999 and is in the form of a tenancy agreement – for grazing - for one year from 1st April and then from year to year thereafter. An accompanying plan shows the area let to be identical to the Application Land and to be approximately 1.09 hectares (which equates to the original 2.7 acres). The agreement included obligations on the part of Mrs Colley not to permit any trespass on the land and to keep it clean and free from various identified weed species. There is a handwritten endorsement on the front sheet of the agreement which records that it was cancelled on 3rd August 2005.

73. A Council file note from July 2000 records that Mrs Colley had brought to the Council's attention that a gateway had been created into the Application Land from an adjoining property at 36 Kenyon Bank. The Council responded by writing on 8th August 2000 to the occupiers of the property asking that access cease immediately and that arrangements be made to make the access up. That letter was in turn replied to on 22nd August 2000 by solicitors acting on behalf of the owners of the property (a Mr and Mrs Sharp) who asserted that the gateway was kept locked and padlocked, was not used on a regular basis and was only there to facilitate access, possibly a couple of times a year, for the purposes of maintenance of the boundary fence. It was said that there would be a statutory right of access for this purpose in any event. The letter also complained about the unkempt state of the Application Land near its boundary with 36 Kenyon Bank and stated that grass had been allowed to grow several feet in height on occasions and that the land had been used as a dumping ground for various bottles and other rubbish. On the basis of that letter the Council, by letter of 29th August 2000, agreed to the gate remaining but asked to be consulted when access was required in order that the Council's tenant could be advised accordingly.

74. A letter from the Council to Mrs Colley of 20th August 2001 informed her that large areas of the land were infested with weeds and sought confirmation that clearing the land would be undertaken without delay.

75. An undated Council note records the receipt of a telephone call from a resident about a horse newly arrived at the land which was behaving erratically and frightening footpath users. A further Council note, which is dated 18th March 2004 and appears to

follow on from the last, then records that Mrs Colley had telephoned to say that she had removed a young horse from the field.

76. An account of the documentary material in relation to the termination of the tenancy in 2005-2006 is provided in the summary of the evidence of Mr Chappell at paragraph 62 above. As there set out, it was eventually agreed in August 2006, after resolution of issues in relation to the condition of the land, that the tenancy was cancelled on 3rd August 2005.

77. After this the documentary material reveals that an enquiry about grazing the land was received by the Council at the end of 2006 which was met with the reply in early 2007 that it had not yet been decided whether the land would be re-let.

78. In relation to the hanging grounds to the rear of the Bank Lane properties, the Council produced relevant record cards and correspondence. This material shows that there were originally agreements with the owners of 2, 4 and 6 Bank Lane going back to April 1980 at which time the rent for the areas concerned was £3. It also shows that Mr and Mrs Campbell of 2 Bank Lane were given a new tenancy in 2004 at a rent of £20 while the arrangements in respect of 4 Bank Lane and 6 Bank Lane were cancelled on, respectively, 31st March 1994 and 3rd July 2009. There is inconclusive correspondence with owners of 10 Bank Lane in 2009 and 2010 (different owners on each occasion) with regard to the potential grant of a new hanging ground agreement for the benefit of that property. One of the letters from the Council in this regard (dated 18th October 2010) records that the land vested in the Children and Young People's Service.

79. An exchange of correspondence between the Council and the owners of 2 Bank Lane in February 1992 also casts some light on the Council's holding of the Application Land and its intentions for it at that point. On 28th February 1992 the Council received an enquiry from the owners of 2 Bank Lane asking whether it would be possible to purchase the area rented by that property as a hanging ground to incorporate into the garden of the property. A reply from the Council dated 2nd April 1992 records that the author of the letter (writing on behalf of the Council's Chief Estates Officer) would come back to the owners if the Education Department agreed to release the

land. A handwritten note on the same letter records that the owners were informed in a telephone call on 4th December 1992 that the site had been put forward for development in the UDP and, as it was not known what was happening, the owners' request would be put on hold until that knowledge was available.

80. There are two final matters which I mention in relation to the Council's documentation. The first is that the Council produced some material (including a couple of photographs) which confirmed that small scale environmental enhancement works were carried out at the Application Land as part of the Denby Dale Parish Countryside Project in 1997. These works included some wall and footpath repairs and the planting of four individual parkland trees protected by post and rail timber fencing. A plan drawn up in connection with the works shows a "kissing gate stile" where the Application Land abuts Ash Well Wood north of Bridgewood House with the line of a permissive path in the wood itself.

81. The second is that the Council submitted a good number of plans for the purposes of the inquiry, including: plans of parish and ward boundaries; plans of "settlement" areas (one being "Denby Dale"[20]) used by the Council for the purposes of data collection but having no legal significance; and plans of the addresses of users of the Application Land.

82. The Council also produced a body of photographic evidence. I deal with this in chronological order also. A photograph of the tree planting in 1997 shows land in the south west area of the Application Land not to be overgrown. Three photographs taken on 4th August 2000 (one of which shows grazing horses) show patches of weed infestation on the Application Land but, generally, a fairly short grass sward. Photographs taken on 21st April 2005, all from Barnsley Road, show the Application Land significantly overgrown in its southern reaches. These photographs would have been taken in connection with the ending of Mrs Colley's tenancy. Photographs taken on 22nd August 2006 (which was just before the final resolution of matters with Mrs Colley), including a number on the Application Land from the footpath, show the area

[20] The Council's objection states (the OB6) that Council data for 2009 showed there to be approximately 2,850 residents in this settlement area and that Council data for 2010 showed there to be approximately 1,353 households in the same area. The settlement area differs from the claimed neighbourhood of Denby Dale village.

to the west of the footpath, in particular, to be significantly overgrown and suffering from widespread infestation of what appear to be tall rank weeds, probably docks. The Council also rely on photographs taken on 3rd August 2011. These were, of course, taken after the Application had been made but there is no reason to think that what is shown on photographs is not representative of summer periods in earlier years once grazing had ceased. The Application Land is very significantly overgrown save for the hanging grounds area where there is short mown grass. The area around the footpath leading thereto also appears less overgrown than the rest of the Application Land.

83. The Council further produced three aerial photographs, taken in 2002, 2006 and 2009. The overall appearance of the Application Land in the 2002 aerial photograph appears significantly different from its overall appearance in the 2006 and 2009 photographs. The latter photographs show a considerably more overgrown picture than the former. Also, on the 2002 aerial photograph the only routes across the application land which appear are the public footpath from Barnsley Road to Trinity Drive and the footpath from the Trinity Drive entrance to the Application Land to the hanging grounds. On the 2006 aerial photograph a path is apparent leading south east from the Trinity Drive entrance to the Application Land to the entrance to Ash Well Wood from the Application Land. There is also a path which runs west from the last mentioned path to join it to the path from the Trinity Drive entrance to the Application Land to the hanging grounds and, in so doing, it intersects the public footpath at a right angle. A path also branches off the public footpath to the south of Bridgewood House and runs to the north east to the entrance to Ash Well Wood from the Application Land. On the 2009 aerial photograph a further path is apparent running across the southern part of the Application Land from the public footpath west to the hanging grounds. It is apparent from the 2009 aerial photograph that the paths could be combined by a walker to produce a longer, continuous, single route, broadly rectangular in shape, which circumscribes a large central body of the Application Land.

