APPENDIX C

In the Matter of

an Application to Register land known as

Cherry Orchard Playing Field, Herne, Kent

as a Town or Village Green

REPORT

of Miss LANA WOOD

18 September 2009

Kent County Council

Invicta House

County Hall

Maidstone

Kent

ME14 1XX

Ref: Mr C Wade/ Miss M McNeir

In the Matter of an Application to Register land known as

Cherry Orchard Playing Field, Herne, Kent

as a Town or Village Green

REPORT OF INSPECTOR MISS LANA WOOD

CONTENTS

Executive summary

I conclude that the application fails for two principal reasons:

(1) The Applicant failed to show that use of the land has been as of right, because local people who at other times used the land freely for lawful sports and pastimes modified their behaviour when the pitches on the land were in use by teams who had booked to play on them so as not to interfere with those games. Their behaviour therefore did not have the appearance of an assertion of a right.

(2) The Applicant failed to identify a qualifying locality which had existed for the whole of the relevant period. I was not satisfied that the area identified by the Applicant as a neighbourhood was a neighbourhood within the meaning of the statute.

In the Matter of

an Application to Register land known as

Cherry Orchard Playing Field, Herne, Kent

as a Town or Village Green

REPORT of Miss LANA WOOD

18 September 2009

1. The Village Green Application

1.1. On 25th January 2004 Kent County Council, as Registration Authority, received an application in prescribed Form 30 to register land at Herne, Kent as a new town or village green. The applicant was Ruth Hilary Bowley of 253 Canterbury Road, Herne Bay, Kent CT6 7HD. The land in respect of which the application was made was land known as Cherry Orchard Playing Field, and was edged green on the plan appended to the application. The locality was given as Herne, Kent. The land was said to have become town or village green on 6th January 2004 by use of local inhabitants for more than 20 years without hindrance. Canterbury City Council was specified as a person whom the applicant believed to be an owner, lessee, tenant or occupier of any part of the land. The application was supported by Mrs Bowley's statutory declaration in the prescribed form. Various documents in support of the application were submitted with the application.

Objections

1.2. The application was advertised by the Registration Authority. Canterbury City Council objected to the application. The grounds of the Council's objection were (in summary):

(1) The application land was acquired by the Council's statutory predecessor by conveyance dated 17th April 1957. The conveyance recorded that the land was required so that it might be used for the purposes stated in the Physical Training and Recreation Act 1937. Attached to the conveyance was a plan which carried the heading "Herne Bay Urban (Cherry Orchard Playing Field) Compulsory Purchase Order 1952. The Council submitted that it was clear that the land was acquired specifically for the purpose of the 1937 Act.

(2) Section 19(5) of the Local Government (Miscellaneous Provisions) Act 1976 (which Act repealed section 4 of the 1937 Act) provided that land

formerly held under section 4 of the 1937 Act was instead to be held under section 19 of the 1976 Act

(3) A local authority providing recreational facilities under section 4 of the 1937 Act or section 19 of the 1976 Act may impose a fee charging structure which (for example) requires payment for some recreational activities but not others, regulate use of the land, and restrict access to the land by reference to classes of person or activity, or by reference to times of the day, or days in the week or year or otherwise.

(4) Section 32 of the County of Kent Act 1981 makes it an offence (if a notice setting out the effect of section 32 is displayed on the premises) to remain on premises to which the section applies after being requested to leave them, or, without lawful authority, to be on such premises within one month of such a request. Such a notice has been displayed on the application land for many years.

(5) The statutory test for registration requires members of the public to have used the land for the prescribed purposes for the prescribed period "as of right". If user of the land has been by permission, it cannot be "as of right". The Objector relied on paragraph 5 of the speech of Lord Bingham in *Beresford*. The Objector accepted that members of the public had used the site for the purposes of recreation, but asserted that their use had been by virtue of permission granted by the Council. The Council had made it clear that the public's use was permissive by the following acts:

(a) laying out football pitches and letting them during the football season for a fee; letting the pavilions along the north western side of the applicatin land for a fee; excluding members of the public from the relevant parts of the site at such times. The Objector contended that this was a clear assertion of its right to exclude the public, and thus a manifestation that the inhabitants' use on other occasions occurs because the Council does not choose on those occasions to exercise its right to exclude them, and so permits such use.

(b) Maintaining a notice under section 32 of the County of Kent Act 1981 on the site. The notice is an express manifestation that the public's use of the site occurs because the Council does not, in general, choose to exercise its right to exclude persons under section 32.

(c) Maintaining a notice on the land prohibiting the playing of golf. The notice is an express manifestation that the public's use of the site for purposes other than golf is by the permission of the Council.

(6) The Council also relied on paragraph 87 of the speech of Lord Walker in *Beresford*: the application land continues to be held by the Council for the purposes set out in section 19 of the 1976 Act i.e. recreational purposes. Members of the public making use of the land for recreational purposes are availing themselves of a facility provided under statutory powers. It is impossible to regard them as trespassers, tolerated or otherwise. It follows that for this reason also, the use of the site by the public is by permission rather than "as of right".

(7) The Registration Authority had previously (on 21st March 2003) resolved that the application land was not a village green on the basis that the user by the public was by permission rather than "as of right".

There had been no change in circumstances since that date, and none had been identified by the applicant. It would not be proper for the Registration Authority now to adopt a position which differed from the view expressed in March 2003.

2. The Public Inquiry

2.1. I was appointed by the Registration Authority) to hold a non-statutory public inquiry into the application and to report in writing to the Council with my recommendation whether the Council should accede to or reject the application.

2.2. I gave Directions on 17th March 2009 and held the Public Inquiry at St Paul's Hall, St Mary's Church, Herne on Monday 18th May 2009, Tuesday 19th May 2009 and Wednesday 20th May 2009. I held an evening session on the first day of the inquiry to enable witnesses and members of the public who wished to give evidence to the inquiry but who were unable to attend the inquiry during working hours to appear.

2.3. The Applicant was represented by Mrs Graham Paul, instructed by the Kent Law Clinic. Canterbury City Council was represented by Mr Ground of Counsel, instructed by the Council. The Parish Council indicated by letter that it did not intend to appear or to be separately represented at the inquiry.

2.4. I would like to express my gratitude to Mr Chris Wade and Ms Melanie McNeir who arranged the public inquiry and provided me with administrative assistance and support during the inquiry with their customary good humour and efficiency.

3. The Applicant's Evidence

3.1. The Applicant's evidence can conveniently be dealt with in two parts. First, there is the evidence of witnesses who gave oral evidence to the public inquiry and were subject to cross-examination. Inevitably, this is the evidence which carries the most weight and which I must consider in detail. Second, there are a number of evidence questionnaires, affidavits and written statements completed by witnesses who did not attend the public inquiry to give oral evidence. As this evidence could not be tested by cross-examination, it necessarily carries less weight, but must nonetheless be taken into account.

3.2. I heard oral evidence at the inquiry from 17 witnesses on behalf of the applicant. I set out in the following paragraphs my notes of their evidence and the conclusions I have drawn in respect of it. I have summarised the evidence of those witnesses who provided written statements or questionnaires, but did not give oral evidence, in the table appended to this report.

(1) Mrs Ruth Bowley
253 Canterbury Road, Herne.

3.3. Mrs Bowley is the applicant. Mrs Bowley provided an evidence questionnaire dated 12th December 2003[1] and a statutory declaration declared on 27th April 2009[2]. In her evidence questionnaire Mrs Bowley gave her current address as her address when she used the land and knew that it was used by the local inhabitants. She stated that she had signed the reverse of Map A, but no copy map was attached to her questionnaire. The name by which the land was known was Cherry Orchard. She had known the land from 1961 to 2003 and had used it for the same period. She considered herself to be a local inhabitant in respect of the land. During that period the general pattern of use had remained basically the same. She gained access to the land by gate and went onto it to exercise neighbours' dogs, to collect elderflowers and as a short cut to the shops. She used the land periodically. She did not take part in any activities. Her immediate family did not use the land. She listed as community activities which had taken place on the land: school sports, Fun Fair and Fete. Football clubs and cricket clubs used the land for sports and pastimes. She had seen children playing, dog walking, football, cricket, picnicking, kite flying, people walking and tobogganing on the land. She stated that she knew who owned the land, and in reply to the question "Has the owner or occupier seen you on the land?" stated "Council owned". She had never sought permission nor been given for activities on the land. She had never been prevented from using the land. No attempt had been made to prevent or discourage the use being made of the land by the local inhabitants.

3.4. In her statutory declaration, Mrs Bowley stated that she has lived at her present address since 1961, having moved there from Guildford.

3.5. Mrs Bowley said in oral evidence that her husband had made the first application for the land the subject of the present application to be registered as a town or village green. The application was determined at a meeting in Maidstone. Mr Bowley made oral representations, and the Parish Council made oral submissions as well. No other witness on behalf of the applicant gave oral evidence. Mrs Bowley said that she could not remember what press coverage there had been at the time of the first application. The application was fairly well-known within the local community. The perception was that the Parish Council was the main protagonist. She did not remember any public statement on behalf of Canterbury City Council.

3.6. Mrs Bowley said that she had decided to make the present application in 2004. The Chairman of the Regulatory Committee had suggested that a fresh application should be made after the *Beresford* case had been decided. She thinks that the evidence in support of the present application is identical (insofar as she can remember) to the evidence in support of the first application, although there are people who have written letters in support of this application who did not write in relation to the first application, and there are people who are coming to give evidence who were not involved in the first application.

[1] A47
[2] A39

3.7. Mrs Bowley uses the Cherry Orchard herself on occasion, but not frequently. She crosses it to go to the village, as a cut-through. Mrs Bisk lives 2 doors away from Mrs Bowley. She has a gate onto the application land. If she needs Mrs Bowley to, Mrs Bowley takes her dogs and walks them.

3.8. When using the land Mrs Bowley has seen children playing, kite flying, dog walking, to a tremendous degree, people just walking on there, or sitting on the seats, spectators coming to watch football, parents taking their children for walks. The use may have increased slightly, but the general pattern of use has remained the same during the time she has known the land.

3.9. The plan at A312 was drawn by Mrs Bowley's son, who is not giving evidence to the inquiry. Mrs Bowley enters at entrance 1. When she walks Mrs Bisk's dog, she enters from the garden gate at 257 Canterbury Road. The black arrows represent properties which have gates opening onto the application land. The black arrow from 257 Canterbury Road above the cross marked 1 is intended to represent that gate. 12-16 Mill View Road have gates which are shown in a similar fashion. The entrances shown by red crosses are always open. The houses in Woodrow Chase all have access directly onto the Cherry Orchard. The access is at the front of the properties. There are two houses in Benstede Close which have access gates as well. There is no restriction on when the gates to the Woodrow Chase properties can be opened. None of the people she knows who live on Woodrow Chase had ever been told that they could not have access onto Cherry Orchard.

3.10. The green rectangle and arrow indicate the location of the building where the County of Kent Act sign is located. The sign is quite high up. Mrs Bowley says that it would be difficult for her to see it. It is on the side which faces the park. She has no idea how long it has been there. She first became aware of it when she was told it was there, when the toilets were opened, in 2003. Someone on the Parish Council saw it there, and drew attention to it. She had not noticed it before, and said it was not a sign one would be drawn to look at. It is virtually illegible. She does not think anyone was aware of it, before the Parish Councillor drew attention to it.

3.11. The dark blue circles on the plan relate to the "No Golf" signs. She did not remember exactly when they appeared; they had been there quite a while. She imagined they had been put there because people had been practising golf shots, and that was a hazard to people walking nearby. She did not remember anyone practising golf, but said that golf balls had come into her garden. She did not know of anyone who had had a problem with the golf, and the balls in her garden had not caused any damage.

3.12. She had not seen any other signs before she made her application. Since the application was made, she said she thought there might have been some notices put on the gate, but they were not there for very long. She was not aware of any signs in connection with the MUGA or with the outdoor fitness area.

3.13. As well as the dog bins, there is a children's play area on the land. The playground was there when Mr and Mrs Bowley first moved in. There are also two picnic tables, just above the childrens' play area. There are also some seats, benches. She thinks there are three benches. She thought that all of those facilities would have been provided by the City Council.

3.14. The map at A313 is the same base map as the one at A312. She could not remember where it had come from. The calculations were done by her son. He is an architect. The pitches shown are not present all the time: the football pitches are present during the winter months, and the cricket pitch during the summer. She thought that the locations of the pitches as drawn on the map were a fair representation of where they were. The football pitches are marked out with a white line. Mrs Bowley said that she was not very clear on how one knew where the cricket pitch extended to. She had not seen any football or cricket matches taking place on the land herself.

3.15. During the relevant period there had never been a time when she or anyone she knew had been unable to access and use the application land.

3.16. In reply to questions in cross-examination, Mrs Bowley said that she had never watched a football or cricket match taking place on the land, as a spectator. She agreed that the evidence in her statutory declaration as to what happens when a football or cricket match takes place was not from her own knowledge.

3.17. She said that although the information about the cricket matches relates to something she has not seen, she can hear the matches taking place. She was asked, as she has not seen a match taking place, how she had been able to say that people walked over the boundary line. She said that she did not know that she did, and she was taken to paragraph 20 of her statutory declaration. She said she may have walked by when a cricket match was on, but she could not remember. She said she must have done. She said that she was sorry for being vague. She said that she would be more comfortable if the second and third sentences of paragraph 20 were crossed out.

3.18. Mrs Bowley agreed that she knew that football and cricket pitches had been let out by the City Council. Mrs Bowley was taken to O88. She agreed that she did not dispute that the various charges there set out were made by the City Council. She said thought that the use might have got more intensive, lately, although that might be outside the time period. Between 1984-2004, she thought it had always been used to the same extent.

3.19. Mrs Bowley agreed that she had not heard of any formal complaint about any encroachment onto a football game. She did not remember anything atypical about the 1999-2000 football season at Cherry Orchard. She was taken to O89 and she agreed that throughout the season it appeared that there were regular games on Saturdays and Sundays. She said she did not know whether that was typical or not. She agreed it was a typical season, and that it was perfectly normal for there to be games on a Saturday and Sunday on the land.

3.20. Similarly, Mrs Bowley did not know of any complaint of interference by the hirers of the cricket pitch.

3.21. Mrs Bowley was taken to A313: she agreed that the explanation stated that the exercise had been carried out on a plan which was not to a recognised scale. Mrs Bowley agreed that there would be an area around a football pitch where the touch judge runs, and spectators stand, which had not been allowed for. It was put to her that pitches would be moved from year to year, to allow the grass to recover. She said she did not know about that, but agreed that there had been no allowance to take account of the fact that the area covered might move from year to year. She did not know whether it was correct that the area of the outfield on a cricket pitch might change, depending on which square was used.

3.22. The Parish Council was created 13 years ago. Before that time there was not a Parish Council boundary. She agreed that Herne Common is separate from the rest of Herne village, and has a separate identity. She did not know which open space people who lived there might use. She agreed Herne Common was quite a separate place.

3.23. Mrs Bowley was asked how the line showing the eastern boundary of Herne had been arrived at. She said that she drew the line. She said that the line is where the housing ends. On the eastern side of the line would be Broomfield. She said it was very difficult to find a map which identifies where Herne ends and Broomfield starts. She agreed that the area was continuously built. On Kingsfield Road for instance, she said that they did not know where Broomfield ended and Herne started: they put it in as best they could. They did the best line on a map they could, but it did not represent anything other than a line on a map, really. She agreed that people from Broomfield did not have a different playing field, and she thought that they would use Cherry Orchard playing field. She was asked whether it was correct that a dog walker living in Broomfield would be more likely to use the application land than a dog walker living in Herne Common, and she said she was unable to answer that question.

3.24. Mrs Bowley was asked whether she had done a survey of who used the land and where they came from. She said there was a map to show that. She agreed that she had not stood on the field and asked people where they came from. She had asked people who lived in Herne whether they used the field, and got questionnaires from them. She did not know whether people predominantly came from within the pink line or whether people came from outside it.

3.25. Mrs Bowley was asked whether it was correct that quite a few of the football teams who train on the land use it without permission: she said she believed so. The majority of the home teams who play on the land come from outside the pink line showing the neighbourhood. They mostly come from outside Herne. She did not know whether it was the same teams who practiced without formal permission. She agreed it would be a shame if the teams from outside Herne would no longer be able to use it. She said that she did not

think that that would be the effect of the application succeeding. She has not taken legal advice as to the effect of the application succeeding.

3.26. Mrs Bowley did not remember the field being used for overflow parking for a charity event on Thanet Way in 1998. She said it might well have happened, but she was not about. She did not know whether people on that day deferred to the car parking: she was not aware of the event.

3.27. Mrs Bowley was asked about her evidence in chief; that she usually uses the land to cut through. She confirmed that was her usual use. On occasion she uses it to exercise her neighbour's dog, but her usual use is as a cut through from A to B.

3.28. In re-examination Mrs Bowley was asked whether her statutory declaration took into account things that other people had told her about Cherry Orchard, and she said that it did.

3.29. Mrs Bowley was asked about the division between Herne and Broomfield: she said that Mill Lane is in Herne. Hunters Forstall is in Broomfield.

3.30. Mrs Bowley was asked about outside teams using Cherry Orchard for training. She confirmed that she herself had not seen football or cricket teams using the land for training.

3.31. Mrs Bowley was the applicant and was clearly keen for the application to succeed. She made the application and her husband made the earlier application in order to prevent development on the application land, in particular of the Multi Use Games Area. I therefore approached her evidence with a degree of caution and considered whether it had been coloured by her desire to support the application. I found Mrs Bowley to be an honest witness. She conceded points where appropriate, for instance she accepted that she did not know whether the users of the land came predominantly from within the claimed neighbourhood or whether people came from outside it. I accept her evidence in relation to her own use of the land and as to the use she has seen others making of the land over the whole of the relevant period.

(2) Mrs Evelyn Bissett
45 Mill View Road, Herne

3.32. Mrs Bissett provided a written statement dated 24th April 2009[3] in which she stated that she had lived in the area for approximately 23 years. She had used the application land on a regular basis, all the time she had lived in the area, and as a child. She remembered coming to Herne from Canterbury with her father more than 30 years ago by bicycle, to watch cricket matched played on the application land.

3.33. Mrs Bissett stated that she walks her dog every day, and sees and meets many other people on the application land walking their dogs. A few years

[3] A28

previously a group of dog owners had been in the habit of meeting on a regular basis there, to chat and socialise.

3.34. Over the years she had seen many activities: children flying model aircraft, with their fathers flying kites, boys kicking a football around, or playing with cricket bats, and small children with their parents playing on the grass. She had also seen boys with remote controlled cars on the slope, and tennis during the Wimbledon season. In winter the area is always packed with youngsters on make-shift toboggans, sliding down the hilly part at the top of the field.