The submissions

84. In this section of the report I summarise the respective submissions.

(a) The Council

85. On behalf of the Council Mr Hanbury did not accept that any of the necessary requirements for registration were made out. It was submitted that the claimed neighbourhood lacked an adequate degree of cohesiveness to qualify as such and was too large. The claimed neighbourhood also straddled the settlement boundary with Lower Cumberworth in the vicinity of the housing built on the site of the former Bromley clay works. In any event, there had not been use by a significant number of the inhabitants of the area in question, especially when seen in the context of the population and household figures for the Council's "settlement" area of "Denby Dale". Although he did not develop the point in closing submissions, Mr Hanbury submitted in his opening remarks that there had been marked a concentration of users from around the Application Land itself and users were not spread over the neighbourhood as a whole.

86. In relation to the issue of whether use of the Application Land had been "as of right", Mr Hanbury argued that, even though the Application Land was not held for recreational purposes, it should nevertheless, simply on the basis of being local authority land *per se*, not be treated as subject to the possibility of being "sterilised" by registration as a town or village green. The vast majority of the use, it was submitted, had been referable to footpaths and, in particular, the public footpath from Barnsley Road to Trinity Drive (in respect of which use would be *"by right")* and the path from the Trinity Drive entrance to the Application Land to the rear of the Bank Lane properties.

87. It was also argued that sufficient use had not been demonstrated and that the evidence of use in support of the Application should be seen as exaggerated when viewed in the light of the incompatibility of various of the claimed activities with horses grazing on the Application Land, the overgrown nature of the Application Land since grazing ceased, the presence of dog fouling thereon, the availability of other areas for recreation and the absence of use of the Application Land spoken to by the Council's witnesses. Mrs Colley, it was submitted, would not have tolerated use which interfered with her grazing and her attitude to trespass on the Application Land could

be inferred from her having raising with the Council in 2000 the creation of the gate from 36 Kenyon Bank.

(b) The Applicant

88. The Applicant submitted that the village of Denby Dale put forward as the neighbourhood satisfied the test of *"a sufficient degree of cohesiveness"* which had been referred to in *Cheltenham Builders v South Gloucestershire District Council*[21] and that such cohesiveness met the requirement that it be *"pre-existing"* as explained in *Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council.*[22] The village was a well-established and coherent entity and there was also a strong sense of neighbourhood exemplified not just in the user evidence but also by the petition. The anomaly in the boundary of the neighbourhood in relation to the housing built on the site of the former Bromley clay works fell within the *"deliberate imprecision"* of the expression "neighbourhood" which Lord Hoffman had referred to in *Oxfordshire County Council v Oxford City Council.*[23] In relation to the question of "significant number" the evidence produced in support of the Application amply demonstrated that *"the number of people using the land in question .. [was] .. sufficient to indicate that their use of the land signifies that it .. [was] .. in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers"* as set out in *Alfred McAlpine Homes Limited v Staffordshire County Council.*[24] The users came from across the neighbourhood. The fact that the majority of users came from the streets nearest to the Application Land was *"precisely what one would expect"* and was no reason to reject registration as held in *Paddico (267) Limited v Kirklees Metropolitan Borough Council.*[25]

89. The Applicant submitted that use of the Application Land had been as of right. There had been no force or secrecy and no permission had been given (Mrs Colley having for her part confirmed as much in her statement). There had been no attempt by either

[21] [2003] EWHC 2803 (Admin) at paragraph 85 (Sullivan J).
[22] [2010] EWHC 530 (Admin) at paragraph 79 (HHJ Waksman QC).
[23] [2005] UKHL 25 at paragraph 27.
[24] [2002] EWHC 76 (Admin) at paragraph 71 (Sullivan J).
[25] [2011] EWHC 1606 (Ch) at paragraph 106i) (Vos J). This point is unaffected by the later Court of Appeal decision [2012] EWCA Civ 262 reversing the first instance decision.

the owner or tenant to restrict access. No notices had been posted save for the closure because of foot and mouth.[26] No one was ever told to stick to the public footpath. The use had been shown to be for a variety of activities which counted as lawful sports and pastimes. It was not required to be shown that the activities remained unchanged over the relevant period and some were more appropriate than others according to the season and the weather. Users did not restrict themselves to footpath routes. The fact that paths did not show up on the 2002 aerial photograph was because people walked everywhere. The condition of the land did not impose restrictions on its use which would prevent the Application succeeding: areas of large weeds did not mean that the land could not be registered; dense undergrowth and weeds on the margins of the Application Land did not reduce access to the greater part thereof; the Application Land was still inviting even with long grass and it was very usable; and vegetation died down in the winter. The fact that public use had been alongside grazing did not prevent registration here any more than it did in *R v Oxfordshire County Council, ex p Sunningwell Parish Council.*[27] There had been constant use for recreation for well over the required 20 year period. About half of the witnesses had used the Application Land for the full period. There was a continuity in the pattern of use reflected in the life cycle of local residents who had used the Application Land as children and then used it with their own children. Equivalent recreational opportunities elsewhere were lacking.

Findings and analysis

(a) Sufficiency of use

90. I turn at this point to my assessment of the use evidence. In approaching this assessment I first remind myself of a number of substantive principles which need to be borne in mind as established in case law. First, the requisite use which is required to be shown is, as Lord Hope indicated in *Lewis v Redcar and Cleveland Borough Council,*[28] *"use for at least 20 years of such amount and in such manner as would*

[26] This was in the early part of 2001 and the period of closure would fall to be disregarded in determining the 20 year period in accordance with section 15(6) of the 2006 Act with the practical effect of a slightly earlier commencement for that period. Nothing turns on the point.
[27] [2000] 1 AC 335.
[28] [2010] UKSC 11.

reasonably be regarded as being the assertion of a public right."[29] Use which is *"trivial and sporadic"*, to use Lord Hoffman's words in *Sunningwell*, may not carry the outward appearance of use as of right. Secondly, as Sullivan J stated in *Cheltenham Builders*, applicants for registration 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*."[30] Thirdly, in accordance with the observations and guidance of Sullivan J in *Laing Homes Limited v Buckinghamshire County Council*[31] and of Lightman J in *Oxfordshire County Council v Oxford City Council*[32] at first instance, it is necessary to consider the use of paths on the Application Land, the extent to which there has been use of the Application Land not confined to paths and the question of whether use of paths would appear to the reasonable landowner to be referable to their use as such or to be use for more general recreational purposes which would sustain a claim to a new green.

91. In assessing the written evidence in support of the Application in relation to the question of use I remind myself that, as it was put by Sullivan J in *Alfred McAlpine Homes*, it is necessary to treat that evidence with caution because it was not subject to cross-examination but that it is appropriate to consider the extent to which overall it is consistent with and supportive of the oral evidence given by the Applicant's witnesses.[33]

92. As to the oral evidence which I heard in this case, I find that all witnesses – both those in support of the Application and those objecting to it – gave their evidence honestly and to the best of their recollection of matters. I do not believe that there was conscious exaggeration on either side to any significant degree although, as is natural, when recalling events and activities over a period of 20 years plus, recollections may

[29] At paragraph 67. See also paragraph 75.
[30] At paragraph 29.
[31] [2003] EWHC 1578 Admin at paragraphs 98-110.
[32] [2004] EWHC 12 (Ch) at paragraphs 96-105.
[33] At paragraph 75.

not always be completely accurate. When I refer hereafter to particular parts of the evidence it is to be taken that I accept the evidence so referred to unless I specifically state otherwise or that I prefer other evidence.

93. In assessing use of the Application Land over the relevant period it is important to distinguish between the time when it was grazed and the time when it was not grazed and how, first, the presence of the grazing bore on recreational use and, then, what the impact of its absence was on such use. I find that the Application Land was grazed from the beginning of the relevant period in 1991 (and from before then since at least 1988) until 2005 pursuant to a series of written agreements with the Council which latterly took the form of a grazing tenancy and that, throughout this period, the grazier was Mrs Colley. The documentary evidence establishes as much. Mrs Colley's statement and evidence questionnaire say that her grazing arrangements with the Council lasted from 1980-1991. It is possible that the Council had grazing arrangements with Mrs Colley before the documented commencement of the same in 1988 which has been evidenced in this inquiry given that Mrs Colley's letter of 11th February 1988 stated that she would very much like to be considered for the grazing licence then on offer "which had proved invaluable in the past." However, as I have already found that grazing arrangements were in place in 1988 before the relevant period began, it is not necessary for me to reach any conclusion on the issue of whether grazing arrangements existed even before then. In relation to the other end of the grazing period, in finding that Mrs Colley's grazing arrangements lasted until 2005, I much prefer the documentary evidence in this respect to the evidence provided in Mrs Colley's statement and evidence questionnaire that the same lasted until only 1991. I do not accept that. So far as concerns Mrs Farrar, the Council has no record of any grazing arrangement with her between 1980 and 1991 as referred to in Mrs Farrar's statement and evidence questionnaire. The documentary evidence establishes that, from 1988 onwards, the arrangement was with Mrs Colley and I do not accept that there was any arrangement between the Council and Mrs Farrar after this period. It is possible that Mrs Farrar had grazing rights from the Council before Mrs Colley but, again, I do not need to reach any conclusion on that for present purposes.

94. The documentary evidence establishes that Mrs Colley's grazing tenancy was formally terminated with effect from 3rd August 2005. I also find that the grazing

arrangements subsisted in practice (in the sense of horses being on the land) until 2004-2005. It is not necessary to be more precise. Grazing was clearly still going on in March 2004 because that was when the episode occurred with the erratic behaviour of a horse frightening footpath users; and the fact that it was not until April 2005 that Mrs Colley stated that she no longer wished to rent the Application Land suggests that some grazing use had probably continued into the yearly period from 1st April 2004-31st March 2005. It is unlikely, however, that much grazing occurred in 2005 because, as I have already noted, a Council inspection of the Application Land took place on 24th May 2005 which revealed that it was "very overgrown with thistles docks and motherdie" and looked like it had "not been grazed for a long time".

95. I find that the level of grazing was low and amounted to no more than one or two horses (or at most three) at any given time. Mr Robinson's recollection was that there was occasionally more than one horse; the Applicant said that when she first knew the Application Land there was grazing by one or two horses and three on very odd occasions; Mrs Fletcher said that there had always been one horse on the Application Land and sometimes two; and Mrs Colley's written evidence referred to the "one to two" horses she grazed. It is possible that, even from that low level, the grazing diminished further toward the end of Mrs Colley's tenancy; Mrs Campbell said that she could not remember a horse on the Application Land much since moving to 2 Bank Lane in the summer of 2003.

96. I find that, when the land was grazed by horses, that grazing, notwithstanding that it was not intense, generally kept the level of the grass and other vegetation on the Application Land short. This was the general tenor of the evidence of the witnesses I heard in support of the Application (and was said as much in terms by, for example, the Applicant and Mrs Fletcher), is consistent with what one might expect and appears to be reflected in the overall appearance of the Application Land in the aerial photograph of 2002 produced by the Council. There would, however, appear to have been a tendency in the later years of the grazing arrangements for parts of the Application Land to become subject to weed infestation at times, evidence for which is found in the Council's photographs of 4th August 2000 and the Council's letter to Mrs Colley of 20th August 2001.

97. I do not consider that the presence of one or two horses on the Application Land would have posed a significant limitation to recreational use of the Application Land by local residents and so find. Of course, there may well have been some who would have been cautious about going near horses (the Applicant herself stating that she did not go up to the horses although some people did) but, by and large, the position would appear to have been that the horses did not in fact interfere with use. Mrs Naylor said that the horses had never been a source of concern save that a frisky horse was once soon moved (which was probably a reference to the recorded incident in 2004) and that a horse had once tried to bite her daughter (an incident which would appear to me to have been likely to have been before the relevant period) but that that had not put her off. She also said that, if horses were close by, the dog would be kept on a lead – which would appear to be simple common sense that one might expect to be followed by any dog walker in this period – and that, in general, the horses did not approach. The Applicant ventured the opinion that she did not think that Mrs Colley would put a horse which would cause problems on land with a public footpath on it. What appears to have been Mrs Colley's quick response to the problem that occurred with an erratic horse in March 2004 suggests that Mrs Colley was indeed alert to ensure that public use, at least in relation to the footpath, was not impeded by her animals. Mrs Fletcher said that the horses never bothered her family and that the horses were always well-behaved never giving rise to a bad experience. Mr Shone took Scouts or Cubs on to the Application Land during the period when it was grazed and did not go in areas where there was a horse; he had had no incidents with a horse. Mrs Siuda had fed the horses. Mrs Oldroyd was once put off when a horse bit an apple she had but the horses were approachable and not intimidating. So far as concerns horse manure, Mrs Naylor said that this was never a big issue and Mrs Oldroyd that it was not a problem given that it could be seen and avoided. This evidence is all of a piece. It also fits with that part of Mrs Colley's written evidence, which I accept, in which she stated that there was enough space for the one or two horses she grazed and for children and adults to use the Application Land as well.

98. I also accept what Mr Robinson and Mrs Oldroyd (both landscape architects) told me to the effect that grazing had always been an appropriate management "tool" for grassland and that it was common for grassland to be used for both grazing and public recreation, which were compatible uses. It is also worthy of note that the seminal case

of *Sunningwell* was one in which, as reported by the inspector and quoted in the speech of Lord Hoffman, "*the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier.*"[34] In the present case it was no less possible for the grazing use to co-exist with recreational use than it was for the recreational use in *Lewis* to co-exist with the golfing use there.