3.35. Mrs Bissett remembered children from a house for mentally disadvantaged children in School Lane being taken to the application land by carers to play. She herself had taken a blind lady there for a walk, leaving her on a bench whilst Mrs Bissett and the dog walked around the field. She had seen children from Herne Infants School brought by a teacher for a picnic. She had seen the occasional horse rider.

3.36. Mrs Bissett said that dogs run freely on the application land, sometimes across the football pitch, even when play is in progress.

3.37. She had never seen a notice stating that use of the land was by permission of the owner, nor any other restriction, other than the "No Golf" signs, although she had been told there was a sign on one of the buildings, which she had never seen nor read. The area had never been closed, night or day, to her knowledge.

3.38. In oral evidence Mrs Bissett was asked whether she was aware of the 2002 application: she said not. She had no involvement with that application. Mrs Bissett moved to her present address in about 1987. She has been living in the area for about 23 years. She can see the application land from her house. She uses the land for walking her dog mainly. She walks her dog almost every day. She has one dog, but has had a succession of dogs. When walking her dog, she is aware of other people on the land. They could be people she knows or people she does not know. The people she knows are either walking dogs, or just cutting through. She either comes onto the land through Woodrow Chase or from the Canterbury Road side. From Canterbury Road she comes through a gate. From Woodrow Chase she comes on footpaths. There has never been a time when she has been unable to access the land.

3.39. She has seen other people flying kites, having picnics, and enjoying any manner of sport. She said that the general pattern of use has remained the same over the time she has known the land. Mrs Bissett had seen people from the Junior School (Herne Junior School) using the land for sport, and had seen the land being used for cricket and football. She could not remember any teams which used the land, although she had definitely seen football and cricket. The football was in the season, and the cricket in the summer, normally at weekends. She sees that when she walks through the land. She has taken her dog onto the land while a match has been taking place. She was asked what her primary reason for being there was: walking the dog or watching. She said that she likes to watch the cricket. If the weather is nice

there will be quite a few spectators. There would be children playing, some have trampolines over there. They did all manner of things. There had been no restrictions on their activities whilst a match was taking place.

3.40. Mrs Bissett had no knowledge of any difficultly caused by matches taking place, and local people being on the land at the same time.

3.41. Mrs Bissett could not remember having seen any signs before 2004. She was referred to paragraph 10 of her statement and asked whether she had seen "No Golf" signs. She said not. She was asked whether she had seen the Kent Act notice, and said she was aware of it. She said she became aware of it as a result of walking past, although she could not remember when specifically.

3.42. The notice she referred to in her statement, she said might be a "No Golf" sign, although she agreed that those signs were not on the buildings. She said the other notice she knew about was the dog fouling. She was not particularly aware of notices on a building, but of notices on posts.

3.43. There was never a time when she had been unable to use the land.

3.44. In cross-examination Mrs Bissett was asked about the "No Golf" signs. She agreed that there were several no golf signs. She did not accept that they had been erected partly at her instigation. She was taken to O158. She agreed that Councillor Bissett was her. She agreed by reference to that document that the signs had been erected partly at her instigation. She agreed that this meeting would have been in May 2001. She said she could not recall her involvement but that it seemed from the minute that it was at her instigation. She agreed that the signs went up at about that time.

3.45. Mrs Bissett was asked about the Kent Act sign. She agreed that it is on the front of the pavilion. She agreed that, judging by the state of it, it had been up there for quite a while.

3.46. Mrs Bissett was taken to A312. She was asked about the pavilions: they are locked at night. They are only opened for specific games. The WCs used to be locked at night by a cage over the door, but that was taken away, because of anxiety about someone being locked in. She thought that it had been taken away since 2000. She agreed that it would have been there between 1984 and 2000. She agreed that it was probably right, that since the cage has been removed, that the WCs have been locked at night.

3.47. Mrs Bissett was asked about the various activities she had seen on the land. She was asked whether those activities would be adjusted if there was a football or cricket match on, such that those activities would take place outside the football or cricket pitch, and she agreed they would. She agreed that the people doing those activities would not interfere with a touch judge running up and down alongside the pitch either. If a 6 was hit, local people would not interfere with the cricket ball which had just been hit. She agreed that in all her visits to the application land there had never to her knowledge been any interference with the formal games of cricket or football such as to

interrupt those games. She did not know of any occasion when there had been a complaint from footballers or cricketers that their game had been interrupted. On occasion when there might have been a dog straying onto the field, it had not been so significant as to interrupt the game.

3.48. There was no re-examination.

3.49. Mrs Bissett seemed to me to be an honest witness. I accept the evidence she gave of her own use of the application land since moving to the area in about 1986 and of the use that she had observed others making of the land. She gave clear evidence that the activities of the local people on the land would be adjusted if there was a football or cricket match being played, so that they did not interfere with the match and I accept that evidence.

(3) Mr Leonard Cant
241 Canterbury Road, Herne

3.50. Mr Cant wrote a letter dated 19th January 2004 in support of the application[4] and provided a written statement dated 30th April 2009[5].

3.51. In his letter Mr Cant stated that he and his wife had lived at their current address for 10 years. The application land provided facilities for a diverse mixture of activities by all age groups within the community, including football and cricket (as spectator sports for the not so young) kite flying, dog walking and training, strolling around and using the seats to rest and enjoy the ambiance. The public footpath crossing the land provides easy access to the village shop and a safe route to and from the school. He supported the application for registration because he wished to protect the land from development of any kind and preserve it for future generations.

3.52. In his written statement Mr Cant stated that he and his wife moved to Herne 16 years ago. They used the application land from 1994 with their grandchildren when they were visiting to play ball, fly kites and use the play equipment, and also for exercising the family dog. They saw the area well-used for football and cricket matches and saw local children enjoying the open space. During winter they saw tobogganing and children building snowmen and snowballing. Latterly they had taken their great granddaughter to the application land to enjoy the play area, run around in the open space and exercise the same family dog.

3.53. In oral evidence Mr Cant said that he and his wife moved to their present address in April 1994. They have two daughters, and two grandchildren. One lives in Belting, and one in Cox Heath. They come to visit quite often.

3.54. Mr Cant uses the land to walk through, and also when they are dog sitting, he takes the dog across for exercise and to walk around. He dog sits his younger daughter's dog, a couple of times a year. He takes the dog out at least twice a day. When he is on the land, he sees children playing, children playing

[4] A56
[5] A54

football, on the play area, running around. Children play football normally near where one of the football posts is up, during the season. It used to be the City Council's practice to leave one of the posts up outside the season. They would certainly be on a pitch, even if the marking is no longer distinct.

3.55. If the children were playing, he would think it ill-mannered to interfere with them. There is enough space, ample space, for him to exercise the dogs on the land.

3.56. When his family visits, including now his great granddaughter, they use the land: he takes his great granddaughter to the play area.

3.57. Mr Cant remembered the opening of the Thanet Way in May 1998, and the event for the opening. In the morning he was in his garden, and in the afternoon he went to see what all the fuss was about. In the morning he saw no signs directing people away: people were parking in the surrounding roads to go down. People were parking in Canterbury Road: the road was full, and Mill View Road was full. He asked people why they were not parking on the Thanet Way where there was a car park designated for them to use. That was the only car park he was aware had been designated. There were no signs that he saw suggesting where people should be parking.

3.58. Mr Cant said there was no time when he or anyone he knew had been prevented from accessing the Cherry Orchard.

3.59. In cross-examination Mr Cant was asked about whether Broomfield Road was part of Herne. He said he had never taken any notice about whether it was part of Herne or not. He did not know whether people on Broomfield Road considered themselves part of Herne: he said possibly, he did not know.

3.60. Mr Cant agreed that he takes pleasure in watching football and cricket matches being played on the playing fields. He agreed that predominantly the teams come from outside Herne. The pitches are available in Herne, and it is the nearest place for some of them. It was put to him that if the effect of the application was to prevent them playing in the future, he would not support the application: he said they would be able to. He said he had never considered one needed a right to play a football match on a village green. Supposing it was correct that the teams could not play, he said he would still support the application because he wants to preserve Cherry Orchard as an open space, even if it would have that effect.

3.61. Mr Cant supported the application because he wants to preserve the application land as an open space. I considered carefully whether this desire had coloured his evidence, but concluded that his evidence was honest. Mr Cant's evidence relates to the period from 1994 to the present day. I accept Mr Cant's evidence that he has used the land to walk his daughter's dog when dog sitting, which he does a couple of times a year, and to walk across. I accept his evidence that he sees others using the land for recreation when he is on it. He enjoys watching the football and cricket.

(4) Mrs Margaret Newman
8 Streetfield, Herne

3.62. Mr and Mrs Newman provided a joint written statement dated 26th April 2009[6]. They moved to Herne village in 1982 from Herne Bay. They had three children, all of whom attended the local Infant and Junior schools. The application land was their main open space. Local clubs organise football and cricket, both practice and matches, on the application land on a regular basis, and these have always held a great interest for the public.

3.63. Over the years Mr and Mrs Newman had enjoyed meeting friends with young families for ball game activities. Picnics were also a regular activity.

3.64. In winter when there was snow, the application land would be a hive of activity, with children and adults using anything that would substitute for a sledge.

3.65. Mr and Mrs Newman's children have now grown up and left home. They continue to enjoy a leisurely walk around the application land with their dog, meeting people and having social conversations, and watching young people.

3.66. In oral evidence Mrs Newman said that she and Mr Newman moved to their present address in 1982. Their three children were all of primary school age when they moved in, and lived with them there. The last child left home about 10 years ago. The family used Cherry Orchard on a great many occasions. When the children were younger, they used the play area. They used the land for ball games and to run free. They kicked a football between themselves. They had taken sandwiches and had a picnic, and met up with friends. Now it is a Darby and Joan exercise with the dog. They meet up with people; the land has a friendly atmosphere.

3.67. At the moment Mr Newman uses the land twice a day, and Mrs Newman once a day. The children used the area to play. They were not allowed to play in the street. They would go there after school and at weekends, perhaps. Mrs Newman thought that Mr and Mrs Newman's use had become more regular, as compared with 1982 when they moved in, because of the dog. They had had the current dog for nearly 9 years, and they had a dog before that for 8 years. They take the dog for a walk twice a day.

3.68. From Streetfield either they come in at entrance 4 or 5 as marked on A312. There has never been a time she can remember when they have found they could not get onto the land through those entrances.

3.69. When she had been on the land she had seen other people doing the same as themselves, there was the football and cricket, and in winter sledging.

3.70. There are both informal and organised football and cricket matches. She does not know who is playing: she says they are local leagues and teams. She

[6] A72

thinks that there would be local children from Herne who use Cherry Orchard to play football and so on.

3.71. Mrs Newman had not recently gone onto Cherry Orchard to watch a football or cricket match, but did when the children were younger, in the mid-late 1980s. The matches take place mostly at weekends and there are practices through the week as well. She had never been told that she could not come onto the Cherry Orchard to watch a match. There had never been a time that she or anyone she knew had not been able to access the Cherry Orchard.

3.72. Mrs Newman was asked whether she remembered the opening of Thanet Way in 1998. She remembered it being opened, but did not take much interest. She did not remember whether she was in Herne on that day.

3.73. In reply to questions in cross-examination, Mrs Newman was referred to paragraph 3 of her statement. She agreed that there were occasions when there were quite a lot of spectators watching matches, clusters of people. They would be friends and family of the participants and others as well. She was asked whether people walked through the spectators. She said it was a matter of courtesy: mostly people would go behind the spectators, although there may have been children who wandered through. When she had been watching, no-one had interfered with her watching of the game. There may have been the odd occasion when someone walked where they should not, but basically people let the spectators watch the games.

3.74. Cricket takes place, but she is not particularly fond of cricket, and could not really talk about it.

3.75. Mrs Newman said she could not say one way or the other whether there had been parking on the application land in connection with the opening of Thanet Way. She was asked about the charity event before the opening of Thanet Way, and she said she could not really say whether there had been parking on the application land then or not.

3.76. Mrs Newman was an honest witness. I accept the evidence she gave of the use that she and her family have made of the application land for the whole of the relevant period. She gave clear evidence that local users did not interfere with people watching the football matches which take place on the land, but walked behind them, and did not interfere with their watching of the game, which I accept.

(5) Mr Terence Newman
8 Streetfield, Herne

3.77. Mr Newman is Mrs Newman's husband. Mr and Mrs Newman provided a joint written statement, the content of which is set out above. In oral evidence Mr Newman was asked about the Cherry Orchard when he was a child. He used to come from the town, most weekends, and the area used to be open fields. It was a rolling plain with trees, and was farmland. The houses in the new estate were not there. There used to be 4 or 5 houses which are still there now.

There were 5 or 6 houses between the cemetery and Cherry Orchard along Canterbury Road. Woodrow Chase was not built. The area is now so built up. Herne Bay and Herne were separate, and it is all being gobbled up. If this area is not preserved as village green, Mr Newmand thinks it will be gobbled up as well. They did not use Cherry Orchard when he was a child: they would go through it to the wood on the other side of School Lane.

3.78. There were no questions in cross-examination.

3.79. Mr Newman was an honest witness and I accept his evidence.

(6) Mrs Jean Brown
213 Canterbury Road, Herne

3.80. Mr and Mrs Brown provided a joint written statement dated 27th April 2009[7] in which they stated that they had lived at their present address since 1983. They had walked their dogs over the years on the application land, and had taken their grandchildren to the land for family play. On one occasion they had had to collect their dog from a football pitch whilst a game of football was in progress. They had not seen any notice about the use of the application land. They considered that they used the land as of right as they were not aware of anyone ever being refused entry or being removed from the land. They knew of no restrictions or laws which allowed them to do or not do anything on the land.

3.81. In oral evidence Mrs Brown stated that her son lived with them for a short time, leaving home in about 1988 or 1989. Mr and Mrs Brown use the Cherry Orchard. Currently they use the land twice a day to walk the dog, which they have done for about 8 ½ years. They got their first dog about 10 years ago and their current dog 2 ½ years ago. Before that she used to look after her grandchildren and would take them onto the land. She uses the main entrance off Canterbury Road, entrance 1 on A312. She has never been there and found she could not get in to the Cherry Orchard.

3.82. While on the land she had seen football, children playing, other people walking dogs. She had not seen the cricket. She does not know who was playing football. They were adults. She thought she would see that a couple of times a week, a midweek practice and a match, probably, on a Saturday.

3.83. The occasion she referred to was when her dog was young and not very obedient and had run onto the pitch. They had had to go and get him back. There was no real reaction from the players – they were quite amused. The players did not say anything about not bringing the dog onto the Cherry Orchard, and neither did they suggest that she should not be there either. There had been no time when either she nor anyone she knows of had been unable to access the land.

[7] A52

3.84. Mrs Brown was not aware of the Kent Act sign. She had been told about the sign when preparing her statement, but did not know about it before that. She has not been to look at it.

3.85. In cross-examination Mrs Brown agreed that there were probably football matches on a Sunday as well. The incident with the dog was just the one occasion. After that if they were playing, Mr and Mrs Brown put the dog on a lead. She agreed that when the incident happened they had made every effort to get the dog off as quickly as they could, and said that was a matter of courtesy. She was not aware that the team had hired the pitch, but knew they were playing an organised game or practice, and did not want to interrupt it. If they are playing they put the dog on the lead, when they are near the pitch. She avoids the pitch, because she is not a rude person. If there is no football game, she would walk across the pitch, but if there is a game on, she adjusts her route out of courtesy. She was asked about other people, and said she had not really noticed, but would imagine they did the same.

3.86. In re-examination, Mrs Brown was asked whether she would walk on the pitch if local children were playing, and she said she would, if it did not interfere with their actual playing, for instance if they were all down the other end. Her behaviour would be different if it was an organised match. She would still put her dog on a lead if it was children, because he loves children, and can be a bit of a pest.

3.87. Mrs Brown gave honest and clear evidence. I accept her evidence that she has used the application land throughout the relevant period for recreation. Mrs Brown gave clear evidence that she adjusted her behaviour to ensure that she did not interfere with organised matches on the application land. There had been one occasion when her dog was young when he had run onto the pitch. Since then, if there is football going on, she puts the dog on a lead. She drew a distinction between organised matches, and the games of local children: she would walk on the pitch when local children were playing, if she could do so without interfering with their actual playing, but would not cross the pitch if there was an organised match going on.

(7) Mr David Bowley
20 Ash Close, Herne Bay

3.88. Mr Bowley provided an evidence questionnaire dated 16th December 2003[8] and a written statement dated 29th April 2009[9].

3.89. In his evidence questionnaire Mr Bowley gave his present address (1978-2002) and his previous address of 33 Woodrow Chase (1962-1978) as his addresses when he used the land. He stated that he had signed the reverse of Map A, but no copy of the map was appended to his questionnaire. The land was known as Cherry Orchard. He had known the land from 1962 to date, and used it from 1962-1978. He considered himself a local inhabitant in respect of the land. During the time he had used the land the general pattern of use had

[8] A34
[9] A31

remained basically the same. He gained access to the land via footpath. He used to go onto the land to play cricket, for general exercise, and to watch football, daily, between 1962-1978. At the time of filling in the questionnaire he used the land weekly to watch football. He listed as community activities which had taken place on the land: local football team, cricket and local scout/guide group, and a fete in the early 1960s. Football had gone on for 80 years at least: his father played on the land in the 1920s. He participated in cricket. Football and cricket clubs use the land for sports and pastimes. He ticked the following activities as activities he had seen taking place on the land: children playing, dog walking, team games, fetes, football, cricket and kite flying. He stated that he did not know who the owner of the land was, but that he believed it was given by the original owner of Strode Park to the village people of Herne. He said that it was probably taken over by Herne Bay UDC, now Canterbury CC. He did not know whether the owner or occupier had seen him on the land. He had never been prevented from using the land.

3.90. In his written statement Mr Bowley gave some interesting historical information about his family's connection with Herne, and his father's sporting activities, and exhibited a photograph of a team in which his father played, taken when they won the Canterbury Hospital Cup in 1922/1923, taken on the application land. Mr Bowley himself had lived in the village since 1961, for the first 19 years in Woodrow Chase, overlooking the application land. He watched the regular football matches, and during summer evenings played over 20 friendly matches for the Royal British Legion. He used to walk his spaniel around the ground daily. Since moving to Ash Close in 1980, he had, until winter 2008/2009, regularly walked around the application land on his way into the village to collect his daily paper.

3.91. In oral evidence Mr Bowley stated that he had lived at his present address for 29 years, and moved there from Woodrow Chase. From his house in Woodrow Chase he could see most of the application land from his windows. He could see football and cricket matches from his house. He used to play cricket for the Royal British Legion. He did not play football. He also used the field because he had a crazy dog, and it was safe to take him on the field, and quite close to home. The team members of the Royal British Legion were local: it was the Herne Bay British Legion so they were from Herne Bay, Herne, Greenhill and Broomfield. That would have been from about 1964-1982 or 1983. He did not know whether the team had paid to play on the field or not.

3.92. When he lived in Woodrow Chase, he accessed the land from the gap between numbers 42 and 40 (number 5 on A312). There is also a footpath all the way around the edge, which he would use if he was walking into Herne. He did not remember any occasion when he was unable to access the land from that entrance. There had never been a time when people could not access the land: on one occasion royalty had come by helicopter and landed on the land, but there was still access.

3.93. Mr Bowley was asked about Strode Park: it is on the opposite side of Canterbury Road from the recreation ground. It has been a home for disabled people since 1948. Prior to 1948 it was the Squire's home, and was requisitioned during the war. Mr Bowley's grandfather was the gardener in Strode Park from about 1915, and his father served his apprenticeship locally. His father told him that the Squire, Major Prescott-Westcar, had given the Cherry Orchard to local people for their enjoyment. There was football there in the 1920s.

3.94. In cross-examination Mr Bowley was asked about the Royal British Legion team: he said the team folded about the time he stopped playing, as they were all getting a bit old. The Royal British Legion covered the Herne Bay area, including Herne, Broomfield and Greenhill. The Legion's Lodge is on the seafront in Herne Bay: that is its headquarters, but the lawn there is not big enough for cricket. Otherwise it was the centre of social activity for the Legion.

3.95. Mr Bowley said his father always said that the playing field was given to the village by Major Prescott-Westcar, but he did not state a date. Mr Bowley was taken to the conveyance of the land dated 17th April 1957 and made between (1) A E (Estate Developers) Limited and (2) the Urban District Council for the Urban District of Herne Bay of the land. Mr Bowley agreed that it did not appear that Major Prescott-Westcar had anything to do with the purchase of the land. He said he was dead when Mr Bowley went to Canada in 1956. Mr Bowley said he did not know what happened between the First World War, after which he understood that the land had been given to the council, and 1957. He agreed he had seen no documents to substantiate what he had been told.

3.96. Mr Bowley is not related to Mrs Bowley, the applicant, as far as he knows.

3.97. Mr Bowley's said that his understanding was that the land had been given to the village, rather than to the council, by Major Prescott-Westcar.

3.98. Mr Bowley's own use of the application land within the relevant period was limited to a right of way- type user, walking around the application land to the village to collect his daily newspaper. He did not claim to have used the application land for recreation. I accept his evidence that he has seen others using the application land during the relevant period for recreation, including formal football and cricket matches.

(8) Mrs Doreen White

2 St Martins View, Herne

3.99. Mrs White provided a written witness statement dated 29th April 2009[10] in which she stated that she had lived in Herne for about 40 years and knew the application land very well. Between 1984 and 2004 she took her grandchildren to the application land to play, and walked her dogs there on a regular basis. Before that she took her own children to the application land to

[10] A90

play. Over the years she had seen people having picnics, and others practising golf, and children playing games and football. In snowy conditions her grandchildren had used their toboggans to slide down the hill. She commented that the land is not as good for tobogganning now as it used to be before Woodrow Chase was built. Mrs White stated that the application land is really the focal point of the village. She had always believed that it was given to the village. She was not aware of any rules that could stop people using the field. Lots of people had used the application land over a long period of time for their own enjoyment, and with their families.

3.100. In oral evidence Mrs White said that she was not really aware of the previous application to register the land as TVG and had no involvement in it. Mrs White has lived at her present address for 47 or 48 years. She has lived in the village since 1930, although during that time she has lived away. Mrs White has two children. They have children themselves. They live in Herne. One lives next to the school, and the other in Vinten Close.

3.101. Mrs White has not used the land so much herself, apart from taking the dog there and taking the grandchildren to play. Going back over the whole period, she has used the land to walk the dog and with the children to play. She has always had a dog, more or less since 1930. She does not now walk her dog, her son walks her dog. In the past she has walked her dog on the Cherry Orchard, only if it was bad weather, otherwise she went up the woods.

3.102. She gained access to the land through the path via entrance 3 on A312, along the path from School Lane. She said that it is not possible to close it off and it had never been closed.

3.103. When she had been on the land she had seen others playing football and cricket and using it generally. It was the school's playing field, the Church school. That was why the land was given in the first place by Prescott-Westcar. In the 1980s and 1990s she had seen the land being used as a general playing field for children and people in general. She was referred to paragraph 3 of her statement and said that children use it in the winter for tobogganing. She agreed that the photographs on A326 showed a typical scene, when there was snow. She used to toboggan there herself as a child. She said that the only change over the time she had known the land was that the school now had its own playing field.

3.104. Mrs White had seen people practising golf, although she said it was not allowed really. At one time there had been notices saying not to practice golf. She did not know when the notices appeared, but said they were only little printed ones. It was only occasionally that people did that; people turned a blind eye, as long as they only used practice golf balls.

3.105. There was never any occasion when it had not been possible to access the land: it was impossible to shut it off.

3.106. There were no questions in cross-examination.

3.107. Mrs White was an honest witness, although I was not sure that her evidence as to the history of the application land was reliable. I accept her evidence that she has walked her dog on the application land in bad weather and taken her grandchildren to play there during the relevant period. She no longer walks her dog, and I infer that she no longer uses the land personally. It was not clear from her evidence when her use ceased but it appeared from her written evidence that it must have been after the end of the relevant period.

(9) Mr John Moore

302 Canterbury Road, Herne

3.108. Mr Moore provided a statutory declaration declared on an unspecified date in April 2009[11]. Mr Moore is a Parish Councillor on Herne and Broomfield Parish Council. He was elected in a by-election in April 2008. He has lived in Herne for over 9 years. Before moving to Herne he lived in Whitstable. Whilst living in Whitstable a vacancy had come up for a Canterbury City Councillor for Herne and Broomfield, and he stood as a candidate in that by-election. As a result he had known the parish for over 10 years.

3.109. Mr Moore stated that he had supported the application even before he was elected to the Parish Council. He did not believe that the land was covered by the Kent Act sign, as the sign is seven feet from the ground and is 12 inches by 8.5 inches in size. It is attached to one of the buildings put there for the use of footballers and cricketers who use the fields and is on the opposite side of the building from the field, and overlooking the footpath from Canterbury Road to School Lane. He was unable to read the wording on the sign.

3.110. Mr Moore commented that he had seen empty beer cans and rubbish left by youngsters after a night socialising on the Cherry Orchard: he said that the youngsters had not had permission and had not been worried about being removed. Although this was anti-social to the rest of the village and to other users of the Cherry Orchard, it was an activity which had been carried out as of right.

3.111. Mr Moore was a team manager for Herne Bay Harriers Youth Football Club for three years. When he took over the team they used Herne Junior School for football matches and training, but when they reached an age at which they came to play 11 a side games, they played at Briary School. They often used the Cherry Orchard for training. They were never asked to leave or refused entry, and neither did they pay any money, and were not asked to pay money to use the football pitches.

3.112. Mr Moore said that he uses the Cherry Orchard to walk his partner's dog, to watch the organised teams playing football, and to walk across the land to go up to the top of the village, for example to Mill Lane. When he has been on the land he has observed families playing on the land, including playing informal games of cricket. He recalled one occasion the previous summer when he saw that cars had been parked on the land when there was an organised game of cricket. He walked onto the pitch, crossing the boundary

[11] A68

line unchallenged, to speak to a member of the team about the parking. He said it was not the home team but the away team members who had parked there, and said that someone must have left the gate unlocked. Mr Moore complained to him, and mentioned the incident to the Parish Council.

3.113. Mr Moore said that the Parish Council chairman had put a proposal to the Parish Council that they would not support the application, because to do so would upset the City Council. This motion was passed by the Parish Council, but without Mr Moore's vote. The Parish Council (he said) had since decided not to be an objector, but to lend its support to the City Council's objection.

3.114. Mr Moore stated that when he had spoken to the residents of Herne about the signage, they were very surprised that any law permitted the use of Cherry Orchard, as they felt that the land was used by the villagers as of right.

3.115. In oral evidence Mr Moore said that his house is on the opposite side of Canterbury Road from the application land, the first house after Lower Herne Road. He has lived there since 2001.

3.116. Mr Moore was asked about the Parish Council's objection. He supports the application and did not take part in the debate which led to the decision to object.

3.117. Mr Moore was taken to A10 and asked whether he had any knowledge or experience which would help in determining the boundary between Herne and Broomfield. He used to be involved in Herne Residents' Association. They had problems identifying exactly where the boundary was. There is nothing on public record. They felt that Mill Lane was the boundary. Looking at the architectural differences: the properties on either side are different. Broomfield is newer than Herne.

3.118. Mr Moore said that the Parish Boundary follows the new Thanet Way, along Boggs Hole Lane: he does not know whether Parsonage Farm is part of the parish or not. This is his assumption, rather than information from an official source.

3.119. Mr Moore knows many people in Herne and also he knows people who live in Broomfield. He knows people who live in Herne who use the Cherry Orchard: probably 30 or 40 people he can think of without research. He knows fewer people who live in Broomfield. He sees people on Cherry Orchard who he does not recognise but does not know where they come from. He does not positively know anyone who lives in Broomfield who uses Cherry Orchard.

3.120. Mr Moore is no longer involved in local sporting activities. He used to run a team for Herne Bay Harriers Youth Football Club between about 2003 and 2006. The Club used and still use the field for organised football games and also training sessions. They played their organised matches on recognised pitches. Training would take place wherever: it was down to manager's discretion. Some used Cherry Orchard, others used other fields. No-one was told to his knowledge that they could not use Cherry Orchard for training.

They had regular meetings and he did not hear that from anyone else. They did not pay money to play. He was not aware of the team being asked to leave the Cherry Orchard when they were on there for training. He never booked pitches: that was done by the secretary of the football club. He understands that it is done through Serco. He was told to be on a certain pitch at a certain time. That was for matches. For training, they did not believe there was any reason to book. There was never an occasion when they went to Cherry Orchard and found they could not use it. There were other people there all the time when they were training. Other people use it for all sorts of pastimes. The presence of other people did not make training difficult: he would not interrupt someone having a picnic, and no-one interrupted them.

3.121. Mr Moore was taken to the map at A312: he agreed that it was a fair representation of the location of the pitches. He said he did not know the measurements, but it looked fair. Mr Moore said he is not a football player, although he has managed a team. The assistant referees or linesmen run up and down the pitch at the side, half on each side, indicating whether the ball is in or out of play. As an assistant linesman he has had to run up and down the field because spectators have been standing right up to the line. There was nothing to stop them getting close to the pitch. There is no recognised area around the marked pitches where spectators are not allowed to go.

3.122. Mr Moore had watched cricket matches on the Cherry Orchard. He had seen people walking around near the boundary. He had never experienced a problem occurring when cricket was going on.

3.123. Mr Moore had seen other organised games of football on the Cherry Orchard, most Saturdays and Sundays. Sometimes all the pitches were used, sometimes one or two. The procedure was that if the club required a pitch the council had to find them a pitch: it could be anywhere within the boundaries of Canterbury City Council, so the teams could be from anywhere within the area. AFC Smugglers, he thought were something to do with the pub in Herne. He thought people from Beltinge had used it, but he could not name specific teams.

3.124. While he had been watching football, he had seen other people having picnics, and children kicking balls about, or when it is cricket, family cricket games. He said that it has happened that that has been going on at the same time as an organised match.

3.125. Mr Moore was referred to paragraph 7 of his statement. He was asked whether people went onto pitches which were being used for organised matches. He said people do come onto the pitch for one reason or another. On the occasion he had mentioned he did walk across the boundary. It was not causing a problem and no-one stopped him. He spoke to the manager of the home team. It does happen that dogs go onto the field or children kick a football onto the pitch. Some people walk across the pitch: he said he has known that to happen. He does not know who they are, and said it was in the past. As a football manager if someone walked across to get a dog or a ball, he would not have complained about it. There is no physical impediment. On

occasions very occasionally he had seen people walking across the boundary of a cricket pitch, but no-one had complained to him of any problems.

3.126. He thought people felt able to walk across the pitch because there was no physical barrier, and local people felt it was their field, and no-one had ever been stopped. As a manager, he would not have a problem if someone walked across the field, as long as they did not kick the ball. He said that whereas an adult match was 90 minutes, youth matches were shorter, between 40 minutes and 90 minutes, depending on age.

3.127. People would not kick the ball, because it belongs to the football team. He was asked why it was unlikely that people would walk into the middle of the football match and he said he did not know, that was a matter for the individual people.

3.128. Mr Moore was asked about his use of the Cherry Orchard more generally. His partner has a boxer dog, which he walks, when she is staying with him, at least twice a day. He goes there to watch football, but is not particularly interested in the cricket. As a councillor if he notices problems he reports them to the Clerk.

3.129. When on the field he has seen people picnicking, kite flying, in snow tobogganing, the MUGA is used and the children's play area.

3.130. Mr Moore was taken to A312 and asked to state where he accesses the land: he said gate 1 on A312, sometimes, if he is going up to the shop with the dog he goes up through gate 1 and out through gate 2. He had used entrances 3, 4 and 5, and has not used 6. There has never been an occasion when any of those entrances has been blocked. There has never been an occasion when he has been unable to go onto the land and use it.

3.131. He could not comment in relation to the Thanet Way event.

3.132. The photographs on A321 were taken by Mr Moore's friend, about 2 months before the inquiry. Mr Moore is about 5'10". He has measured how high the sign is off the ground: the top is 7 feet from grass level. The bottom is 6 feet from the ground. He measured its size. The position of the sign is accurately represented by the mark on A312. The building is a changing room and storage facility for footballers and cricketers. The sign overlooks the path. The entrance to the building is on the far end, so the sign is on the side of the building, not the front or back.

3.133. Mr Moore said that the majority of use is on the field. The path is there for access to the field and as a through route, but most people use the field. Mr Moore did not know how long the sign had been there. He first became aware of its existence when he became involved with the application, about 3-4 months ago. He was not aware of it before. He thought that was because of the position and condition of the sign. He must have walked past it many times without noticing it was there. He had been talking to local people and asking them whether they knew of the sign, and few people did. One knew of the

sign, but did not know what it meant. Mrs Bowley had said she had had her attention drawn to it at the official opening of the public toilets.

3.134. In reply to questions in cross-examination Mr Moore said that a whole manner of teams play at Cherry Orchard, depending on where pitches are available. He said he could not name the teams who play there. He believes that the council tries to locate teams on pitches within the area of the club, but that is as far as he can go. He agreed that Cherry Orchard is a perfectly good place to play home games of football. He did not know of any complaint to the City Council or Serco about people interfering with games of football. He said it had happened, but he was not aware of complaints being made. He agreed that football teams pay to rent fields, although he did not deal with the finances in his own club, and did not know how much and how often, but was aware that a payment was made for the facilities provided. He agreed that his team were paying for the facilities provided on the pitch, to his knowledge. He did not know whether there were separate payments for the ground and the pavilion. He understood that the fees were for lining the pitch, cutting the grass, providing the goal posts and the provision of the pavilion.

3.135. Mr Moore was taken to O88, where the charges were set out. He agreed that there appeared to be a ground only fee, but said he did not know what was meant: the ground still had to have white lines and goalposts. He agreed if you wanted to hire a pitch you had to pay. He said it did not say exactly what you were hiring, but he did not do the bookings. He agreed no-one would want to hire the posts and not the pitch. He agreed that the City Council or Serco as agents for the council were paid for the facilities. If someone wanted to play, if it was an organised cup game, then they had to pay.

3.136. It was put to Mr Moore that an organised team would then have a football field to play on. He agreed, but said he was aware of circumstances when pitches had been overbooked and two different games had been booked on the same pitch, but said that was possibly not at Cherry Orchard and he did not know when it was.

3.137. Mrs Bowley's evidence was put to Mr Moore: the only reasons that people do not encroach are as a matter of courtesy and for health and safety reasons. He said he thought it was more for health and safety reasons. Some people do it for courtesy, but it could be a dangerous place and most people would not want to be there for health and safety reasons. He did not disagree with the penultimate sentence of paragraph 19 Mrs Bowley's statement: "The only reasons that people do not encroach upon the football pitches when play is ongoing are as a matter of courtesy and for health and safety reasons". He said he had been involved in football and people had walked across the pitch. It was a question of percentages and the amount of time it happened.

3.138. In the three years he managed the team, he agreed that there was never an interference to the extent that he complained to the people from whom he hired the pitch. He said when you are playing a game of football on a public open space, that is part and parcel, and is not something he would complain about. It was put to him that there was never any material interference with

the game. People, footballs, and dogs came onto the field, but no-one touched the ball. No-one deliberately interfered with the game. It was put to him that any incursions were an accident. He said he was aware of one occasion when an elderly gentleman had just walked across the pitch. Otherwise it was children and dogs, which might have been an accidental event. The elderly gentleman was not an accident: he knew the pitch was there and the game was in play, but his walking across did not interfere with the game. He did not know how old the man was or what he looked like. He thought that he knew what was going on. He was about a quarter of the pitch away from the ball. He did not know the man concerned, and did not speak to him. He walked across the width of the field. No-one spoke to him that Mr Moore remembered. He did not remember how many spectators were there. The referee did not stop the game. Apart from that, everything else was accidental, to Mr Moore's best recollection.

3.139. Mr Moore had read Robert Scales' evidence[12]. He agreed that in Mr Scales' experience people had not walked across the pitch. Julian Vaughan's evidence was put to him[13]: he did not dispute Mr Vaughan's recollection.

3.140. Mr Moore did not generally go and watch cricket. He might look as he is walking across, but it is not his game.

3.141. Mr Moore was asked about the Parish Council's discussions: at one he was advised by the chairman that he should leave the room as a matter of prejudicial interest, which he did not feel was correct, another councillor said he did not have a prejudicial interest, but he felt he did have a personal interest, and although he remained in the room, he did not take part in the debate or vote. Mr Moore agreed that he had attributed a motive to the Parish Council: he was present at the meeting. He did not have a written note and did not rely on the minute: he said he heard it with his own ears. He said it did not surprise him that that was not the reason given in the objection. He said it might not be the reason given, but the chairman had said at the meeting that the Parish Council should not support the application, because they should not upset the Parish Council. He did know that the Parish Council also objected to the first application.

3.142. Mr Moore was asked about his evidence that Mill Lane was the boundary chosen by Herne Residents' Assocaition, because of the architectural differences. He thought people living in Hunters Forstall would say they were living in Broomfield. The properties to the west of Mill Lane are older than the properties to the east, he believed. The Residents' Association boundary was in the same place: Mill Lane they felt was a natural boundary. The logic was that the properties were older on the left than on the right, and that people on the right lived in Broomfield and those on the left lived in Herne. He did not know when the properties fronting onto Broomfield Road were built. He did not accept that it might be the 1930s, and said he did not know when they were built. He did not know when Woodrow Chase was built, but knew they

[12] O313
[13] O316

were there 10 years ago, when he first knew Herne. It was suggested to him that they would have been built after the properties on Broomfield Road. He said he did not know.