99. I next turn to the question not of the compatibility of the grazing use with public recreational use of the Application Land but the submission made on behalf of the Council that Mrs Colley would not have tolerated use which interfered with her grazing and that her attitude to trespass on the Application Land could be inferred from her having raising with the Council in 2000 the creation of the gate from 36 Kenyon Bank. It is true that, as the documents demonstrate, Mrs Colley did raise with the Council in 2000 the creation of the gate on to the Application Land from 36 Kenyon Bank. It must follow that she did have some concern in relation to the effect of that gate on her grazing arrangements. Mrs Colley has not been called to give evidence by either side in this case and this matter has not been able to be explored further. Mrs Colley's written statement and evidence questionnaire do not deal with this point. In her written statement Mrs Colley does say that, when she had a tenancy between 1980 and about 1991, she did not give permission to anyone to come on to the land, or ask them not to, and that there was enough space for the one or two horses she grazed and for children and adults to use the land as well. I have already said that I cannot accept that Mrs Colley's arrangement with the Council lasted until only 1991 and I have found that it remained in place until 2005. The fact that Mrs Colley's written statement is unreliable in this respect and so far apart from the contemporaneous documents in relation to dates leads me to approach Mrs Colley's written evidence with a good deal of caution. Nevertheless, Mrs Colley's account of grazing "one or two horses" fits with all the rest of the evidence and her claim that there was enough space on the Application Land for grazing and use by others is also correct in my estimation. More directly relevant to the submission made by the Council which I am addressing at this point, Mrs Colley's statement that she never gave permission to anyone to come on to the land or, more pertinently still, never

[34] At p 358.

asked them not to, is also consistent with the overall use evidence. None of that evidence (except that given in writing by those who said that they were permitted grazing rights, that is, Mrs Colley and Mrs Farrar) speaks of permission being given to use the Application Land or of any challenge being made to use. The Council adduces no evidence of any challenge to use by Mrs Colley and, in the circumstances, the most it can say is that she would have objected to users trespassing on the Application Land and that her raising of the issue of the gate from 36 Kenyon Bank in 2000 suggests as much. I find that Mrs Colley did not give any permission to users to be on the Application Land nor did she ever challenge such users.

100. That last finding, however, does not address the real point of the Council's submission. The Council does not in reality invite a finding that use was permissive or that it was challenged. The finding that it effectively argues should be made is that there was no significant use of the Application Land which might have given rise to such challenge. In assessing this argument it is important to consider, first, use of the Application Land which would not have been objected to in any event. I am prepared to infer for the purposes of assessing the argument that Mrs Colley would have been a reasonably regular visitor to the Application Land to attend to her horses.[35] Mrs Colley would have had no grounds for any objection to use of the public footpath which led from Barnsley Road to Trinity Drive precisely because it was a public footpath. There is also no reason to think that Mrs Colley would have thought she was in any position to object to use of the flagged route from Trinity Drive to the rear of properties on Bank Lane by those who lived in the properties served by the route. All the evidence is suggestive of a well-established private right of way in this regard. It also seems unlikely to me that Mrs Colley would have objected to use of the route from the Trinity Drive entrance to the Application Land to Ash Well Wood. I have already indicated that the works carried out in 1997 indicated the making of provision for a kissing gate stile where the Application Land abuts Ash Well Wood and a permissive path in the wood itself. This suggests that public passage across the Application Land from Trinity Drive to Ash Well Wood would have been uncontroversial. All the evidence points to the fact that the public footpath from Barnsley Road to Trinity Drive across the Application Land would, at all relevant

[35] I say that I am "prepared to infer" this because it is not a matter specifically addressed in Mrs Colley's written evidence.

times, have been a well-used route serving as a good short cut from Barnsley Road into the centre of Denby Dale (and vice versa) across a green open space with pleasing views. The route from Trinity Drive to Ash Well Wood would also have been popular for similar reasons with the added attraction of a walk through the adjoining Ash Well Wood. There would further have been a body of use of the flagged route by residents of Bank Lane. And a degree of recreational activity, such as children's play, in the vicinity of the hanging grounds (which fell within the land let for grazing) would also have been to be expected and would hardly have been likely to be considered objectionable whatever may have been the strict limits of the entitlements which the residents had.[36] There is no evidence that Mrs Colley ever took exception to any mowing here by the Bank Lane residents.

101. Having said all of the above, it does not seem to me to have been the case that use of the Application Land by local residents during that part of the relevant period when it was grazed was confined to the routes I have described in the preceding paragraph and the immediate surrounds of the hanging grounds; and I so find. It is true that some of the witnesses I heard in support of the Application tended to refer to footpath use. The prime example was Mr Robinson whose description of his own personal use of the Application Land for walking or running was very much in the nature of a use which involved traversing the Application Land as part of a route from "A to B" via either the public footpath or the route across the Application Land from Trinity Drive to Ash Well Wood. Another example is Mrs Fletcher who accepted that it might be true to say that her primary use of the Application Land had been going across it, although she was keen to emphasise that children, including her son, did not so restrict themselves. On the other hand, other witnesses gave rather different evidence. For instance, Mrs Naylor said that she spent many hours wandering around the Application Land and that she wandered off the pathway nearly every time she went there and the Applicant said that people roamed everywhere when horses were on the Application Land. The overall tenor of the evidence did not paint a picture of use largely confined to defined routes. I am also mindful of the fact that the evidence questionnaires asked about frequency of use of the land "apart from the public paths" so that, at least at face value, all answers given to that question were describing non-

[36] The exact terms of the hanging grounds agreements (and, indeed, the agreements themselves) are not in evidence.

public path use. I say "at least at face value" because it has not been possible, in the case of those who did not give oral evidence, to test the understanding of the question by those who completed forms (which would include the question of whether the route from Trinity Drive to Ash Well Wood was considered to be a public path) and the accuracy of the answers given. That limits the weight which can be placed on this aspect of the evidence but the answers on the forms provide a small degree of further support for the conclusion that use was not confined to footpath routes.

102. On the totality of the use evidence I find that there was significant use of the Application Land generally for informal recreation and a range of activities by local residents during the currency of the grazing arrangements. In arriving at that finding I have not been persuaded to the contrary by the evidence of lack of use (apart from the public footpath) which is spoken to by the Council's witnesses. This evidence has inevitable limitations in terms of the frequency of the witnesses' observations, sometimes by the timing of those observations (Mr Chappell's visits all having been on normal working days during working hours) and sometimes by the observation points (Mr Hoyle on many occasions having looked from Barnsley Road and from a moving vehicle thereon). I also do not think that the lack of routes (save for the public footpath and the route to the rear of the Bank Lane properties) showing up on the 2002 aerial photograph compared with the later 2006 and 2009 aerial photographs is a matter which supports the proposition that there was an absence of general use at this point. The appearance of the Application Land on the 2002 aerial photograph is equally consistent with the fact that, at this point, the grazed condition of the Application Land allowed its general use and that the vegetation growth was not such that users were channelled along defined routes.

103. Bringing the point back to where it started, that is, with Mrs Colley's absence of challenge to use, it follows from what I have concluded above that I do not consider that that lack of challenge is to be ascribed to the absence of anything to challenge. As to Mrs Colley's having raised in 2000 the issue of the gate from Kenyon Bank, it is possible that Mrs Colley's concern here was with the security of her horses and the potential for escape from the Application Land rather than access to it as such but the matter remains rather speculative in the absence of oral evidence from Mrs Colley. Be that as it may, this matter is in any event insufficient to lead me

to any different conclusion than that which I have found to flow from the totality of the use evidence that there was significant use of the Application Land generally for informal recreation and a range of activities by local residents during the currency of the grazing arrangements.

104. In accordance with the test set out by Lord Hope in *Lewis* I consider that, during the currency of the grazing arrangements, the use of the Application Land for informal recreation by local residents was use of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. I also consider that, during this period, in accordance with the observations of Sullivan J in *Cheltenham Builders*, it could sensibly be said that the whole of the Application Land was used for informal recreation.

105. I turn therefore to consider the use of the Application Land in the period since grazing ceased which, I have already found, was in 2004-2005. As the first part of this consideration I turn to the issue of the condition of the Application Land since grazing ceased. I find that, since grazing ceased, the Application Land has, each year become significantly overgrown over most of its area. In arriving at this finding I have taken account of all the witness evidence (both oral and written) and documentary evidence before me and the body of photographic evidence. I have found the Council's photographic evidence particularly useful and place significant weight on it. I provided a summary of this evidence in paragraph 82 above and, for the sake of convenience, I repeat here so much of that summary in respect of the period I am now considering. Photographs taken on 21st April 2005, all from Barnsley Road, show the Application Land significantly overgrown in its southern reaches. I acknowledge that the location from which these photographs were taken imposes a degree of limitation on the weight that can be placed on them in assessing the condition of the Application Land as a whole, and that the photographs would have been taken in connection with the ending of Mrs Colley's tenancy so that, to that extent, they might be thought to have been taken with the object of presenting as strong a case as possible against the tenant. Notwithstanding those matters, I find that the photographs are useful in evaluating the condition of the Application Land. It does not seem to me that the Council's record of the condition of the Application Land at this time that it was "very overgrown with thistles docks and motherdie" is inaccurate. Photographs taken

on 22nd August 2006 (which was just before the final resolution of matters with Mrs Colley), including a number on the Application Land from the public footpath, show the area to the west of the footpath, in particular, to be significantly overgrown and suffering from widespread infestation of what appear to be tall rank weeds probably docks. Again, notwithstanding that these photographs would have been taken by the Council to serve the Council's position vis-à-vis Mrs Colley, I consider that the photographs are of material assistance for present purposes. The Council also rely on photographs taken on 3rd August 2011. These were, of course, taken after the Application had been made but, as I pointed out in paragraph 82 above, there is no reason to think that what is shown on the photographs is not representative of summer periods in earlier years during the relevant 20 year period once grazing had ceased. The Application Land is very significantly overgrown save for the hanging grounds area where there is short mown grass. The area around the footpath leading thereto is also less overgrown than the rest of the Application Land.

106. The condition of the Application Land since grazing ceased as revealed by the photographs I have referred to above is generally borne out by the aerial photographs for 2006 and 2009. I mentioned in paragraph 83 above that the overall appearance of the Application Land in the 2002 aerial photograph appears significantly different from its overall appearance in the 2006 and 2009 photographs and that the latter photographs show a considerably more overgrown picture than the former. Photographs submitted by the Applicant as part of the RTO, including some in the winter and early spring 2011 showing less overgrown conditions, are not out of line with my finding. The dying down of vegetation in the winter and its lack of regrowth in early spring are to be expected. These are also the times when use might generally be expected to be least. Before leaving the topic of photographic evidence I should add that I have not sought to rely on Mr Turner's 2012 "before and after" mowing photographs in coming to my conclusion. I do not regard these photographs as providing any sure basis for judgment.

107. In terms of the verbal evidence in support of the Application, the fact that the Application Land became overgrown since the cessation of grazing was acknowledged, in varying degrees, by many of the "live" witnesses. Mr Robinson stated that, once grazing ceased in 2005, it was disappointing to note that no

alternative management was introduced with the result that the sward deteriorated and an invasion of coarse weeds took place. He also said that the Application Land quickly grew unchecked after grazing ceased and that it was a matter of fact that there had been infestation with docks although weed infestation was mainly around mature trees and was not so bad at the bottom of the Application Land. Mrs Naylor said that the condition of the Application Land had got worse since around 2005-2006 and that it was for only this "last little bit" of the relevant period, as she called it, that it became overgrown, in distinction to the time she had used it when it was grazed. Mrs Hodgson agreed that since the mid–2000s the Application Land had become "pretty overgrown". For her part the Applicant said that the Application Land had become overgrown "only in parts" since grazing ceased and that the edges were difficult to go into and there were clumps of docks in the central section but with plenty of grass around them. Mrs Fletcher confirmed that what she had written on her evidence questionnaire about the Application Land recently having "become messy and overgrown" was her opinion and that it referred to the time since grazing had stopped. Mrs Campbell agreed that the Application Land had become more overgrown, "certainly in patches" since 2005 but said that most of the overgrown areas were just long grass. Mr Shone said that he thought that it was 2005 when the grazing ceased but it could have been 2003 or 2004 and it was correct to say that the Application Land then became unsuitable for games because the vegetation became thicker. Mrs Siuda acknowledged, by reference to the birth of her children in 2004 and 2006, that the Application Land was no longer used for grazing and that the grass had become longer. Mr Hill said that there were times when the Application Land was very overgrown and times when it was less so although he did not regard it as inaccessible or impenetrable away from the paths. The overgrown nature of the Application Land since the cessation of grazing also featured significantly in the Council's evidence although it is right to record that Mr Chappell agreed (perhaps not surprisingly) that the August 2011 photographs showed that on some parts of the Application Land the height of the growth and the extent of the weed infestation was not as great as on others.

108. The next question to be considered is what effect, if any, the overgrown nature of the Application Land since grazing ceased has had on what I have found to be its general use for informal recreation and a range of activities by local residents during

the currency of the grazing arrangements. Making all due allowance for the fact that in winter (when use would generally be less) the grass and other vegetation would die down, I have no doubt that the condition of the Application Land since grazing ceased has had a significant impact on the extent of the recreational use and the range of activities carried on. Mrs Naylor said that use of the Application Land had become "much less" as it had become overgrown. That concurs with my assessment. I find that since the Application Land ceased to be used for grazing its predominant use (other than simple use of the public footpath from Barnsley Road to Trinity Drive – which I discount as qualifying use) has been for dog walking. It appears to me from her evidence that Mrs Hodgson's main recent use of the Application Land has been for dog walking. The same seems to me to apply to Mrs Fletcher's evidence. Mrs Campbell's description of the other people she saw on the Application Land (as opposed to her description of her own family's activities there since moving to Bank Lane in 2003) was that they were primarily dog walkers. Mr Shone's account of recent personal use (by him and his wife) gave the impression that dog walking was the main such use. Mrs Siuda described, *inter alia*, her children's play on the Application Land in recent years but also referred to several morning dog walkers using it. Mr Ward's present use was for walking and exercising his dog because it was a convenient area to let the dog off to run around safely and one where he regularly met and chatted with other local dog owners. Mr Hill (all of whose use has been since grazing ceased) walked his dogs on the Application Land and referred to it as "a doggy kindergarten" with a regular group of other dog walkers.