3.143. In re-examination Mr Moore was asked about the occasion when he walked onto the cricket pitch: he said it was a natural path to go and speak to the people he wanted to speak to. He did not purposely walk on the pitch or purposely not. It was a deliberate decision to speak to the cricketers because there were cars parked on the field.

3.144. In reply to my questions, Mr Moore said that the partner he had mentioned who has the boxer dog does not live with Mr Moore, but comes to stay. She has been coming to stay since late last year (2008), November approximately. His previous partner who lived with him had two dogs, a Jack Russell and a Labrador. Both of them walked those dogs. She lived with him until August 2008 and was there for about 3 years. He did not walk dogs on the application land during the relevant period.

3.145. I asked Mr Moore whether, if he had been training his youngsters on a pitch and someone had turned up who had booked the pitch, he would have moved his youngsters. He said that the training with the youngsters was midweek, so it would not happen that a pitch would be booked on that evening. On very rare occasions, there might a midweek match booked, but he could not say whether he would have moved his youngsters, because it never did happen.

3.146. Mr Moore was asked where the Herne Bay Harriers Youth team he managed came from: he said that in the team he managed, most of the boys came from the same class in the same school in Herne. A couple came from elsewhere.

3.147. Mr Moore was not a straightforward witness. He was clearly well-informed about the application, and had read the evidence. In my judgment his support for the application led him to overstate his evidence in a number of respects and to give misleading impressions. For instance, Mr Moore stated that he had use the land for dog walking in his written evidence, but when asked about that evidence orally, accepted that it had not been during the relevant period. Mr Moore was unwilling to accept that the fees paid by the teams were for exclusive use of the pitch booked at the time for which it had been booked. He initially sought to say that the fee was to pay for lining the pitch, cutting the grass, providing the goal posts and providing the pavilion. In my judgment this suggestion does not accord with reality, and was made because Mr Moore understood the danger to the success of the village green application that the booking of pitches for exclusive use by the teams who made the booking potentially represented. When it was put to him that the team had to have a pitch to play on, he sought to distract from his concession that that was correct by referring to occasions on which pitches had been overbooked, although the incidents to which he referred did not relate to the application land. His evidence that people did walk across the pitches during matches was not in my judgment reliable, and was not supported by any other evidence before the inquiry. Mr Moore sought to support his contention that people did come onto the pitches whilst an organised game was taking place

by reference to an occasion on which he had walked across the cricket outfield, but in my view, the one-off nature of the incident he described, and the reason behind it (to complain about inappropriate parking) in fact tended to support the other evidence before the inquiry, that people generally did not interfere with the matches or go onto the pitches when they were in use for matches. When pressed to recall incidents when people had walked across the pitch, other than accidental incursions by children or dogs, he could only remember one incident when an elderly man had walked across the pitch.

3.148. I accept Mr Moore's evidence that he used the application land from 2003-2006 to train a youth football team. The dog walking activity was after the end of the relevant period. His use of the land to walk across is a right of way-type use rather than a village green-type use. I accept his evidence that he has seen others using the land for recreation since moving to the area 2001.

(10) Mr Raymond Beer
34 Woodrow Chase, Herne

3.149. Mr Beer wrote a letter in support of the application dated 17th January 2004[14] and provided a witness statement dated 28th April 2009[15].

3.150. In his letter Mr Beer stated that he had lived at his present address since 1982 and had been a constant user of the application land throughout that time. He is the treasurer and a playing member of Longport Cricket Club who had been using the facility as a home venue for a number of years. Prior to that he had played cricket for a number of sides which had used the facility as a casual venue. He had also used the land as a local resident on a number of other occasions. When friends or family with children visit, he and his wife encourage the children to use the land as a safe play area. When he used to play as a local league footballer, he played in matches at Cherry Orchard on a number of occasions. At the time of writing, he regularly wandered out to watch the local sides play.

3.151. Over the years he had observed others using the application land: he is regularly at home during the week. There is never a part of the day when the land is not being used by someone: children playing or residents walking their dogs.

3.152. Mr Beer said that he was aware how difficult it is for sides without their own venue to secure a regular place to play, and believed that facilities such as the Cherry Orchard should be preserved at all cost. He had always understood that the land had been provided to the village for their enjoyment and relaxation, and thought that villagers thought of the land as their village green. He thought that the fact that cricket had been played on the land meant that the application land should be recognised as Herne Village Green.

3.153. In his witness statement Mr Beer added the following information. He played for Bishopsbourne Football Club between about 1976 and 1993, and

[14] A25
[15] A22

frequently used the field when playing an away fixture against Herne Football Club and other clubs which used the field for home games. He was treasurer and a playing member of Longport Cricket Club until 2007. The club moved from Canterbury and made the application land their home for a number of years. He had also played cricket on the land for other casual sides since the 1970s.

3.154. In addition to the activities mentioned in his letter, he stated that he and his wife often at the time of writing his statement included the application land in their route as they took an evening walk. They observed that the application land continued to be used late into the evening.

3.155. In oral evidence Mr Beer said that he had lived at his present address for 27 years, with his wife. Mr Beer said that he had started to use the application land before he moved to Herne, as a member of Bishopsborne Football club and of Bridge and Riverside cricket clubs. He played for Bishopsborne from the mid 1970s to the mid 1990s. Before he moved to Herne in 1982 he lived in Canterbury. Bishopsborne club is based in Bishopsborne village. Mostly the games on the application land would be against Herne football club, but there were other clubs which used the field as a home ground. It would be Saturday afternoon matches, possibly with the odd evening towards the end of the season when they were catching up. There would be two or three games in a season against clubs which had their home ground at Cherry Orchard.

3.156. While he was playing there would be other people on the field, such as spectators. It was always very busy. There would be various children playing, quite often inspired by the football, kicking their own balls, people walking dogs: bustling activity. On a nice day, over and above those participating, there might be 30-40 people around. There were always somewhere between one and three games going on on the 3 pitches that were there. There were never any difficulties with the other people on the land caused to the game. They were going about their own activities. Those who were not playing were respecting of the games which were going on. Mr Beer stopped playing football in the early 1990s.

3.157. Mr Beer played for Bridge and Riverside Cricket Clubs in the 1970s and 1980s. He played for Longport from the mid 1980s until he stopped playing, about 2 years ago. The casual sides he was referring to were for instance sides put out by the Constitutional Club in Herne Bay, of which he is a member: ad hoc arrangements. The matches would sometimes be in an evening, otherwise a Sunday afternoon. The ad hoc games were more likely to be evening games. The club games were always Sunday afternoons.

3.158. Mr Beer was the treasurer of Longport Cricket Club (from around the late 1990s until he stopped playing in 2007) and the skipper of the side for a number of years (from the mid to late 1990s). As the treasurer he had responsibility for the finances of the Club. The Club paid for the pitch. The ad hoc teams would also have paid for the pitch.

3.159. When playing cricket, there were members of the public on the land while the game was being played. Unless it was raining, every Sunday afternoon, there would be several people around the field doing various things: children playing over by the swings, children playing various ball games, people walking dogs, people walking for the afternoon who might wander by and perhaps watch for a little while.

3.160. The game of cricket is concentrated in the centre: there would be periods of time when there was no-one in parts of the outfield. The matches would start at 2 p.m. and finish somewhere around 7.30p.m. There was no physical barrier surrounding the boundary: the boundary was marked with a white line, and little white markers would be placed on the boundary at various points by the club (to make the boundary more visible). There was nothing to physically stop someone coming onto the pitch.

3.161. Mr Beer also uses the Cherry Orchard as a place to have a walk on a pleasant evening, to wander around and take a bit of exercise. On occasions he may watch a cricket match on a Sunday afternoon. There has been nothing to stop him watching the matches.

3.162. Mr Beer can see the application land from his house. He has seen other people doing the activities he has described: children playing with footballs or cricket, people walking dogs, people having a stroll of an evening; it is not uncommon to see people just sitting out there, having a chat. There is always something going on there. There has never been a time when Mr Beer or anyone he knows has been unable to access and use the land.

3.163. Mr Beer remembered the opening of the Thanet Way, but had no involvement in the celebrations and could not remember where he was on that day. He could not say whether the application land was used for overflow car parking or not. He had no recollection of seeing cars there, but did not know whether he would have been at home to see it. He did not remember whether he was told or not told that it was to be used for overflow car parking.

3.164. In cross examination Mr Beer was asked whether he remembered a Rotary Club event which used the field for overflow car parking. He did not remember, and agreed he might have been out that day.

3.165. Mr Beer agreed that it was a pleasure to play both football and cricket at Herne, and that he felt privileged to have used Cherry Orchard as the Club's home venue for a number of years.

3.166. Those who were not playing respected the games which were going on. It was part of the privilege of playing that no-one interfered in the games. It would reduced the pleasure and privilege had people interfered.

3.167. It was put to Mr Beer that the effect of the application succeeding might be that it was difficult or impossible to allow teams who had no connection to play: Mr Beer said that village greens are used widely for football and especially cricket in the area. He had not taken any legal advice as to whether

registration would create a problem. He agreed he would want the ground to continue to be used in the way that it has been used. He agreed that the way it has been run has been beneficial: the council has allowed sport to be played there, and they have charged a fee so that they can prepare the pitches. That has pretty much worked happily.

3.168. Longport Club was named as a result of a couple of the members being prison warders at Longport. The club was fairly nomadic until it made Herne its home ground. Bridge is a village outside Canterbury. Bridge had its own ground in Bridge. The players would not necessarily come from Canterbury, a fair number of the players in the Longport team lived in Herne Bay. Riverside is a nomadic club which is Canterbury-based. Some of the players came from the Canterbury area, but quite a few lived over this way, in Herne or Herne Bay.

3.169. During a 40-overs a side game, there might be 60 boundaries in a game. When the ball did cross the boundary, it never happened that anyone interfered with it. Every now and again there was a player who might hit the ball a long way, but not to the full extent of the application land, although the boundary would be cleared on occasions.

3.170. The batting side would sit around near the changing facilities. There was never a net put up. Other people would not interfere with their view of the game from the changing facilities.

3.171. Mr Beer was asked about football linesmen: ideally each team provided one linesman. The linesman would run half the pitch each, if you were lucky enough to have two, and at half time they would swap and run the other half. During the course of a game, one or other of the linesmen would have run all the way down each side. When people were respecting a game of football, they would also respect the spectators and would not interfere with them. Mr Beer was asked about the area behind the goal. He said that people happily stood behind the goal watching the game. Other people walked behind the goalposts: that was not interfering with the game, and there would be no reason not to walk there.

3.172. Football he played as an away fixture, cricket as a home fixture. If people were on or near the cricket square playing informally, and the teams turned up, in the vast majority of time they would realise that the game was about to start and they would vacate the area. On other occasions a polite request would result in them moving, if they had not realised. People were quite happy to move so that the cricket game could be started.

3.173. In re-examination Mr Beer was asked again about the linesmen and whether there was any specific area at the side of the pitches set aside for them. He said no area was set aside, but people stood back a yard or two to allow space for them. There was no marking on the ground to indicate the area.

3.174. The people who might have been playing an informal game would not feel that they had to vacate the Cherry Orchard altogether: they would normally

stay on the Cherry Orchard, but would move away from where the cricket was going to be played. They would allow the game to continue and enjoy their own time elsewhere on the field.

3.175. Mr Beer was in my judgment an honest and reliable witness and I have no hesitation in accepting his evidence. None of the cricket clubs with which Mr Beer had been involved, nor the football club, all of which played on the application land as their home ground, were village clubs: all drew their membership from a wider area. This evidence was consistent with and supported the evidence of other witnesses that the pitches were used by teams from the district, rather than local teams.

3.176. Mr Beer gave clear evidence that people did not interfere with football matches taking place on the application land, or with people watching those matches and of people who were on the land moving without demur in order to make way for cricket games. People did not interfere with the batting cricketers' view of the field from the area in front of the pavilion.

(11) Mr David Nutt

Ravenswood, 47 Lower Herne Road, Herne

3.177. Mr Nutt produced an evidence questionnaire completed on behalf of himself and his wife, originally dated 1st March 2002, and amended and re-dated 10th December 2003[16]. He also provided a witness statement dated 29th April 2009[17].

3.178. In his evidence questionnaire Mr Nutt mistakenly gave his address when he used the land as The Cherry Orchard. He confirmed that he had signed the map to confirm that it related to his evidence, and that he agreed with the boundaries of the locality as shown. The land was known as Cherry Orchard. He had known it for 29 years from 1973 to the date of completing his questionnaire (December 2003) and used it during that period. He considered himself to be a local inhabitant of Herne Village. He stated that the people of the village use the land for recreation. The general pattern of use had remained the same during the time he had used the land. He gained access to the land through a gate off the main road or from a path that runs along one boundary of the land. He stated that he and his family had at one time or another used most of the land. The frequency of his use varied: sometimes every day, and sometimes less frequently. He took part in the following activities: walking, games with children, cycling, children using slide, in winter if snow tobogganing. His immediate family uses the land for the same activities. He knew of the following community activities which had taken place on the land: football, cricket, school activities, hockey, Brownies. They had been going on since at least 1973, when he had moved to the area. He used to participate, but did not at the time of completing his questionnaire. He specified as organisations which use the land for sports or pastimes, cricket clubs and football clubs. He ticked to indicate that he had seen the following activities taking place on the land: children playing, rounders, dog walking,

[16] A78
[17] A76

team games, community celebrations, football, cricket, picnicking, kite flying, people walking, bicycle riding and carol singing. The land was owned by Canterbury City Council. He had never sought nor been granted permission to go on the land nor been prevented from using the land. No attempt had been made by notice or fencing or by any other means to prevent or discourage the use being made of the land by the local inhabitants.

3.179. In his witness statement Mr Nutt stated that he and his family had lived in Herne since 1973. He had been under the impression that the Cherry Orchard belonged to the village. All the people he spoke to when he came to the area told him the same thing. His family had used the application land like many people as a village green. When the children were young the family was always going there. The children would run around and on the playing field when cricket and football were being played. No-one ever complained about this. His children were not alone in running about.

3.180. In oral evidence Mr Nutt said that he has four children who have lived with him and his wife at their present address. When they moved in they had one child; the other three were born while they lived at their current address. The oldest one is now 38 and the youngest 28. They would have been children in the 1970s and teenagers in the 1980s.

3.181. When he moved in people said that the land belonged to the village and that they all used it: they looked on it as a village green. People used it for all kinds of activities: football, cricket, ball games, children running around, when it snowed, tobogganing. They never asked permission of anyone.

3.182. Mr Nutt and his family used the land: the children liked going over there to run around and play ball. There was plenty of space, and they used to go over there quite a lot. They would meet people, there were shows on, he would watch the cricket. There was never an occasion when he was told by anyone he could not go on the Cherry Orchard, and had that happened, he would have taken great exception to it.

3.183. While football or cricket matches were taking place, he liked to watch the cricket but the children would get bored. He and Mrs Nutt would sit quietly watching the cricket, sometimes the children would run around as children do, the children might play ball in another part of the field so it was not disturbing the cricketers. No-one ever complained about them being there or the children running around while matches were taking place. There was no difficulty caused by the land being used for matches, and them being there. People would watch the football, standing back to allow space for the linesman and referee, and they would do something else on another part of the land. There was no real conflict. People from the village were never annoyed that there was football or cricket taking place: they all enjoyed it. A lot of people used to turn up to watch. Cricket was often Saturdays and Sundays. Football in the winter was often on a Sunday, because there were lots of cars parked all around the place.

3.184. The general pattern of use over the time Mr Nutt has known the land has not really changed at all. Every now and again there will be a village show, and put on things and side shows and main events, two or three times a year. Those were always open to the public and his family turned up to have a look. He could not remember when they were now.

3.185. Mr Nutt accesses the land via entrance 1 as shown on A312. His house is on the corner of Lower Herne Road and Canterbury Road. There was one occasion when he could not get through when they were renewing the gate, but otherwise there has been no occasion when he could not access the land via that route. Even on that occasion he could have accessed the land via another access. He could not think of any time when he or people he knew had been unable to access the land.

3.186. In reply to questions in cross-examination Mr Nutt agreed that if people were playing football or cricket his family would do something on another part of the land so that there was no conflict. The cars he had referred to in connection with the football were parked on the local roads, not on the land itself. It occasionally annoyed him when people parked across his drive. He agreed there were quite a few extra cars parked when a football game was going on. He did not agree that it was a reasonable assumption that quite a lot of the drivers lived a driving distance away, and said that people from just down the road might drive. A lot of people came from Herne Bay and they used to decide that they were too lazy to walk, so they would drive. People from Herne he thought would walk. He commented that people seemed disinclined to walk what he thought were comparatively short distances. People from Broomfield might drive, as that is further away. There were not so many cars with the cricket, but quite a lot with the football. He thought a lot of the people came from Herne Bay. He thought that because he recognised some of the people.

3.187. Mr Nutt was a straightforward and honest witness, and I accept his evidence. Mr Nutt and his family had used the application land for the whole of the relevant period. I accept his evidence as to the behaviour of spectators and of his family during football and cricket matches.

(12) Mr Brian MacDowall

302 Canterbury Road, Herne

3.188. Mr MacDowall provided a witness statement dated 26th April 2009[18]. Mr MacDowall stated that he had lived in Herne for a period in excess of 10 years. He had believed that the application land was already a village green. He had walked his dogs, watched football, cricket and kite flying and seen local residents enjoying the field, as he believed and he thought they must believe they had a right to do. In snow he had seen children using bits of cardboard and carpet and sledges, sledging down the top bank from Woodrow Chase. Occasionally he had seen picnics and rubbish from picnics which had been left behind. He had also seen dog faeces which had not been cleared up by the dog owners.

[18] A66

3.189. It had never occurred to him that he or anyone else did not have a right to use the land in this way. The only signs he had seen were the "No Golf" and "Dog Fouling" signs, both of which had been erected since he had moved to Herne. There was no signage informing residents of any restrictions on the use of the land.

3.190. In oral evidence Mr MacDowall said that he has been living at his current address since the beginning of 2009, and before that he lived at 100 Mill Lane, where he had lived since 1998. Before that he lived in Medway. At Mill Lane he lived with his then partner. Mr MacDowell uses the application land, and has used it from both addresses, particularly Mill Lane, because when he lived there they had a couple of dogs and would take them for a walk every day, and onto the application land certainly two or three times a week. Apart from that, his partner had a nephew who they would take there to play football, and to watch matches and wander around.

3.191. When playing football with his partner's nephew, they would play wherever the goalposts were situated. There was never an occasion when they went to play and were unable to do so. When on the land he saw children playing, people walking round. There had always been a variety of activities on the land, and people used it freely. Walking dogs was a common activity, people's kids using the play equipment, and people crossing the green to get from one side to the other, rather than going round on the roads.

3.192. When there was enough snow on the ground, the Cherry Orchard became extremely popular, especially with youngsters. The slope was ideal for sledging. No-one ever said you can't use it, you have no right to be here. There was never an occasion when he or anyone he knows was not able to access and use the land. He said that they all assumed that they had a right to use the land.