109. The curtailment of more general recreational use since grazing ceased with the resultant deterioration in the condition the Application Land and the recent use of the Application Land for dog walking is borne out by a number of statements which appear in the written evidence in support of the Application. Some of these statements also include reference to dog fouling on the Application Land. I have already referred to the fact that Mrs Fletcher's evidence questionnaire stated that the Application Land had recently become "messy and overgrown"; the very same statement said that it was "therefore used less". In an accompanying statement dated March 2011 (as opposed to her witness statement for the inquiry) Mrs Fletcher referred to the Application Land as "overgrown now and used by many as a sort of unofficial dog toilet". Lisa Taylor's evidence questionnaire stated that "we would use the field more often if it was

maintained ie not overgrown and covered in dog mess. Even the path and the entrance near the church becomes hard to walk on/through during the summer due to overgrown nettles." Elizabeth Moore's evidence questionnaire stated that the "field is not currently very user friendly particularly for young children because of problems with dog dirt". Wayne Ibbotson's evidence questionnaire referred to having seen dog walking "mostly since horses left". David Wood's evidence questionnaire, after reciting various uses (dog walking, children's ball games, grazing for horses and general amenities) stated that the Application Land "has become overgrown in the last 18 months which limits use". Natalie Callender's evidence questionnaire said that the general pattern of use had remained basically the same during the time she had used the Application Land "until horse grazing was stopped. Now use for walking dogs." Mandy Meachen's evidence questionnaire stated that she did not know of any community activities having taken place on the Application Land "because [it was] too overgrown". Matthew Bright's evidence questionnaire said that "we wish that the land was better maintained then we as a family could enjoy it more". Alan Turner's witness statement stated that "when the horses stopped grazing the grass got longer and it is used more by dog owners and less by children."

110. The finding I make that since the Application Land ceased to be used for grazing its predominant use (other than simple use of the public footpath from Barnsley Road to Trinity Drive) has been for dog walking fits reasonably well with the Applicant's own assessment of the matter in the RTO which states in terms that "walking and dog walking are now the most commonplace activities."[37] It also has the merit of consistency with the Council's evidence albeit that, as already acknowledged, there are inevitable limitations to that evidence. Mr Turner's evidence was that, when grazing stopped, the Application Land became overgrown and was not used at all by anyone other than people who walked their dogs and let them foul there. Mr Chappell said that he had witnessed members of the public using the footpath from Barnsley Road through to Trinity Drive and, on occasions, he had also witnessed dog walkers on the route between the path and the neighbouring privately owned woodland. Mr Wickham gave evidence that, when he had met with the Applicant on 12th January 2011, he had stressed that, apart from the use of the footpath, the Application Land

[37] The RTO41.

was used only for dog exercising. In relation to the latter two witnesses, the evidence I have referred to here covered a longer period than simply that which followed the cessation of grazing (Mr Chappell's evidence going back to 1993 and Mr Wickham's to 2000). I have already indicated that I do not consider that this evidence provides a representative picture of overall use of the Application Land in the period before grazing ceased. However, I do think that it is much closer to the mark in terms of the post-grazing period. More generally, it is to be expected that the attraction of a piece of land for dog walking might well increase when there are no longer any horses on the land to restrict the inclination of owners to let dogs off the lead.

111. In terms of the issue of dog fouling, a number of the witnesses called in support of the Application were keen to stress that there was not a particular problem in this respect. Mr Robinson said that the Application Land was not heavily fouled. Mrs Hodgson said that dog fouling was not a problem and that she would not describe the Application Land as a dog toilet. Qualifying what she had said in her March 2011 statement that the Application Land was "used by many as a sort of unofficial dog toilet" Mrs Fletcher put matters somewhat differently at the inquiry - that there was some dog fouling in overgrown areas where some did not clear up after their animals. Mrs Campbell said that she had not seen that much dog mess on the Application Land and had not trodden in it. Mrs Siuda stated that her children had never returned with dog mess on them. Mr Hill said that he would not say the Application Land was a dog toilet and that people were quite disciplined (about cleaning up). Mrs Oldroyd stated that there was not a problem with dog fouling. The evidence called on behalf of the Council painted a different picture. Mr Turner said that the Application Land had become a large dog toilet and Mr Wickham stated that it was his opinion, which he had voiced to the Applicant, that the dog walking use was actually preventing any recreational use as using the Application Land away from the path inevitably meant stepping in dog mess. There is some written evidence in support of the Application which puts matter in a similar way to the Council's witnesses. I refer to the comments of Lisa Taylor and Elizabeth Moore which I mention in paragraph 109 above (which were, respectively, to the effect that the Application Land was covered in dog mess and that it was not currently very user friendly, particularly for young children because of problems with dog dirt). Some difference in emphasis between witnesses is perhaps to be expected in relation to a topic of this nature which is capable of

arousing strong opinions and where impressionistic judgments come into play. I consider that there is an element of over-statement on both sides in relation to the extent to which the Application Land has been afflicted by dog fouling since grazing ceased but I do find that there has been an appreciable degree of dog fouling since the Application Land ceased to be grazed and I consider that the overgrown nature of the area has contributed to that by making some dog owners feel less readily disposed to clean up after their animals in such surroundings. I also find that the extent of the problem has been such that it would have represented, in particular, a real restraint on parents' allowing children's play on the Application Land. In making that finding I have not lost sight of the evidence of Mrs Campbell and Mrs Siuda in relation to their children's play on the Application Land (and other written evidence to similar effect such as that provided by Mr and Mrs Ward of 36 Kenyon Bank). In my view many other parents would have been considerably more cautious about permitting their children to play in an area which was known to suffer from dog fouling or, perhaps just as importantly, was perceived in that way.

112. In finding that, since the Application Land ceased to be used for grazing, its predominant use (other than simple use of the public footpath from Barnsley Road to Trinity Drive) has been for dog walking, I do not find that there has been no other use of the Application Land at all during this period. There has, for example, been some children's play (some of which may well have been in long grass) as instanced by the evidence of Mrs Campbell, Mrs Siuda and Mr and Mrs Ward which I refer to in the preceding paragraph. However, I do find that such other activities have been very limited given the overgrown nature of the Application Land and the problem with dog fouling. A notable feature of Mrs Campbell's evidence in my view was her expression of opinion about likely future increase in use of the Application Land by children as opposed to any expression of opinion that there was any extensive use of the area presently for children's play. I consider that, leaving dog walking aside for the present, there has not been sufficient other use to amount to the assertion of a public right over the whole of the Application Land.

113. As for the dog walking, I find that some of it will have been on the public footpath from Barnsley Road to Trinity Drive and some on the route from Trinity Drive to Ash Well Wood as part of longer overall walks. I consider that use of such

routes would, in accordance with the guidance provided by Sullivan J in *Laing Homes* and of Lightman J in *Oxfordshire County Council*, have appeared to a reasonable landowner as referable to the established right of way in the first case and referable to a footpath type use in the second case. I also find that most of the dog walking on the Application Land which has not consisted of taking the routes just referred to will have taken the form of following in whole or part the continuous route, broadly rectangular in shape, which circumscribes a large central body of the Application Land and which I described in paragraph 83 above. The obvious nature of the worn paths which make up this route, as apparent on the 2009 aerial photograph, is a strong pointer that the bulk of foot traffic has been concentrated here. I accept that a number of witnesses in support of the Application suggested that dog walkers (and others) might have ranged more generally across the Application Land. Mrs Fletcher spoke of 10 to 20 dog walkers who used the Application Land, not on the path. Mrs Campbell spoke of people using not just the marked footpaths but tending to take advantage of the whole space including perhaps a couple of dozen of dog walkers. Mrs Siuda spoke of always seeing people on the Application Land not keeping to a path. However, I regard the objective evidence provided by the aerial photograph as a better guide to the overall pattern of use than this oral evidence. That the bulk of the use would be restricted to worn paths is also entirely consistent with the overgrown nature of the Application Land which would have the effect of channelling use to such paths. In paragraph 101 above I mentioned the limited weight which could be given to the answers on the evidence questionnaires which were directed to the question of frequency of use "apart from the public paths". The answers do not in fact help much at this point in the analysis because my consideration of matters here extends to the question of the extent of use of worn paths on the Application Land which are not public paths. And in any event, I prefer to put more weight on the aerial photograph.

114. I also consider that there is a body or oral evidence which supports my finding. Although he himself would follow his dogs where they went, Mr Hill acknowledged in his evidence that the obvious thing to do was to stick to the paths. I find that that was indeed the obvious thing to do and was what was generally done by dog walkers (and others) on the Application Land after it ceased to be used for grazing. No doubt dogs have been let off the lead to roam freely over the Application Land and some owners may sometimes have followed but, in the main, dog owners

would themselves have kept to the worn paths and made their way accordingly. This finding is also consistent with Mr Wickham's evidence on behalf of the Council that most dog walkers tended to do a kind of circular route around the perimeter of the Application Land and ties in with Mr Ward's evidence in relation to his dog walking that he "might just do a circular walk". The Applicant herself referred to seeing, after grazing had ceased, dog walkers "on a circuit" (but also mentioned their taking "little zig-zags" off the path).

115. In the light of my findings in relation to dog walking on the Application Land after grazing had ceased I consider that the appearance of this use to a reasonable landowner would have been the assertion of a right to walk on particular paths rather than to indulge in informal recreation more generally over the Application Land. The roaming of dogs which I have described in the previous paragraph would not have suggested to a reasonable landowner that the dog walkers were exercising a public right to use areas beyond the paths for informal recreation. I refer in this connection, in particular, to the judgment of Sullivan J in *Laing Homes.*[38] I consider that this is very far from a case where the Application Land is so criss-crossed with paths that it can be said that use of the paths in itself would amount to the assertion of a right to indulge in informal recreation over the whole of the Application Land. As I pointed out in paragraph 83 above, the paths can be combined to produce a longer, continuous, single route, broadly rectangular in shape, which circumscribes a large central body of the Application Land.

116. My findings in relation to the period after the cessation of grazing on the Application Land may be summarised as follows:

- that in this period the predominant use of the Application Land was for dog walking (paragraph 108)
- that in this period other activities have been very limited and do not consist of sufficient use to amount to the assertion of a public right over the whole of the Application Land (paragraph 112)

[38] At paragraphs 103 and 104.

- that the predominant use of dog walking would have conveyed to a reasonable landowner the assertion of a right to walk on particular paths rather than to indulge in informal recreation more generally over the Application Land (paragraph 115).

117. Combining these findings leads me to the conclusion that, in the period after cessation of grazing and thus for the last five to six years of the relevant 20 year period, use of the Application Land has been insufficient in amount and manner (in accordance with the principles I have set out in paragraph 88 above) to enable the Application to succeed. There has, therefore, not been sufficient use for the full relevant 20 year period.

118. This conclusion is fatal to the Application. In the light of it I intend to deal with other matters more briefly although I do consider them in deference to the submissions made to me.

(b) Other matters

Neighbourhood

119. I do not accept Mr Hanbury's submission that the Application should fail in any event on the basis that the claimed neighbourhood of Denby Dale village does not qualify as such. Mr Hanbury argued, first, that the claimed neighbourhood was too big and, secondly, that it lacked the requisite degree of cohesiveness. In relation to the first point, I do not consider that there is any statutory restriction *per se* on the size of a neighbourhood and I reject the free-standing submission that Denby Dale village is too big to be a neighbourhood. It does, however, seem to me to be correct that the size of a neighbourhood will bear on the question of whether, in any given case, there has been use by a significant number of the inhabitants of that neighbourhood. That is, however, a separate point. I make some observations below on the question of "significant number" as it relates to this case.

120. As to Mr Hanbury's second point, the requirement for a neighbourhood to have *"a sufficient degree of cohesiveness"* is to be sourced to the judgment of

Sullivan J in *Cheltenham Builders.*[39] In *Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust* HHJ Waksman QC made it plain that such cohesiveness should be *"pre-existing"* but also pointed out that "neighbourhood" was *"a more fluid concept"* than "locality" and that the factors to be considered when determining whether a purported neighbourhood qualified as such were *"undoubtedly looser and more varied than those relating to locality"* although a neighbourhood had to be *"capable of meaningful description in some way."*[40]

121. In *Oxfordshire County Council* Lord Hoffman 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."*[41]

122. In *Leeds Group plc v Leeds City Council*[42] at first instance HHJ Behrens said that "neighbourhood" was *"an ordinary English word"* and that, given Lord Hoffman's guidance in *Oxfordshire County Council* about the imprecision of the term and the fact that a number of judges had said that it was the clear intention of Parliament to make the registration of village greens easier, *"cohesiveness"* should be read in the light of those considerations.[43] In relation to the question of the need for a neighbourhood to have boundaries, HHJ Behrens said that he agreed with the submission made to him *"that boundaries of districts are often not logical and that it is not necessary to look too hard for reasons for the boundaries."*[44]

123. In the same case in the Court of Appeal[45] Sullivan and Arden LJJ endorsed Lord Hoffman's dicta in *Oxfordshire County Council* in relation to the "*deliberate degree of imprecision"* in the drafting of the expression "any neighbourhood within a locality" and all members of the court recognised that Parliament's intention in enacting the neighbourhood provision was to make easier the task of those seeking to

[39] At paragraph 85.
[40] See paragraphs 69 and 79 for the quoted passages.
[41] At paragraph 27.
[42] [2010] EWHC 810 (Ch).
[43] At paragraph 103.
[44] At paragraph 105.
[45] [2010] EWCA Civ 1438.

register new greens and to avoid technicality by loosening the links with historic forms of green.[46]

124. Guided by this case law I have no difficulty in rejecting Mr Hanbury's submission and coming to the conclusion that Denby Dale village as put forward in support of the Application qualifies as an appropriate neighbourhood in terms of section 15 of the 2006 Act. The village so defined is a cohesive entity manifested as a largely separate and self-contained physical or geographic unit, served by its own facilities and marked by a sense of community identity. The boundaries of the chosen area have a clear logic to them based on the village envelope as originally inset from the Green Belt for planning purposes when the Council's UDP was being prepared and any anomalies are, to my mind, both inconsequential in terms of the overall judgment and swept up in the *"deliberate imprecision"* of the term "neighbourhood". I accept in its entirety Mr Robinson's evidence in relation to the issue of "neighbourhood" as set out in paragraphs 23-25 above. The fact that, as pointed out by Mr Hanbury, a part of the neighbourhood lies within the settlement of Lower Cumberworth is nothing to the point. The settlement boundaries in question, as I explained in paragraph 81 above, have no legal significance and are used by the Council simply for the purposes of data collection; and, as I have already stated in this paragraph, this is no more than an inconsequential anomaly which is swept up in the *"deliberate imprecision"* of the term "neighbourhood". The point put to Mr Robinson in cross examination (noted in paragraph 28 above) that there was an absence of shops or a pub in the area round the Application Land is also irrelevant.