3.193. Mr MacDowall had seen a "No Golf" and a dog fouling signs, but had never seen any other signs. In particular he had never seen a sign saying there was a ban or restriction on use of the land. When living at Mill Lane he would have come onto the land at accesses 5 or 6 as marked on A312. There was no occasion on which he found he was unable to use those accesses.

3.194. There were no questions in cross-examination. I accept Mr MacDowell's evidence.

(13) Mrs Angela Beer

251 Canterbury Road, Herne

3.195. Mrs Beer provided an evidence questionnaire dated 10th December 2003[19], a letter in support of the application dated 9th March 2004, written jointly with her husband, Mr David Beer[20], and a written witness statement dated 27th April 2009.

[19] A16
[20] A21

3.196. In her evidence questionnaire Mrs Beer gave her address when she used the land as her present address and 35 Lower Herne Road, Herne. She stated that she had signed the map to confirm it related to the evidence provided by her, although no copy map was included in the Applicant's bundle. She did not confirm the boundaries of the locality. The land was known as Cherry Orchard Playing Field. She had known the land from 1972 to 2003 and had used it from 1972 to 1987 and then from 1996 to 2003. She considered herself to be a local inhabitant in respect of the land. During the time she had used the land the general pattern of use had remained basically the same. She accessed the land via the gates and free entry to dog walk, and to take children to the play area. She uses the land twice daily. Her immediate family uses the land for walking and play. She did not know of any community activities which had taken place on the land. She listed as organisations which use the land for sports and pastimes, football and cricket clubs. No seasonal activities take place on the land. She ticked to indicate that she had seen the following activities on the land: children playing, dog walking, team games, football, cricket, kite flying and people walking. She believed the owner of the land was the City Council. She never sought permission for activities on the land. She had never been prevented from using the land. No attempt had ever been made to prevent or discourage the use being made of the land by the local inhabitants.

3.197. In her witness statement Mrs Beer stated that she and her husband moved from London to 35 Lower Herne Road in 1972. They then moved to Fordwich, and returned to Herne in 1996, to their present address. Over the years they had used the Cherry Orchard many times to entertain their daughter, Sarah, and to walk her to school. Sarah used to have picnics with her friends on the field. They also used the land to walk their dog, Marble. They have watched local teams play football and young children enjoying the freedom of the field. She was not aware of any restrictions on use of the field in the previous 37 years. Along with their neighbours, Mr and Mrs Beer had used the field without permission and without payment, at will.

3.198. Mrs Beer said in oral evidence that she is not, so far as she knows, related to Mr Raymond Beer who had given evidence earlier that day.

3.199. Mrs Beer moved to her current address in September 1996. Before that she lived in Fordwich from 1981-1996, and from 1972-1981 she lived in Lower Herne Road. At present her husband lives with her, and when she lived at the first address in Herne, their daughter lived with them as well. Their daughter has not lived at their present address at all.

3.200. As a family they used the application land most days, and they continue to use it most days, even now. From their first address, they took the dog a walk every day on the Cherry Orchard, took their daughter to the play area, and might even go for a walk on a nice summer's evening. Since they have returned to Herne, they still walk the dog, and she takes her grandchildren to the play area, and use it to walk through to take her grandson to school on the days she has him. Mrs Beer has not walked the dog for the last year, since she

had an operation, but before that she would have walked it on the application land every day.

3.201. Mrs Beer lives next door to Mr and Mrs Bowley. She accesses the land via access 1, as marked on A312. She has never found her access to be prohibited.

3.202. Whilst on the land she has seen football, cricket, dog walking, children playing, sometimes people just sitting on the grass. The football and cricket would be Saturday and Sunday, the football, and cricket, very often evenings in the summer. When dog walking, there is always someone playing something on there. Even the children set up their own teams and cricket matches. When a children's match is going on she would respect their game and walk around the area. Her behaviour would not be any different if it were children playing to what it would be if there were an organised game. They all respect each other.

3.203. Mrs Beer is not a great football fan, but knows that the Herne Bay Harriers have used the land, but does not know if they still do. She has very been on the land when they or another organised team is using the land. No-one has ever said she cannot be on the land when a match is taking place, or that she cannot walk her dog while a match is taking place.

3.204. There had never been a time when she or anyone she knows has been unable to access and use the application land. She said it is not really possible to close it off.

3.205. There were no questions in cross-examination. I accept Mrs Beer's evidence.

(14) Mr Harry Keys
217 Canterbury Road

3.206. Mr Keys provided a witness statement dated 27th April 2009[21]. Mr Keys stated that he had lived in Herne for a period in excess of 10 years. He had taken his family to the application land, walked his dog and generally used the land at will without being questioned. He had seen local people using the land for all sorts of activities, such as football, kite flying, football teams playing games and training. Cricket is played in season by local clubs. There is not and has not been in the 10 years he has known the land any restriction on walking on the cricket wicket. The field is only used for organised sports on some Saturdays and Sundays, and then only for a few hours, but it is always available for the locals to use on demand.

3.207. In oral evidence Mr Keys said that he moved to his current address in June or July 1998. Before that he lived in London. His wife lives with him. They have lately used the land quite a lot: they have acquired a dog and are using the land to train the dog. Prior to that he would just use it for watching football matches. They acquired the dog two months ago.

[21] A64

3.208. They used the land as a short cut to their friends in Woodrow Chase, and he watched the occasional football match. The football he remembered watching on a Sunday. The matches would go on for an hour and a half. He did not think they ever played extra time. He said that most of the teams were local pub teams. The Red Lion in Herne used to have a team. He did not remember the names of any of the other teams. There had never been an occasion when he was told he could not come onto the Cherry Orchard to watch a match.

3.209. There were other people who were not involved in football on the land on those days: dog walkers, kids having a kickabout on another area adjacent to the football pitches. There was enough space for them to do that. There was never any difficulty in local people walking their dogs or using the space while matches were going on. There was no physical restriction to prevent people walking onto the football pitches or onto the cricket pitch in summer. There has never been a time when he has not been able with his dog to walk wherever he wanted to in the Cherry Orchard. There has never been a time when he or anyone he knows has not been able to access and use the land.

3.210. He has seen young children (one or two) cycling on the green, people flying kites, people using the play area with children, picnicking.

3.211. In cross-examination Mr Keys was taken to O85, and asked about the first football season after he moved into his house (1998-1999). He did not know the members of the teams personally, although he might know one or two of the Red Lion team, as he sometimes drinks there, and did not know where Chaplins came from. He said he did not know who had played. He normally followed the Premier League, but would stop and watch the match on the way from getting his paper. He thought Parkers was the steel company based in Canterbury. He was not familiar with Crusaders or Whitstable Eagles or Whitstable TJ. The only team he recognised as being a Herne team was the Upper Red Lions. He did not really recognise any other team as being a Herne team: he said he just watched in passing.

3.212. In response to my questions as to Mr Keys' general answer to the question whether he had always been able to walk wherever he wanted to on the application land, Mr Keys said that he would not walk across a football match. He said that walking round a match was not being refused permission to go on the land, and that was how he had understood the question. He would not walk across a football match out of courtesy: he did not want to interfere with their game.

3.213. Mr Keys' written evidence suggested that he had used the land more extensively than he said he had when he came to give his oral evidence. It appeared from his oral evidence that the only use he had made of the application land during the relevant period was to walk across the land from 1998 to get his paper and to visit friends in Woodrow Chase, and on occasion, to stop in passing to watch a football match. In his statement he said that he had taken his family to the application land, walked his dog and generally used the land at will. I did not think that he had sought deliberately to mislead the inquiry, but I do consider that his evidence provides a good example of the

reasons why written evidence may be less reliable than oral evidence. Although he said in evidence in chief that he thought that most of the teams were local pub teams, he accepted in cross-examination that he could only identify one of the teams which regularly booked the pitches in the first season he lived at his present address as being a Herne team. This accorded with the evidence of other witnesses. I accept his evidence that he did not walk across the football matches.

(15) Mr John Dilnot

Hollybush Cottage, Herne Road, Herne

3.214. Mr Dilnot wrote two letters in support of the application, both dated 15th January 2004[22], and provided a witness statement dated 30th April 2009[23].

3.215. In his first letter he stated that in 1946 he came to live at 22 School Lane, Herne with his uncle and aunt. His earliest recollection of going to the application was kite flying in 1949 with his uncle. He said that during the winter of 1953 six man toboggan runs were possible from Mill Lane to Canterbury Road across the application land. He recollected other events and activities on the land in the 1950s and 1960s. In his second letter he stated that he had never been asked to pay an admission fee, nor was it necessary to seek permission to enter the land. The land was used without restriction or charge by the whole village community prior to its compulsory purchase by the Herne Bay Urban District Council. That situation had continued to the time of writing his letter, with the exception of the charges made by Canterbury City Council for the use of the football and cricket pitches.

3.216. In his statement Mr Dilnot added the following information. He used the application land with his children, and, at the time of writing his statement, with his grandchildren. His use of the application land had always been unimpeded in whatever he had chosen to do. They only payment he had every known was that by football teams requesting the use of the facilities i.e. the changing rooms, showers, nets and goal posts for organised games.

3.217. In oral evidence Mr Dilnot said that he has lived at his present address for about 43 years, and prior to that he lived at 22 School Lane, where he had lived since 1946, when he was 3.

3.218. In the 1950s, the land was used by most of the children in the village, the children from School Lane, the village, Lower Herne, as far as Mill Lane. Children from Broomfield did not appear to come down that far in those days. There were a good 30-40 children using the Cherry Orchard in those days. The distinction between Herne and Broomfield as separate places was clearer then than it is now. He did not know children from Broomfield. One or two used to come down and go to the primary school, but he would not know the others. If you went further than where Hawe Farm Way is now (although it was not then built), then you were out of Herne. If you went up Mill Lane, as far as Pigeon Lane, along Hunters Forstall Road then that was Broomfield.

[22] A62 and A63
[23] A60

Pigeon Lane was Herne, but Hunters Forstall Road was Broomfield. The buildings now there were not there, it was open farmland and one or two properties with very large gardens. There was no Woodrow Chase, and the Strode Park Road estate had not been built.

3.219. As a boy Mr Dilnot played as a boy would do. The grass used to grow quite tall, and was cut for hay. They used to build camps and forts and all sorts of things. He was not sure when the grass began to be cut as it is today; he thought at about the time Woodrow Chase began to be built in the early 1960s.

3.220. In the early 1960s, they used to play tennis, badminton, football and cricket there. Most of them learned to ride their bicycles there. There was never any indication when he was a boy that they should not play there.

3.221. In more recent times he has continued to use the land. He goes there with his grandchildren, who use the equipment, ride their bikes, fly kites, go for picnics. When they had a dog, they used to walk all the way down with him. One of his daughters lives in the village, and those are the children they take out. She has two daughters of 11 and 8. The other daughter comes down with her family by car. She has twins who are 9. They use it for the same activities when they are visiting. When he is using the land he sees other people doing much the same as they are. The pattern of activity has remained the much the same over the years. He accesses the land via entrance 3. There has never been an occasion when he has not been able to use that entrance.

3.222. Sport takes place on the land, but he is not involved and does not know who they are. He thinks that the matches usually take place on weekends, judging by the amount of vehicles parked on the road. He said he had not recently been on the land when matches were taking place, although he had in earlier years, and there were never any problems. He had not gone onto the land recently because he is usually at work, apart from on a Saturday afternoon or maybe a Sunday evening, which would be when they take the children down.

3.223. Mr Dilnot understands that payment is made to the City Council for the changing room and showers, nets and goal posts. He said that he does not know what the payment is for, but that is what he believes it is for. There had never been time since he moved to Herne as a boy that he had not been able to access and use the land. He had never been stopped doing whatever he was doing.

3.224. Mr Dilnot's current address is not on the map on which the locality is marked: it is to the south of the area shown on the A291, opposite the caravan park. The School Lane address was almost opposite the alleyway which leads to entrance number 3 on A312.

3.225. In cross-examination Mr Dilnot was asked about his evidence as to what the payment made by the teams was for: he was asked whether he accepted that the payment was for the pitch and the goals. He said he supposed it all came as a package: they paid for the labour of putting it all together. He agreed a

team wanted a pitch so that they could play a game of football. His previous understanding was only hearsay, he had no other evidence.

3.226. Mr Dilnot was asked about whether he lived in Herne. He said his postcode is a Herne postcode and he does think of himself as living in Herne: he comes under the Parish of Herne, and the Sturnfield boundary is further up the road. He would be disappointed to be outside the area where people had a right to use the playing field. It was put to him that he was outside the claimed neighbourhood. He had not been aware of that. It was put to him that were the application in its current form successful, he would be outside the area where people had rights to go onto the land. He said he was not aware of that, and that village greens were open for everyone to use. He had not taken any advice about the effect of village green status.

3.227. Mr Dilnot was asked about his answers as to where Herne and Broomfield were related to the 1950s: he said he was not aware of there ever being a boundary between the two places, but confirmed that his evidence had related to the 1950s. He was asked about the position in 1984: by that time a lot had been built. He agreed it had become harder to distinguish where Herne ended and Broomfield began, and said that the area had been filled up. He agreed that in 1996 Herne and Broomfield were put into the same Parish Council area, and were not separated for that purpose.

3.228. On the one hand Mr Dilnot stated openly that he knew little about the sport which takes place on the application land, and on the other sought to say that the fees paid to the City Council were for use of the changing room, showers, nets and goal posts (i.e. not for the pitches themselves). When challenged about this in cross-examination he accepted that the fee was for a package including the pitch and said that his evidence had been hearsay. It seemed to me that it was likely Mr Dilnot had repeated a point made by someone else, possibly Mr Moore, without having any first hand knowledge of the arrangements and without subjecting the point to any real scrutiny himself. I was not impressed by this and therefore put little weight on his evidence.

(16) Mrs Janet Benjamin
12 Mill View Road, Herne

3.229. Mrs Benjamin provided a witness statement dated 26th April 2009[24]. She stated that she has lived at her present address with her husband for the past 10 years. Their two teenage children live with them. They have a gate which opens onto the Cherry Orchard field from their back garden, which gives them direct access onto the land. Her two children frequently used the gate when they were younger, and still use the gate sometimes, to go and play on the Cherry Orchard, or to meet their friends there.

3.230. Mrs Benjamin stated that the Cherry Orchard is well-used by dog walkers and children. The children use it for various unsupervised games, either accompanied by their parents or on their own.

[24] A27

3.231. In oral evidence Mrs Benjamin was taken to A312: her property is the one marked number 12 on Mill View Road.

3.232. Mrs Benjamin said that her children used the area a lot more when they were younger. They now use it to meet friends and as a cut through. She did not remember there being any restriction in the use of the back gate when they bought the property, and no-one had ever told them that they could not use the gate. The gate had never been blocked. The Cherry Orchard is visible from Mrs Benjamin's house: she sees people walking, flying kites, taking dogs for walks, playing rounders, families playing rounders, lots of things. The use is weather-dependent. In spring and summer time it is used frequently, as it stays lighter later. In winter it is just people going out for a walk or taking their dog for a walk. In snow, there will be children out sledging or snowballing. As long as it is not raining really hard it is used. There has never been a time when Mrs Benjamin and her family have not been able to access Cherry Orchard and use it.

3.233. There was no cross-examination.

3.234. In response to my question, Mrs Benjamin said that she can see the Cherry Orchard from the Velux windows in the loft conversion which is her bedroom. She can look out straight towards the ball court, and see everything to the left of that.

3.235. I was puzzled by Mrs Benjamin's evidence as to the activities she could see taking place on the application land from her house, and took care when on the site inspection to identify the Velux windows to which she referred. In my judgment it is unlikely that she spends any significant time looking out of those windows onto the application land: the angle of the windows is such that it would not be possible to see the land through the windows in passing: they would have to be open for the land to be visible. I therefore doubt Mrs Benjamin's evidence that she has seen the activities mentioned from her house, and consider that her desire for the application to succeed led her to overstate her evidence in this regard. Her evidence as to the use made by her own children of the land was unchallenged and I accept it.

(17) Mr Pete Tait

5 Magnolia Rise, Broomfield

3.236. Mr Tait provided a written witness statement dated 25th April 2009[25]. He has lived at his present address since 2004. Prior to that, between December 1997 and 2004, he lived at 5 Blenheim Close, Herne.

3.237. Mr Tait is chairman of Herne Bay Harriers Youth Football Club, and also a team manager for the club.

3.238. Whilst he was living at Blenheim Close he took his children to the Cherry Orchard. They played football and cricket and took them in the play park on

[25] A87

Saturdays and summer evenings. He did not take them to the land on a Sunday, as he was involved in the youth football on a Sunday.

3.239. Mr Tait is an ex-army man and used to train by running around the Cherry Orchard, and up the hill for hill training. He has seen lots of other people walking their dogs, flying kites, and families playing football and cricket.

3.240. As a youth football team manager, he has hired facilities on the Cherry Orchard. On occasions he has seen young children playing kick-about football. The ball would come onto the pitch and the children would retrieve it whilst the game was in play. Also dog walkers had walked onto the pitch, and people would cut across the pitch whilst the game was in play

3.241. Mr Tait said that he had been made aware of the Kent Act sign. Had it not been brought to his attention, he would not have known about it: he had not previously seen the sign. He said that he was unable to read the sign due to its condition. He had never been aware of any restrictions on the field.

3.242. In oral evidence Mr Tait said that he has ceased to be a youth football manager: his team are now over 18 and have to play as adults and he is no longer their manager. He remains the chairman of Herne Bay Harriers Youth Football Club.

3.243. Mr Tait was not aware of the 2002 application to register Cherry Orchard as a TVG, and had no involvement in that application.

3.244. Magnolia Rise is at the eastern end of Broomfield, off Honeysuckle Way. When Mr Tait lived at Blenheim Close, he would have described it as Herne. He now gives his address as Broomfield.

3.245. When he was living in Blenheim Close, Mr Tait would use Cherry Orchard quite a lot in the summer. He has two boys who were born in 1990 and 1994, and he used to take them there to play football. His children still use the land, to meet with their friends and to play football in the MUGA. He has used the Cherry Orchard for fitness purposes: running around it and doing various exercises. His use has decreased since he has moved to Broomfield. He said that that was purely because his boys have got older and their interests have changed, although when he was asked whether it also had something to do with where they were living, he said he supposed that had something to do with it, as they lived further away.

3.246. Mr Tait has been with the Youth Football Club for 11 years. He started as a mini soccer manager, then was Vice Chairman for about 3 years, and has been Chairman for about 3 years. There are 10 or 11 teams in the Club, including 4 mini-soccer teams, the remainder play 11-a-side. The mini-soccer teams play their games at Herne Junior School. Three or four of the 11-a-side teams play their competitive games at Briary School. The older teams use Cherry Orchard, because the pitches are bigger.

3.247. The teams which use Cherry Orchard only use it for organised football matches, because the Club has been told by the council that it cannot use them for training, because if there is training and matches on there, the pitches would get in a poor condition. The matches would be Sunday afternoons. The training is on a Thursday evening under floodlights at Herne Bay High School and at Briary School.

3.248. Mr Tait was asked about his statement that balls belonging to children playing kick-about would come onto the pitch and children would retrieve them whilst the game was in play: he said on occasions he had seen that happen: although they were hiring pitches, the playing fields were there for the public, and they could not stop them being there. When a ball goes on the pitch and someone retrieves it, he had not thought of complaining about it, because it is a public area.

3.249. Mr Tait was asked about his statement that dog walkers had walked on the pitch and people had cut across the pitch whilst a game was in play: he said it did not happen every game. Because of the location of the pitches, when people come in from the Canterbury Road, they cut across the corner of the pitches while the game is being played. It is a short cut. There is no physical impediment. It has happened on a number of occasions: he has definitely seen it. Not every game, but considering the number of games he has played up there, he would have thought it would be quite a few.

3.250. Mr Tait was asked about the Kent Act sign. He said he thought he had heard of it, but he was not actually familiar with it. He is aware of the sign, but did not know it was there until Mr Moore told him it was there. He has seen it on the wall since he has been told about it. He has never read it. Before Mr Moore told him about it he had no idea of its existence.

3.251. Mr Tait agreed he was quite a regular user of the application land in relation to his football use. He had never found that he could not access and use the land.

3.252. In cross-examination Mr Tait was asked where his information as to the effect of the application came from: he said he had no idea what the effect of the application would be if it were successful. He has not spoken to Mr Moore about it.

3.253. Mr Tait was taken to the plan of the claimed neighbourhood at A10 and he was asked whether anyone had told him that if the application was successful he would no longer have a right to go onto the field. He said not. He was asked whether if that were correct he would still support the application. He said he would need to look into it further. Teams have been able to use the pitches, and this has been very important for the people who play football. He did not know whether that could continue if the application succeeded, and said he would need to look into it. The applicant had not told him about that. Accepting hypothetically that whereas at the moment the Council let people use the land, it would go to a position where it was very uncertain at best whether that would continue, he said he would possibly need to reconsider his position.

3.254. Mr Tait agreed that there had not been interruptions from people outside of the game to football games while the game had been played which made the game unsatisfactory. There had been a couple of dogs which had gone off the leash running around, and the game had had to be stopped while the owners collected their dogs. He could definitely think of one occasion, but said he could not necessarily think of every single dog on the field. He agreed that was not a deliberate act by the owner: the dog was off the lead, and the referee had to stop the game while the game was controlled. He said it was an accident: he would not apportion the blame to the owner. He agreed that the owner would have apologetically tried to get the dog in as quickly as possible.

3.255. Mr Tait agreed that generally the local people respected football games, although he was not entirely sure that the people living nearby were entirely happy with the ball flying into their gardens on occasion. That would have been from organised games. When a football game was going on, dog walkers with a dog on the lead would walk somewhere else, other than on the football pitch. If the football strayed off the pitch, the players would go and get it: no-one stopped them doing that. The older boys could kick a ball so that it would travel to most parts of the playing field: for instance a ball which missed the goal on the upper pitch could get the ball as far as B2. It might be harder to get it to A3, as that is uphill. On the pitch outside the pavilion, they could definitely without doubt get it into the play area if they were shooting on goal.

3.256. The Herne Bay Harriers Youth Football Club teams on occasion have used the facilities at Hursden, depending on allocation: his team used that facility last season, because Cherry Orchard had been switched to cricket. The connection of the Club with Herne Bay is that when it was first set up 11 years ago, you need a name, and that was the name agreed at the time. The lion's share of the players in the Club are from Herne Bay.

3.257. Mr Tait's evidence about the level of interruptions to organised football games changed substantially between his written statement, his evidence in chief and his evidence in cross-examination. When challenged, his evidence that dog walkers walked onto the pitch became a couple of dogs, then one occasion which he could definitely call to mind. I reject the suggestion in his witness statement that football games were interrupted by children coming onto the pitch to retrieve their balls, by dog walkers walking onto the pitch and by people cutting across the pitch whilst the game was in play. This evidence was not consistent with the other evidence before the inquiry, and was not supported by Mr Tait's own evidence in cross-examination. I prefer his evidence in cross-examination that generally local people respected the games and would walk elsewhere when a game was going on.

Documentary evidence on behalf of the Applicant

3.258. The Applicant submitted a number of documents. Several were referred to in the course of evidence. I have re-read all the documents submitted, whether specifically mentioned or not.

4. **The Objector's evidence**

4.1. I heard oral evidence at the inquiry from 8 witnesses on behalf of the objector. I set out in the following paragraphs my notes of their evidence and the conclusions I have drawn in respect of it. Two witnesses provided written statements but did not give oral evidence, and I have summarised their evidence in the section which follows, headed "Evidence of witnesses on behalf of the Objector who did not give oral evidence to the inquiry".

(1) Mr Julian Vaughan

16 Whitehall Gardens, Canterbury

4.2. Mr Vaughan provided a written statement dated 30th April 2009[26]. Mr Vaughan works for Serco which manages Canterbury City Council's Environmental Services Contract. From 1985-2005 he played for the Chartham Sports Club team. The team played away games over the years at the Cherry Orchard Playing Fields. They never had any trouble with any kind of interruptions to their games. No-one ever invaded the pitch when Mr Vaughan was playing there. Mr Vaughan also played away cricket matches at the application land for the Chartham Sports Club. Those games were not interrupted either.

4.3. In oral evidence Mr Vaughan said that during the period 1985-2005 he would have gone to Cherry Orchard 2 or 3 times a season, sometimes less. He would have gone there as part of an away team.

4.4. Pages O85-O122 come from Serco's computer records. Every season Serco completes a spreadsheet as to which teams have played. Mr Vaughan took the information off the computer. O85-87 is the 1998-1999 season. Mr Vaughan stated that Chaplins are a Herne Bay team, Crusaders is a Herne Bay team, East Kent Gills is a Herne Bay team, Herne Millers is a junior side, and he is not sure where they are from, Parkers is a Canterbury side (he agreed that the team is related to Parkers Steel, a Canterbury company), the Upper Red Lions come from Herne, the Whitstable Eagles is a Whitstable team, Whitstable TJ is Whitstable Town Juniors, and they are Whitstable team. Radfall is Chestfield, just outside Whitstable, P & B Social are from Swalecliffe, near Whitstable. Mr Vaughan was not sure about Four Fathoms, and thought they might be from Herne Bay. Monument is a Whitstable team. Two Brewers is a Whitstable team. Of the home teams in that season, the majority of them come from outside Herne. Visiting teams, from his own knowledge, would come from all over Canterbury, Herne Bay, Whitstable and the villages outside.

4.5. During a football game at Cherry Orchard, Mr Vaughan said people would be a little bit away from the line, behind the rear of the goal, because they would not want to be hit. Dog walkers would not come that close to the spectators, but would be several yards away, leaving plenty of room. The linesmen control the left hand side. Each team has a linesman, and they look at the defence, going up to the half way line, and the same the other side. At half time they swap over when the teams swap ends. Half of each of the lines is run up and down therefore.

[26] O316

4.6. Mr Vaughan played cricket once, or maybe twice at Cherry Orchard. He could remember one time definitely. There would have been boundaries. He would not necessarily remember whether there was a problem with interference with the ball, if it had gone over the boundary. He said there had not been very many problems wherever he had been to play cricket so thought it unlikely that there had been a problem at Cherry Orchard. He would not remember an interruption in any particular venue, but could not remember any incident where there had been an interruption in any venue such as to make a difference. He said he was fairly confident therefore that there had not been any interruptions at Cherry Orchard.

4.7. So far as football was concerned there was never a clash with people playing informally. There might be children playing in the goal when they arrived, but as soon as the nets go up, they move. You don't really have even to ask them, because they realise that there is a game going on.

4.8. In cross-examination Mr Vaughan agreed that the majority of his games of football would be at other grounds. There were about 10 teams in a league and there would be home and away games against each. Cherry Orchard was only one of many venues. He would be concentrating on the game, rather than the venue. He agreed he was not really in a position to have a lot of experience as to what went on on Cherry Orchard. He does not live in Herne and does not go to the Cherry Orchard for any reason other than the away games.

4.9. Mr Vaughan was asked about his statement that people would not go behind the goal: he agreed this was from his general experience, wherever you go, people would not really go behind the goal. The shooting can be bad in any amateur game. It was not particular to the Cherry Orchard. The linesman information is also general football information, rather than particular to the Cherry Orchard.

4.10. Mr Vaughan agreed there was no physical barrier stopping people coming up to the side of the pitch; there was only the line. There was nothing to stop people or balls or dogs going onto the pitch. There was no area marked out for the linesman; spectators would stand back from the line to allow them to go up and down. Spectators would be closer, but people with dogs would go a few yards away. Someone walking a dog would not want to walk through a crowd. The spectators would be both teams' supporters, and possibly people from Herne as well, although he thought the majority would be supporters. The people from Herne would not be in any different position, they would be able to stand up to the line.

4.11. Mr Vaughan agreed he could not comment on what had happened on occasions when he was not at Cherry Orchard. His evidence related to his own personal experience, rather than what generally happened.

4.12. Mr Vaughan thought he had played cricket at Cherry Orchard in the late 1980s or early 1990s, playing Longport. He played cricket every season, but elsewhere. He agreed that he had limited experience of playing cricket at

Cherry Orchard and had never gone there to watch. He agreed that he would not necessarily be able to remember an interference with the ball and that he could not state categorically that the games were not interrupted.

4.13. Mr Vaughan was in my judgment an honest witness, and was careful not to overstate his evidence. I accept his evidence.

(2) Mr Christopher Sear
Serco, Canterbury

4.14. Mr Sear is the Head of Environmental Services and Contract Lead with Serco at Canterbury. He provided a written statement dated 1st May 2009[27] in which he explained that Serco is the contractor which carries out the majority of Canterbury City Council's grounds maintenance work in the Canterbury district, including at Herne. Serco has undertaken the grounds maintenance requirements for the pitch facilities for both football and cricket at the application land since the commencement of Serco's contract with the City Council in 1996. A full maintenance regime is applied, including full weekly pitch markings, reinstatement works, general maintenance, fortnightly grass cuttings to the whole complete, with weekly cutting of cricket tables and outfield as necessary. At times Serco fences off parts of the football pitches whilst the grass is being reseeded. In the late 1990s Serco used to fence off the cricket square to prevent damage, but it no longer does this, as the fencing itself attracted informal games of football, which damaged the square.

4.15. Serco has managed all the bookings for football and cricket games from the 1998/99 season to date. Serco collects the booking fees and accounts for the income from bookings to the Council. The football season lasts from the end of August until the middle of April. The cricket season overlaps slightly with the football season and runs from the middle of April to early September.

4.16. Mr Sear stated that the only complaints Serco had received relating to the application land were from residents complaining that footballers had left litter after a game. He said that he would certainly have heard if clubs had complained about interruptions to their games whilst playing either football or cricket, but Serco had not received any such complaints. So far as he was aware the football and cricket usage had never been interrupted by members of the public attempting to walk across the field during games. He said that there would be a major health and safety concern, were this to be the case.

4.17. Mr Sear said that he is a football lover himself. In the late 1970s and early 1980s he had played football and refereed matches at the application land on a few occasions. The games in which he participated had continued from start to finish without interruption by members of the public.

4.18. In oral evidence Mr Sear was asked about the bookings: he said that what the team is being given is the facility and service for that facility, on behalf of Canterbury City Council. They would be able to play an organised fixture on that venue, and would have the lines marked out, goal posts, nets, corner flags,

[27] O314

the changing facilities if they wanted them and the permission to use the playing field.

4.19. Mr Sear was taken to O88, a document headed Ground Recharge values: they are the prices laid down for the hire of the facilities, including the various options for hire. A team who wanted just the pitch would hire ground only: that would give permission just to use the pitch. Full would give the pitch and the changing room facilities as well. On O85-87, everyone has taken the full facility. Mr Sear said 9 times out of 10 they take the full facility at Cherry Orchard. When they take the full facility, the pavilion is opened at an appropriate time for changing, and after the conclusion of the game, it is locked and made secure. If it is a Saturday game, it is cleaned, if it a Sunday morning game, it is cleaned for afternoon use. If there is no afternoon use, or after the afternoon use, it is locked, and cleaned on a Monday or Tuesday. Opening up facilities includes turning on the hot water to provide showers. The pavilion is usually opened about 45 minutes before a fixture is due to kick off. Some clubs like it opened a bit earlier, and let Serco know if that is the case. It is closed, usually, about half an hour after the game finishes. Serco do the opening and closing. Mr Sear has general control of that: people who work under him are responsible for supervising the locking and unlocking.

4.20. Mr Sear was asked how many games he has been at. From 1999 he became the grounds manager for Serco in Canterbury, and would attend at least 10 times in a season. He stopped being grounds manager about 4 years ago, in 2005. Prior to 1999 he visited in his role as a football referee and member of a football club. That would have been about twice a season.

4.21. He was asked how he could be confident that he would hear a complaint: he said that the jurisdiction of the football pitches and bookings is something he has always taken an interest in, and in his role with Football Association, he liaises and communicates with football leagues, and is told of incidents such as games having to be abandoned. If someone is not able to complete a fixture through no fault of their own, they would expect not to pay either the full or any cost for the facility. That has never happened as a result of people walking onto the pitch, thus meaning the game had to be cancelled. He has checked the records and there have been no games cancelled for that reason.

4.22. Mr Sear knows independently from Serco's records that football has been played at Cherry Orchard because of his involvement in the sport. That only applies to cricket. He does not know anything about cricket there prior to 1999 when he started with Serco in Canterbury.

4.23. Mr Sear was asked about where players in the various teams lived. He did not know about the teams which were nominally based in Herne. He said that it is not very common that a team is made up with the majority of the team being from the area whose name is carried by the team, or from the business whose name is carried. He thought that general observation would apply to the Herne teams, but did not know definitely. Mr Sear thought that the visiting teams would have been made up from various areas, Herne Bay, Canterbury and Whitstable. Occasionally teams come down from London.

4.24. When a football game is going on, you might see dog walkers walking around, around the perimeter of the field. Occasionally there might be an individual who has control of their dog, who might walk between the pitches. People know whether they have control of their dog, on a lead. He had never seen anyone walk across a football pitch, although he had seen a dog run on. When he had been on Cherry Orchard when football was not on he had occasionally seen people on the pitches, but most people went for the longest walk, and went around it.

4.25. Mr Sear was asked about the role of the assistant referee or linesman. His jurisdiction is to judge whether the ball is in or out of play along the whole line: his jurisdiction does not stop at half way, although his running does. They have to be able to see along the line, even if they are not running along it. He wants people to stand back a metre or so. It does not always happen, but then he would shout down the line, "give us some vision" or something similar, and people would move back.

4.26. In cross-examination Mr Sear was asked about his statement that at times Serco fences off parts of the football pitches. He said the fencing was a chestnut fence temporarily put round worn areas, to allow the area to reseed, before people walked over it again. The comment about the fencing attracting games of informal football related specifically to the cricket square. The fencing encouraged children to go into the fenced area to kick a ball around. The children did not have to damage the fencing to get in. It was thought that the fencing created more problems, because the children were using it with football boots on and damaging the grass. It was decided to let things be and the fencing was removed.

4.27. Mr Sear was asked about the complaints from residents, and he agreed that there had not been any complaints about car parking from residents. He has had heard of problems via the City Council, about cars parking in the service road at the side, but not more generally in the Herne village area.

4.28. Mr Sear was asked about his statement that there would be a major health and safety concern if matches were interrupted, and he agreed that was his concern. It was not because other people do not have the right to be on the pitches when a match is being played.

4.29. During 1984-1999, when Mr Sear was visiting twice a season, that would be at weekends. Other weekends he would have been involved in football elsewhere. He agreed that his evidence only related to his own personal knowledge, and that he could not give evidence about occasions when he was not there during that period. Mr Sear said that there were spectators at the matches: the facility for anyone coming to watch is open on every recreation ground. The spectators could include people who lived locally. Mr Sear said there was no conflict between the players and the locals, other than the occasion when litter was left by the players. He agreed that Cherry Orchard is a large space, capable of housing lots of different activities at once.

4.30. In re-examination, Mr Sear was asked whether, when a pitch was hired to a particular team, there was a system which prevented the pitch being double-booked. He said that the excel system did not allow double bookings. If it was double booked there would be a conflict, because the teams paid money for the use of the pitch. There would be a problem if they had paid and someone else was using for football. Also if someone else was using the pitch for something else: if they had not paid for the facility, then that would be a problem.

4.31. I was satisfied that Mr Sear was an honest witness and I accept his evidence.

(3) Mrs Carol Davis

Honeywood, Braggs Lane, Herne Common

4.32. Mrs Davis provided a written statement dated 7th May 2009[28].

4.33. Mrs Davis has been a Parish Councillor of Herne and Broomfield Parish Council since the Parish Council was formed in 1996. She has lived in Herne since 1976. She is a member of Herne & Broomfield Local History Group, and is interested in the history of the Parish. She set out her knowledge of the history of the land, from her research. Herne Football team played on Cherry Orchard Playing Field as long ago as 1896. Until the outbreak of the Second World War, the field, together with most of the surrounding countryside, was in the ownership of Major B Prescott-Westcar of Strode Park. The Herne Football Club had the use of the field at a nominal rent for football, cricket and tennis. In the 1920s Herne United Football Club usually played their home games at Cherry Orchard. Village celebrations usually took place at Goldspots Meadow, rather than at Cherry Orchard. During the Second World War, Cherry Orchard was ploughed up to grow crops. After the war, the football club found itself without a field, as the ground had been sold in the meantime. By 1951 there was talk of restoring Cherry Orchard to its previous use. This met with some resistance from the public, as food was still rationed. A public inquiry was held on 24th October 1952 in relation to the compulsory puchase of 11 acres of land at Cherry Orchard, Herne for use as a recreation and playing field for the villagers. A petition with 650 signatures on it, supporting the Herne Bay Urban District Council, was produced to the inquiry. In 1956 St Martin's Fair was held on the application land, a Youth Fair having been held the previous year on Goldspots Meadow. The St Martin's Fair became an annual event.

4.34. Mrs Davis stated that the Parish Council's Finance and General Purposes Committee's agenda item 6 of 24th October 1996 contained a confidential clerk's report on grounds maintenance of the Cherry Orchard Recreation Ground, following a meeting between the clerk and Canterbury City Council's Finance Officer. The report stated that 5 football teams were using the ground on an alternate week basis, each playing an average of 10-12 matches per season, at £21 per game, yielding an estimated annual income of £1050-£1260. There was spare capacity on the ground for additional teams to play.