125. The locality within which the neighbourhood lies has been identified as the civil parish of Denby Dale. In my view that is plainly an appropriate locality for the purposes of the Application. No submission to the contrary was made by Mr Hanbury. I need say nothing more about this matter.

Significant number

126. I turn next to the question of "significant number".

[46] See, for example, paragraphs 24, 25, 26, 44 and 52.

127. In *Alfred McAlpine Homes* Sullivan J said that "significant number" did not mean a considerable or substantial number and that what mattered was 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.*"[47]

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128. In the light of this guidance I am not minded to think that a great deal of assistance is to be gleaned from the approach urged by the Council in this case to compare user numbers with population and household figures for the Council's "settlement" area of "Denby Dale", which, in any event, does not correspond with the neighbourhood relied upon although the neighbourhood relied would be the most populous part of the "settlement" area. Had I thought that there was a sufficiency of use of the Application Land in amount and manner for the full relevant 20 year period I do not think that I would then have been inclined to conclude that the Application should nevertheless fail on "significant number" by reference to the kind of numerical comparison exercise suggested.[48] I put the matter tentatively because the conclusion I express here relates to a hypothetical situation which postulates quite different findings from those determinative findings which I have already made when considering the question of sufficiency of use.

129. A question which, to my mind, is related to the issue of significant number and which is raised by the submissions made to me is whether there is any requirement for a spread of users across the qualifying area and, if so, how such requirement is to be understood. Again, I deal with this matter relatively briefly because it has no bearing on the conclusion I have already reached and would only come into play were I to have to made different findings in relation to the question of sufficiency of use.

130. I consider that there is a requirement for a spread of users across the qualifying area as a matter of principle for two reasons. First, I think that it is necessary that users come from all over the relevant locality/neighbourhood because, if it were

[47] At paragraph 71.

[48] I mention for the sake of completeness that it would, of course, be necessary to discount from the assessment of qualifying use and "significant number" evidence of personal use by those who were not resident in the neighbourhood at the time of such use (such as, for example, Mrs Hodgson's use when she lived in Upper Denby).

sufficient that users came from just one part of the locality/neighbourhood, the locality/neighbourhood requirement would be rendered meaningless and, in substance, it would be sufficient to draw an arbitrary red line on a plan around the area from which users came, which would seem to contradict the requirement for there to be some pre-existing area either known to the law (as a locality) or established as a cohesive unit (in the case of a neighbourhood). Secondly, were the law otherwise, it would create a mismatch between the persons whose use 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 greater burden on the land than the landowner had acquiesced in and would thereby infringe the principle of equivalence referred to by Lord Hope in *Lewis.*[49]

131. I also think that the conclusion that there is a requirement for a spread of users over the qualifying area is consistent with the way in which Sullivan J dealt with the issue of "significant number" in *Alfred McAlpine Homes*. If evidence is needed of *"general"* use by the local community and the local community is taken to be 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 *Alfred McAlpine Homes* it is notable that the inspector had found that users had come from all parts of the relevant locality.[50]

132. I also consider that some support for the notion of a spread of user is to be gained from a passage in the judgment of HHJ Behrens in *Leeds Group plc* where, in rejecting a 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, the judge appears to have implicitly accepted that there was such a requirement in respect of the neighbourhood itself.[51]

133. In expressing the view that there is a requirement for a spread of users over the qualifying area, I have not lost sight of what Vos J said in *Paddico* at first instance[52] as referred to in the Applicant's closing submissions. Vos J said that he "*was not*

[49] At paragraph 71.
[50] See paragraph 38 of the judgment. The locality in question was the town of Leek.
[51] See paragraph 90.
[52] The passages relevant for present purposes were not the subject of discussion in the Court of Appeal.

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."[53] 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 Commons Registration Act 1965. Vos J returned to the matter in the context of considering the amended definition in section 22(1A) of the 1965 Act where he said again that he did *"not accept Mr Laurence's spread or distribution point."*[54] 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 have already set out above.

134. I do not consider that the conclusion that a spread of users is required 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 a principled consequence of the statutory definition in section 15 of the 2006 Act.

135. However, the next question is how the requirement for a 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. And, as Vos J's remarks suggest, *"a scattering of users further away"* may be sufficient.

[53] At paragraph 106i).
[54] At paragraph 111.

136. Approaching the issue of spread of users in this way, had I thought that there was a sufficiency of use of the Application Land in amount and manner for the full relevant 20 year period, again I do not think that I would have been inclined to conclude that the Application should nevertheless fail on the basis of lack of spread. The pattern of user addresses revealed by the Council's plans could be described as showing a concentration of users from addresses close to the Application Land but nevertheless with a scattering of users elsewhere in the neighbourhood. I continue to put the matter tentatively because the conclusion I express here once more relates to a hypothetical situation which postulates quite different findings from those determinative findings which I have already made when considering the question of sufficiency of use.

Use as of right

137. There is no question in this case of the Application Land having been provided to the public for the purposes of recreation under any statutory power (in the Open Spaces Act 1906, the Public Health Act 1875 or in any other statutory provision) so as to confer a right on the public to use the Application Land for recreation. The Application Land was acquired for education purposes. Further, the Application Land has never been appropriated for public recreation in any sense of the term "appropriate". In the circumstances there is no question of use of the Application Land having been *"by right"* in the way in which use of the recreation ground in *Barkas v North Yorkshire County Council*[55] was found to be *"by right"* rather than "as of right". The only way in which any use of the Application Land may have been said to have been *"by right"* is that the use of the public footpath across the Application Land from Barnsley Road to Trinity Drive has been by public right and access to/from the properties on Bank Lane by the flagged route would have been by private right. Leaving those matters aside, it is clear that such use as there has been has not been by force, in secret or by permission. This finding is, however, of no avail to the Applicant given my earlier conclusion in respect of the insufficiency of use in amount and manner for the full relevant 20 year period.

[55] [2012] EWCA Civ 1373.

Exemption of local authority owned land from the village green registration regime

138. I finally deal very briefly with Mr Hanbury's submission that the Application Land as local authority land *per se*, should not be treated as subject to the possibility of being "sterilised" by registration as a town or village green. I reject this submission. There is no authority to support it and there is clear guidance in *Beresford v Sunderland City Council*[56] against it. Lord Walker there said that counsel for Sunderland "*rightly did not argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965."* In my view the same holds good for section 15 of the 2006 Act. As it is, however, this is again not a matter which bears on the determinative aspect of my report.

Conclusion and recommendation

139. In the period after cessation of grazing and thus for the last five to six years of the relevant 20 year period, use of the Application Land has been insufficient in amount and manner to enable the Application to succeed. There has, therefore, not been sufficient use for the full relevant 20 year period.

140. Accordingly I recommend that the Application should be rejected.

Kings Chambers
36 Young Street — Alan Evans
Manchester M3 3FT — 6th February 2013

[56] [2003] UKHL 60.