[28] O131

4.35. Mrs Davis stated that the application land had been used as an overflow car park on Bank Holiday Monday, 25th May 1998, in connection with a charity event "Yours for a Day" held on the new Thanet Way before it was opened to traffic the following Friday. Mrs Davis appended extracts from the Parish Council's 1998 minutes which stated that the Parish Council had been notified at the last minute that Cherry Orchard was to be used. The Clerk was instructed to protest strongly that the Parish Council had been given inadequate notification. The second extract recorded the City Council's response. Mrs Davis said that she knew that the permission of the City Council to use the application land had been sought by the joint organisers, the Rotary Clubs of Canterbury, Whitstable and Herne Bay and Forest of Blean. She stated that according to press cuttings at the time, people came from all around to the event, including Thanet, Canterbury and Whitstable.

4.36. Mrs Davis stated that she knew that the Parish Council had to ask the permission of the City Council to hold its Fun Days on the Cherry Orchard in 2004, 2005, 2006, 2007 and 2008, as she had helped to organise all those events. The City Council issued terms and conditions for the Parish Council's use of the field.

4.37. Mrs Davis also appended a number of photographs to her statement showing events on the Cherry Orchard, including a Canterbury City Council community development event in 2004, an event organised by the Parish Council for younger children, and various Fun Days. She stated that the Fun Days take over most of the field. The photographs showed the extent of the field used. The volunteers who organise the event go to the application land the night before and mark the ground out for the next day. A classic car show is held on part of the field, and a large area is roped off for safety reasons during the parade of the vehicles. No-one other than the stewards is allowed into the area. A Fun Dog Show takes place, and the area in which this is held is fenced off, to contain the competing dogs, and to keep the public out for safety reasons. Other areas are roped off, including areas for the coconut shy, darts game and rides. The people who provide the rides for the event are charged a fee to attend, as are the caterers. Stall fees are charged to outside stallholders. She remembered that in 2007 footballers who wanted to play on the space the event was going to use were moved on, as the organisers of the event had booked it. The Fun Days are widely publicised and attract people from a wide area.

4.38. Mrs Davis stated that the clubs which play football on the application land do not all come from Herne, but from other areas. She stated that the Parish Council had received many complaints since at least October 1999 onwards from residents, particularly those living in the adjacent service road off Canterbury Road, about parking on the surrounding roads. She appended an extract from the Parish Council's 1999 Minutes referring to this issue.

4.39. Mrs Davis stated that she occasionally walks across the application land at the weekend and sees football or cricket matches being played. She avoids going anywhere near the pitches in case she is hit by a ball or bowled over by a

player. She had never seen anyone else walking through a game or interfering with the clubs which had booked the field.

4.40. Mrs Davis reported that she had spoken to two former officers of the City Council, Katie Crux and Carl Barnes, who currently live in France. They had stated that there were problems with people playing golf on the application land and that they had written telling people not to play golf as it was dangerous. Mrs Davis stated that she had received a letter herself from a resident complaining that his window had been broken by a golfer, and appended an extract from the Parish Council's 1998 Minutes in which she reported its receipt. Mrs Davis said that the City Council put up "No Golf" signs at the Parish Council's request after complaints made by nearby residents in May 2001 and appended an extract from the Parish Council's 2001 minutes in which the clerk was asked to approach the City Council regarding signs.

4.41. In 1995/6 the Parish Council planted trees in the area to the north of the ball court. In 1998 the Parish Council paid for bulbs to be planted on the Cherry Orchard. They were planted by the City Council's Landscape Department's contractors.

4.42. In oral evidence Mrs Davis was asked about the neighbourhood as claimed by the applicant. She said that she had tried to work out where Herne was when they tried to get the Parish Council established, but that it was impossible because of the built up nature of the area. There was nothing on the ground to tell you where Herne finishes and Broomfield starts. She said that Broomfield Road as far as Gorse Lane is Herne. Her mother lived there, her sister lived there, and she had friends and neighbours there. The Parish Council was formed in May 1996. It was Herne and Broomfield, because they could not find a defining place to cut the two in half: they had joined together over the years. Herne Common she said was an outlying part of Herne. She now lives at Herne Common and writes Herne Common rather than Herne as her address: Herne Common is separated by fields and Curtis Wood park from the village. Dog walkers from Herne Common tend to walk in the woods either at West Blean or Curtis Wood park, because it is closer and more pleasant for just walking, if you do not want to play football or cricket or something. Mrs Davis has copies of several maps going back in time, and she thought that there were as many houses built in the 1930s in Broomfield as there were in Herne, although they were more scattered in Broomfield. She did not think that a distinction of old in Herne and new in Broomfield could be drawn, because building had gone on in both Herne and Broomfield in the last few years. Mrs Davis did not think the area marked as the neighbourhood was a cohesive area at all. She thought the different estates might be cohesive, or the people who lived around Curtis Wood park, or the cemetery perhaps, but not the area drawn in pink. The extended area was even further away and was not a cohesive area in her view.

4.43. Mrs Davis said that she assumed that the Kent Act sign went up in 1981, when it was new. She photographed it before February 2002. That was the last date on which she had looked at the photograph, when she looked at it again more

recently. When she photographed it, it looked like it had been there for some while.

4.44. Mrs Davis was asked about paragraph 23 of her statement and the "No Golf" signs: she said that the sign was put up not all that long after May 2001, although she could not remember exactly when, within a matter of weeks, probably, because of the safety aspect.

4.45. Mrs Davis said she goes to the playing fields occasionally, often on her way somewhere else, for instance to visit her mother, or to look at something for the Parish Council. She went more often when her children were young and she lived in Broomfield Road, between 1976-1991. Between 1984-1991, she would have gone at least once a week, she thought. At the weekends it can be very busy, but if you go lunchtime when children are at school, you may not see anyone, or just a lone dog walker in the distance. On a wet weekend, there might be no one or just one dog walker with a Mac on.

4.46. In cross-examination Mrs Davis agreed that most of information in her statement fell outside the relevant period. The 2004 Fun Day was in August 2004. She agreed that all the events mentioned in the same paragraph were outside the relevant period. The photographs and events mentioned in paragraph 15 were all after the application was made. She said that the main reason she put these in, was to say that they had to ask permission for these events. The classic car show is part of the Fun Days. She agreed that the Coaching Scheme referred to in paragraph 25 was outside the relevant period, but said that there had been other similar events before, within the relevant period, but she had been unable to find any evidence of those, and so had not mentioned them.

4.47. Mrs Davis was asked whether someone who lived in Broomfield Road would write their address as Broomfield Road, Herne, rather than Broomfield Road, Broomfield, and she said that she would have written Broomfield Road, Herne. The newest bit, beyond Gorse Lane, is Broomfield, and people living there would write Broomfield. Those houses were built later. There were only a couple of houses beyond there before the new houses were built. There is nothing to show that it changes, but she thought the Post Office recognised it. Gorse Lane is counted as Broomfield postal district. Mrs Davis agreed that Herne is a village and a community, but said there was a hamlet at Broomfield as well. There was a village in Herne, but there is not just a village any more. The village now is the centre part where the old buildings are, not where the new development has gone on since. She might say she was going down the village, meaning Herne Street, and the houses off it, maybe taking in the school. The application land is not within the area she thinks of as the village. One of the reasons they wanted a Parish Council was to bring a sense of community because there was not one. There might be 500-1000 people living in the area she has identified. There are 10,000 in the Parish. Her understanding of the village now is the old centre of Herne. She did not suppose that the people at one end of the area marked had anything to do with people at the other end. She did not think they had to know each other for there to be cohesion, but said that they at least needed to see each other. She

agreed that people might take a more modern view of what constitutes a village, but said there was nothing to demarcate a line.

4.48. Mrs Davis was asked where the information came from to support the information about the 1952 public inquiry contained in her statement: she said it came from the local newspaper, the Herne Bay Press, and she has a copy of the relevant edition at home. The St Martin's Fair had ceased, but she did not know when. Someone who lived in Mill Lane had sent in photographs to the local paper, and she had had a copy of that paper (and had brought it to the inquiry).

4.49. Mrs Davis was asked about the "Yours for a Day" charity event. She agreed that O138 was a report as to what was to happen, not what had happened. She did not attend the event. She agreed that her statement that that the application land was used for overflow parking was based on the Minutes appended to her statement, and that she could not state categorically whether or not it was in fact used on that day. She said that she had looked through the minutes and these were the only references she had been able to find. She could not say whether in fact the Cherry Orchard was used, and if it was, to what extent.

4.50. Mrs Davis said that the information in her statement as to the use being made of the land in 1996 repeated what was in the report.

4.51. Mrs Davis had used the application land whilst a football or cricket match was taking place, walking through. She sticks to the public rights of way. There are no gates, and there are public rights of way, so the land would not be shut. She had not been able to go on the grass on occasion because it was muddy, but otherwise there had not been a time when she had not been able to go on the grass had she wanted to.

4.52. Mrs Davis agreed that the Council might be concerned at the prospect of someone being hurt on their land by a golf ball or if something being broken by a golf ball. She agreed that was probably the primary motivation for erecting the signs. She said that the whole point was that people could not do just what they liked: it limited what people could do there. She agreed it was a specific sign to deal with a specific problem.

4.53. Mrs Davis assumed the Kent Act sign went up in 1981, because that was the year of the Act. The screws and the sign were pretty old when she photographed it. She agreed it was not necessarily put up in 1981, but thought it would not have been long after. The sign has always been in its present location. She agreed that the location is not very prominent. When she took the photograph it was legible. The photograph she took was at O323. The wording is not as clear in the photograph as it was to see, although half of the sign was missing, as the photograph shows. It is possible to read some of the words when the photograph is displayed on her computer. It was possible to see what section it was and what numbers. She had looked it up to see what the section was. She thought that even if it was clearly legible, people do not read things. She had to try to read it. It is on the side where the path is and

where the doors are. One might be more likely to notice the "No Golf" signs because they are newer, and simpler. She agreed that legal text is not the clearest way of communicating to the general public. Mrs Davis said she has always known that the area is owned by the council, and so she has never thought she was there as of right. She did not need a notice to tell her that the council could ask her to leave.

4.54. Mrs Davies was clearly strongly opposed to the application. I have borne this in mind when considering her evidence, but have concluded that her evidence was not coloured by this. Some of her evidence related to events which fell outside the relevant period. Insofar as her evidence related to her own use (with her family) and to events within the period, I have accept it. In particular, I found her evidence in relation to the issue of neighbourhood helpful.

(4) Mr William Whiffen
33 Ridgeway Road

4.55. Mr Whiffen provided a written statement which was undated, but which was signed at the end of April or beginning of May 2009. Mr Whiffen stated that he was the Chairman of Herne & Broomfield Parish Council, and had held that position for the last 13 years, since the Parish Council was formed in 1996. He had lived in Herne since 1984.

4.56. Mr Whiffen stated that the application land was originally compulsorily purchased in 1957 under the Physical Training and Recreation Act 1937. Canterbury City Council has owned the land since it became the local authority for the whole area as a result of the local government reorganisations of 1974. The land is currently held under the Local Government Miscellaneous Provisions Act 1976. Mr Whiffen stated that the City Council had maintained the area continuously since taking it over in 1974. The Council and its contractors had marked out cricket and football pitches and cut the grass on a regular basis. They maintain the pathways through the field and the boundaries around it. The City Council also maintains the children's playground with assistance from the Parish Council. The City Council and its contractors have hired out the football pitches and cricket square since 1974 and receive the fee income. There are currently three football pitches marked out for the winter season. The pitches are moved around on an annual basis, to stop the goalmouths becoming worn. During the summer months a different area is marked out for cricket.

4.57. Mr Whiffen said that the land is subject to section 32 of the County of Kent Act 1981. A notice to that effect has been displayed on the site for over 20 years. He appended a copy of a photograph of the sign in its present condition and a transcript of its wording to his statement.

4.58. Mr Whiffen stated that in his opinion the original application for village green status, which was refused, was submitted in an effort to prevent the Multi Use Games Area now on the land being built. He stated that Mr Bowley had also taken other steps to try and stop the MUGA being built, and referred to action taken by Mr Bowley which in his opinion had been an attempt to frustrate the

payment of a grant for the MUGA: he appended an extract from the Parish Council's Minutes, which referred to this matter having been put to Mr Bowley by Mr Whiffen at a Parish Council meeting. Mr Whiffen also appended various press cuttings, which report Mr and Mrs Bowley's public opposition to the MUGA and their stated intention in making the application to register the land as a village green of preventing the MUGA being built.

4.59. Mr Whiffen stated that the Police had on several occasions dealt with complaints about youngsters congregating in the area. He stated that since 2006 when the MUGA was opened, it has been well used and the incidents of anti-social behaviour have reduced.

4.60. Mr Whiffen stated that the Parish Council had worked with the City Council to improve the children's play equipment and to fence off the area to ensure that dogs cannot get in.

4.61. Mr Whiffen said that the City Council had held events for young people from Herne and Broomfield on the application land during the summer months since 2003. The Parish Council had held a Fun Day on the land since 2004, and had sought permission from the City Council for this. He appended copies of the application forms completed in respect of the August 2008 event.

4.62. Mr Whiffen stated that the Parish Council had on two occasions applied to the City Council for a lease of part of the Cherry Orchard: in 2005 to install the MUGA, and in 2008 to install the Outdoor Fitness Equipment. On both occasions the requested leases were granted.

4.63. In oral evidence Mr Whiffen said that he is no longer Chairman of the Parish Council. He did not stand this year, and someone else had become Chairman the week before the inquiry began.

4.64. Mr Whiffen said that his postal address is Herne Bay, CT6 7LL, but he always puts Herne and Broomfield after Ridgeway Road.

4.65. Mr Whiffen was asked where the majority of dog walkers on Cherry Orchard come from. He said he would not expect dog walkers from Herne Common to be on the land, because they had the Blean and Curtis Wood and Goldspots, which are better for walking dogs, and larger, which are more convenient. People who live from Ridgeway Farm to Albion Close would again go to Curtis Wood: it is more convenient and a better venue. There would be no point in going all the way to the playing field. When he had a dog, he always went to Curtis Wood. He sees people walking down with their dogs to Curtis Wood. His last dog died about 5 years ago. People from the area to the north west of the claimed neighbourhood, in Hunters Fostall, he thought were just as likely to use the application land as the people in Hillcroft Road, because the open space in Hunters Forstall was not so accessible. He thought at least just as many would come from outside as inside the pink line, because so many within the pink line have better alternatives. In the part where Broomfield is written, there are footpaths, but he thought only the people living close by the

playing field would use it to dog walk. Again, in Lower Herne, there were footpaths, which were just as easy and a more pleasant walk.

4.66. He was asked where the majority of children and parents taking them to play come from. Mr Whiffen said that the Broomfield area has more young families than the area immediately surrounding the playing field, which is mainly bungalows. He thought the chances were higher, if one saw a family having a picnic, that they came from outside the pink line than inside it. When the Parish Council carried out an investigation as to where the youngsters came from who were hanging about on the Recreation Ground, they found that they came from Broomfield, a couple from Greenhill, a couple from Beltinge, the other side of the Thanet Way. Some of them came from Herne. It was only about 15 children. He thought maybe 50% came from Herne, but probably less because the majority came from Broomfield. Curtis Wood has more family homes than the ones directly around the Cherry Orchard. At one time the Parish Council was told that they would be better off putting the ball court in Broomfield because most of the families came from Broomfield: that suggestion was by the supporters of the application, someone who was opposed to the Council putting the MUGA on Cherry Orchard.

4.67. Mr Whiffen was asked about the survey: he said that it was just a snapshot, out of interest, because of complaints about youngsters hanging around, but also to let them know the Council was interested in them. There was no written record of the survey. It was carried out when they were thinking about having a youth club, a good few years ago. There is no record at all: the information given was just Mr Whiffen's recollection. The Parish Council would like to find some land in Broomfield, because they think that one facility is not enough for such a large area. The site suggested was too remote, and they would not have put it there, even if they had had the money. It is where the BMX track is now, off Ford Hill, where "disused campsite" is marked on A10.

4.68. Mr Whiffen agreed with Mrs Davis's evidence that there was no sense of community before the Parish Council came into being, and that the reason for making the area Herne and Broomfield was to instil that sense of community. He looks on the whole area as one community. Mr Whiffen said he thought that there was a certain amount of snobbery: Broomfield is downmarket, whereas Herne was a village, although it is not any more. He said that no-one who had given evidence to the inquiry, he thought, actually lived in the village as it was. He said that people who lived in quite new houses referred to themselves as "villagers" and one could make of that what one wished.

4.69. There are no playing facilities in Curtis Wood or Goldspots. Mr Whiffen agreed that anyone in the whole community who wants a play area has to go to Cherry Orchard, whether they live within or without the claimed neighbourhood. Mr Whiffen said that dog walking is a minor activity so far as Cherry Orchard is concerned. If one wanted to fly a kite, that could be done at Goldspots. He said it was personal choice and opinion. He could not say that for all recreational activities people who live in his road would use Curtis

Wood or Goldspots, because some activities are more suited to Cherry Orchard: that is why the Council put the ball court there.

4.70. Mr Whiffen confirmed that the photograph at O323 was taken by Mrs Davis and he had no evidence as to when it was taken: the original intention had been that only one of them would give evidence, and when it had been decided that both of them would give evidence, there did not seem to be any point in removing some of the exhibits from his statement. Mr Whiffen was asked about his statement that the notice had been displayed for over 20 years. He cannot remember when he first saw the notice, but assumed it would have been erected shortly after the Act was passed. Mr Whiffen was taken to O327: the quotation at the end of the article reflected his sentiments then and now. He said he was corrected by a District Councillor, who said it was paid for by the rates of everyone in the Canterbury area, and was not just for the local community.

4.71. Mr Whiffen was taken to O329 and O330, and he agreed that Canterbury City Council was not mentioned in connection with the rejection of the application. Mr Whiffen said that the information in the articles would have been given to the press by the applicant: there were no press at the KCC meeting. Mr Whiffen was at the meeting, but cannot remember exactly why the application failed. Mr Whiffen was asked whether it was likely, based on the press coverage he had seen, that people who lived in the area would know why the application had failed. He agreed that it was unlikely that people would know, and said not many people read the local press. He agreed that they probably would not even know that Canterbury City Council had objected to the application.

4.72. Mr Whiffen was clearly opposed to the application, but I did not consider that his evidence was coloured by this. He gave careful evidence, which I accept.

(5) Mr Richard Davidson

Canterbury City Council

4.73. Mr Davidson provided a written witness statement dated 7th May 2009[29]. Mr Davidson is an Assistant Contract Manager for Canterbury City Council. He has worked for the Council for the last 16 years. Mr Davidson manages part of the Council's contract with Serco for Environmental Services, including grounds maintenance in the Herne Bay area. Serco is responsible for the maintenance of the sports pitches and for the sports pitch booking service. He liases with Serco and ensures that the setting up of the various sports pitches and the maintenance of the field is carried out to the standard set in the contract. He appended to his statement extracts from the Council's 2005 contract with Serco setting out the specification for the outdoor sports facilities at Cherry Orchard and sheets listing the jobs carried out to the Cherry Orchard in 2005, as an example of the kind of work which has to be done each year.

[29] O77

4.74. Mr Davidson produced a plan on which the approximate position of the three football pitches and the cricket square and outfield on the application land were shown[30]. He stated that the pitches were not always marked out in exactly the same place because during the football season the goal mouths and centre circle receive much wear. The goals remain in position throughout the football season and are removed during the cricket season. The Council re-marks the pitches for the start of a new playing season insofar as it can, to ensure that play does not continue to wear out the same area of turf.

4.75. Mr Davidson stated that the areas marked on the plan for the football pitches do not include all the land that is used for games of football. Depending upon the level of the league in which the teams were playing, provision had to be made at each match for a run-off area around the pitch, typically a strip of 10 metres width behind each goal, and up to 5 metres wide down the side lines, allowing the linesmen and players to play without causing accidents to spectators. He said that the area used for formal sports is therefore larger than the area of the pitches shown on the plan. The same applied to the cricket pitch: when games are played, cricketers use the area beyond the outfield boundary when a six is hit, for access to the pavilion and to view the score board.

4.76. Mr Davidson appended to his statement a list of teams which had hired the Cherry Orchard playing field between 1998 and 2007, with the fees paid, where that information was available. The fees are paid to Serco and are set by the City Council each year. The income from the bookings is retained by the City Council. He also appended the latest sports and recreation facilities' booking information, including terms and conditions of hire.

4.77. Mr Davidson said that he was aware that other organisations sought the City Council's permission to use the field from time to time, including the Parish Council for its annual fun day, which used the whole of the field.

4.78. Mr Davidson stated that during the 1980s and 1990s the cricket square was often roped off during the winter to prevent people walking across it and damaging it, but this practice was discontinued when the Council discovered that young boys were using the ropes as goals for informal football games, and causing damage to the square. Parts of the football pitches, particularly around the goalmouths, are roped off when the areas are re-seeded each year to allow regrowth.

4.79. In oral evidence Mr Davidson said that prior to 2003 he was a Horticultural Technician, mostly dealing with grass cutting and tree maintenance works. He has had his present job since about January 2003. Prior to 2003 he was aware that Cherry Orchard was one of the Council's Recreation Grounds and that it was used for sports usage. The area is a public open space, and a range of activities take place on it.

[30] O84

4.80. In addition to the matters mentioned in his statement, there is also use by spectators, and the overspill of play, for instance shots going behind the goal. There is flexibility in the layout of the pitches, and space for linesmen and for players to take corner kicks. In relation to cricket, balls may be struck for six, and the umpires need vision through to the pavilion so that they can communicate 4s and 6s, leg-byes and so on. Mr Davidson produced a further plan, marked with a solid red line, which he said showed the area which is used for marking playing surfaces, play that spills over, spectators, linesmen, access to the pavilion, to allow flexibility in marking the pitches, and for areas behind the goal. The dotted line showed an additional area that would have been used before the MUGA was installed about 5 years ago. Before that there was more flexibility to move the pitch. The dotted line marks the extent of how far the sports facilities could have gone in that direction before the MUGA was built.

4.81. The extent of the outfield depends on where the wicket is within the cricket table, the area marked 10 on the plan. There is scope for 5-6 wickets to be marked on the table, and the outfield is marked from the centre of the wicket. The boundary can therefore move within the scope of the site. 11, 18 and 17 are areas marked out for informal practice and training, for football or possibly rounders. A rounders court might be marked out there. For football it might be practice squares, where players could practice passing or strategic moves in a small area.

4.82. In relation to paragraph 7, Mr Davidson was taken to O88. He agreed that set out the hire charges, and that O85-87 set out what people were hiring and what they paid. Mr Davidson agreed, looking at the detail, that the vast majority of teams booked all the facilities.

4.83. Mr Davidson said that the toilets are normally opened at 07:30, and in the winter closed at around 16:00, summer at around 17:00. They are locked when closed. Mr Davidson was aware that sport was being played at Cherry Orchard before he had responsibility for it. He started at Canterbury in 1992. The bookings office was at the Westgate Hall in Canterbury and the bookings were dealt with by Margaret Pamplin. She was there from when he started in 1992. The league or the team would ring her, and there was a system of paying for the bookings: the clubs were billed direct. Mr Davidson was not aware of any complaint that a game had been interfered with by local people.

4.84. In cross-examination Mr Davidson said he lives in Martinmill, between Dover and Deal. His involvement with Cherry Orchard is purely through his job. He has only visited in connection with his job. He works Monday to Friday, and would only have visited the Cherry Orchard on a weekday. The vast majority of matches take place at the weekend. The mid week matches take place in the evenings. Mr Davidson has not been at the Cherry Orchard when one of the matches is taking place. His evidence about linesmen, where spectators stand, and so on it based on his experience of football and cricket usage on recreation grounds generally, but not on Cherry Orchard specifically. He can only make assumptions as to where spectators stand at Cherry Orchard. Again

the information in paragraph 6 is general principle, which is relevant to all grounds, not specifically Cherry Orchard.

4.85. Other than the absence of complaints, Mr Davidson had no personal knowledge of what may or may have happened on the Cherry Orchard.

4.86. Mr Davidson did not think that people using the land for walking the dog would necessarily be outside the red line. The red line includes flexibility for moving the pitches. He agreed that the diagram resulted from general principles, although he said the red line was unique to Cherry Orchard. The map is a GIS mapping map. The locations of the pitches he had drawn on, not for the purposes of the inquiry, but these are maintenance plots for the contractors. The contractor would have a copy of the map with other layers (for instance the litter bin layers) which he had taken out for simplicity. The red line he had added for the inquiry. The plot numbers are identified as football pitches on the Council's database, and there are various maintenance regimes which apply. He was asked about the moving of the pitches: he said that the position shown is indicative of the position of the pitches, as is the cricket outfield. As far as he is aware there have always been three football pitches and a cricket outfield and table at Cherry Orchard.

4.87. The run off area is not something that the Council marks off: the area he is referring to in paragraph 5 is what he would consider a reasonable provision: the provision he thinks is sensible. At the start of a football season, the layout of the pitches would take account of a reasonable safety zone between them by the inter-relationship between the position of the pitches. The pitches have to be a certain size, and one fits them in so that there is sufficient space to allow for this between them. He does not know whether the space is used for this purpose in fact, because he has not been there during a match.

4.88. The fee is applicable to the playing surface and to the pavilion facility if required: the pitch, rather than the whole of the Recreation Ground.

4.89. Mr Davidson's personal involvement with the application land only began in 2003. Much of the information contained in his statement was derived from the City Council's records. His evidence as to how the area has been managed and marked out throughout the relevant period is consistent with the other evidence before the inquiry and I accept it.

(6) Mr Robert Scales

11 Chaucer Avenue, Whitstable

4.90. Mr Scales provided a written witness statement dated 2nd May 2009[31]. Mr Scales has lived in Whitstable since 1973. He was the secretary of Broomfield Crusaders football team from January 2000 until 2009 (8 years). As secretary he helped to organise many of the team's fixtures. The team play their home games at the Cherry Orchard Playing Fields. There are three pitches there which are hired through SERCO, Canterbury City Council's contractors. Each club pays a hiring fee. Mr Scales stated that Cherry Orchard has been the

[31] O313

centre for local football teams playing Saturday and Sunday football ever since he moved to East Kent. His sons have played many games of junior football on those pitches, and he has attended many matches at Cherry Orchard over the years. Local residents often come to watch the games. They do not walk across the pitches whilst games are being played. Mr Scales stated that he had never known a match to be disrupted by the general public in any way, although perhaps very occasionally a dog might escape and need to be rescued from the pitch.

4.91. In oral evidence Mr Scales said that he resigned his position as Secretary earlier this year. He has looked at the records as to where the players for Broomfield Crusaders have lived over the last 5 seasons. During that period only one player came from Herne and Broomfield Civil Parish, the addresses of the rest are split between predominantly Herne Bay, also Canterbury, Whitstable, and a couple from Ashford and London. Mr Scales said that he doubted that any of the players for the away teams would come from Herne. The league is Herne Bay and Whitstable Sunday Football League, and it includes teams from as far away as Faversham, Canterbury, Whitstable, and a couple of teams from the Thanet area.

4.92. Mr Scales moved to East Kent in 1971. His three sons played junior football from 1980 onwards. He has seen at least 20 games a season since he became Secretary: a total of at least 120 games. If a game was going on the local residents with dogs always walked around the pitch. They would never walk across the pitch. The dog escapes were very rare, but he had seen it. After the dog has escaped, the owner would usually put the dog on a lead. It was purely an accident. The game stops, the referee would blow the whistle, and the footballers and the owner collectively would endeavour to catch the dog.

4.93. In cross-examination Mr Scales was asked about the away games: the away games were on other pitches. All the teams have a home pitch, which most of the time is a council-owned pitch in the area. The games in which he was involved were Saturdays and Sundays. During the summer the club might have used the Cherry Orchard for pre-season training, but he did not play cricket. A match lasts for 90 minutes. Mr Scales' team played on a Sunday; he knew of other teams which played on a Saturday. There are three pitches, and Mr Scales said there is a dearth of pitches in the area, so he thinks it likely that the pitches are fully booked. He agreed it was very unlikely that one team would play there more than once in a weekend.

4.94. When Mr Scales' team was there, there would be other games on the other pitches. There would also be spectators: if there were 20 people watching that would be quite a good crowd. Those would be predominantly local people. He thought there would be a mix of people supporting the team who might live in Herne Bay and people out on a Sunday walking the dog who would stop. It might be 50-50. Mr Scales said that he did not know whether dog walkers might come from outside the Parish boundary, and local people would know better, but he agreed that it was likely that those without a connection to the team who came to watch would come from within the Parish boundary.

4.95. Mr Scales was asked about the dog escapes. The players would help the owner with rescuing the dog, and would return it to the owner. If children were having an informal kickabout and their ball ended up on the pitch, similarly the players would return the ball to the children.

4.96. The ball sometimes does go outside the pitch: if a ball went outside the pitch, onto another pitch, then they would give it back. There had to be a bit of give and take when you have football pitches in close proximity. If the ball went off the pitch onto the surrounding land, similarly a dog walker might return it: they would not run off with the ball. That too was a similar situation.

4.97. Mr Scales did not think about making a formal complaint about a dog running onto the pitch: it was a small incident. It was not a big enough deal.

4.98. Local residents did not complain about balls going off the pitch either. Mr Scales said that there had been no complaints at all to his knowledge about his team: there was a good local give and take: they enjoy watching the football and the footballers respect what they do.

4.99. I was satisfied that Mr Scales was an honest witness and I accept his evidence.

(7) Mr John Hawkins

4.100. Mr Hawkins provided a written witness statement dated 6th May 2009[32]. Mr Hawkins is the Events and Facilities Manager for Canterbury City Council. Since the late 1990s the City Council has managed the use of the amenity areas and open space that it owns for public events through a Multi Agency Events Group (MAEG). The MAEG regulates large scale public events. Mr Hawkins chairs the group. From the MAEG records Mr Hawkins was able to confirm that the City Council had given permission for the following events on the application land: a Fun Day in 2004, 2007 and 2008. Smaller scale events are approved by Street Scene. The events approved by Street Scene on the application land included a Neighbourhood Wardens Summer Programme organised by the City Council's Community Development department in August 2003 and Jubilee Event organised by Herne Parish Council in June 2002.

4.101. Mr Hawkins, as a locally resident teenager, had played organised local club and league football at Cherry Orchard in the 1960s.

4.102. In oral evidence Mr Hawkins was asked about the events mentioned in paragraph 9 of his statement: the Neighbourhood Wardens Summer Programme in August 2003 and the Jubilee Event in June 2002: he said that he knew from his records that the events were booked, but he could not say what happened on the day.

4.103. In cross-examination it was put to Mr Hawkins that the relevant period for the purposes of the application was January 1984 - January 2004. He agreed that

[32] O250

all of the events mentioned in paragraph 7 of his statement took place after the end of the relevant period.

4.104. The group that Mr Hawkins chairs (MAEG) was set up to deal with the fact that various events were taking place in public places and there were clashes (more than one group wanting an event on the same day) and problems. There had been a growth in events since the group was set up. As organisers get more organised, the group encourages them to use plans and risk assessments. The system has been developing since the mid 1990s. The system has been used in relation to Cherry Orchard, because they had records of the inquiries in 2002 and 2003.

4.105. The handwritten note on the side of O253 was made by Mr Hawkins. It relates to the Jubilee Event. In the Jubilee year there was lots of talk and things ran very late: at the last minute a lot of events took place. Lots of events took place which were not fully documented. There is evidence in the records that an application was made, but nothing in the documents to show that the event took place. (Mr Ground stated that the Parish Council's information was that an application had been made, but no event actually took place). Mr Hawkins agreed he had no personal knowledge of whether a particular event took place or what happened, other than what was in the records. He was unable to give any information about the August 2003 event, other than that an inquiry had been made to the City Council.

4.106. Mr Hawkins agreed that he could give no evidence in relation to football during the relevant period.

4.107. Mr Hawkins was careful not to overstate his evidence, for instance he acknowledged that he could only say from his records that events were booked to take place on the application land, rather than that they had taken place. I accept his evidence.

(8) Mr Richard Griffiths

4.108. Mr Griffiths provided a written witness statement dated 6th May 2009[33]. Mr Griffiths is the Outdoor Leisure Manager at Canterbury City Council. He has held that post since February 2008. Prior to being employed by Canterbury City Council he worked in local government in Buckinghamshire and Yorkshire.

4.109. Mr Griffiths set out the ownership history of the land and appended to his statement a title report in relation to the land produced by Ms Sue Trevett of the Legal and Democratic Services department of Canterbury City Council for the purposes of the inquiry. I have summarised that document below, in the section dealing with the documents relied upon by the Objector. Mr Griffiths stated that the land (with the exception of two small parcels coloured blue on O174) was acquired by the Herne Bay Urban District Council on 17th April 1957 under the Herne Bay Urban (Cherry Orchard Playing Field) Compulsory Order 1952. A number of easements have been granted over the land,

[33] O160

including a right to construct and maintain sewers. A gas supply pipe and a foul sewer run under the land. Two parts of the land have been demised by two leases granted by the City Council to the Parish Council dated 2005 and 2009.

4.110. Mr Griffiths set out the planning policy relevant to the application land in his statement and summarised its planning history. The application land is covered by the Council's public liability insurance policy on its playing fields and recreation grounds.

4.111. In oral evidence Mr Griffiths was asked about the letter at O247 appended to his statement. He said that the letter is copy of a letter from the Chief Executive of the Kent County Football Association sent in early May 2009. All organised teams have to be affiliated to the Association, to ensure that they have insurance and are properly regulated.

4.112. In cross-examination Mr Griffiths was asked about the information contained in his statement as to the ownership history of the land. He confirmed that the information came from Sue Trevett's report at O166: he relied on the legal advice from the Council's Legal Section.

4.113. The first review of the Canterbury District Local Plan mentioned in paragraph 8 was a 2006 review. The City Council has public liability insurance in respect of the land and he agreed that the Council would be interested in any health and safety issues on the land.

4.114. If an incident occurred where the general public caused the game to be stopped and abandoned, the referee would have to make a report to their Association. The Kent County Association had received no such reports. If the match were stopped and resumed no report would be made. If the public would not let the game continue, for instance if they refused to get off the pitch, then there would be a report.

4.115. I accept Mr Griffths' evidence.

Evidence of witnesses on behalf of the Objector who did not give oral evidence to the inquiry

4.116. The Objector relied upon the witness evidence contained in an email written by Ryan Curtis on 27th April 2009. Mr Curtis stated that he had played Sunday League football for AFC Smugglers on the application land for the last 3 years. During that time there had not been any complaints and they had never been asked to stop playing by a member of the public. They had never had a member of the public walk across the pitch or attempt to do so during a game. No-one had walked across the area they were using when they were training either.

4.117. The Objector also relied upon the witness evidence contained in a short undated letter written by Mr Steve Richards, the Manager of RS Beltinge Football Club. Mr Richards stated that he had been the manager of that team for the previous three seasons during which period the team had played over

70 home games on the application land. The team attracts a fair number of spectators, some known to the players and a fair few strangers, but had never had a problem with any members of the public. No-one had walked across the pitch when the game was in progress, and they had never had to ask any member of the public to vacate the playing area prior to kick-off.

4.118. Both these statements relate to a time after the end of the relevant period, however, their content is entirely consistent with the evidence of what happened during the relevant period and supports that evidence.

Documentary evidence on behalf of the Objector

4.119. The Objector submitted a number of documents to the inquiry. I have re-read all the documents submitted, whether specifically mentioned in this report or not. Many of the Objector's documents were appended to the statement of a witness and were referred to in the course of evidence. Those documents are summarised where necessary in the section dealing with that witness's evidence. I set out here a summary of those documents not already mentioned and which I consider most relevant to the issues before the inquiry.

4.120. Ms Sue Trevett of the Legal and Democratic Services department of Canterbury City Council produced a title report in relation to the land for the purposes of the inquiry. Her report was appended to Mr Griffiths' statement at O166. She stated that the bulk of the land was acquired by the City Council's statutory predecessor, Herne Bay Urban District Council, on 17th April 1957 from A E (Estate Developers) Limited for the sum of £1550 under the statutory powers contained in the Physical Training and Recreation Act 1937, for use as a playing field. A copy of a Conveyance dated 17th April 1957 and made between (1) AE (Estate Developers) Limited and (2) the Urban District Council for the Urban District of Herne Bay was included within the Objector's bundle at O404 and supported this statement. Two small parcels of land coloured blue on O174 were acquired on 16th April 1962 from Taylor Woodrow Homes Limited for the sum of £50, again under the statutory powers contained in the Physical Training and Recreation Act 1937, for use as pleasure grounds. The 1962 Conveyance was not included in the documents before the inquiry. These parcels were registered on 11th August 1960 under Title Number K154706. The land acquired in 1957 was unregistered until 27th December 2007, when it was added to Title Number K154706, following an application for voluntary registration. Official copy entries of Title of K154706 were included in the bundle at O170 contains entries which confirm that the land originally within that title was the subject of a Transfer dated 16th April 1962 and made between (1) Taylor Woodrow Homes Limited and (2) Herne Bay Urban District Council.

4.121. A letter dated 12th November 1957 to the Secretary of the Ministry of Housing and Local Government states that the Cherry Orchard Playing Field was the subject of a Compulsory Purchase Order, confirmed by the Minister of Housing and Local Government in February 1953 and was purchased compulsorily as an open space to be used predominantly by the residents of

the village of Herne.[34] This letter appears to have been written by the Clerk to Herne Bay Urban District Council. The Clerk to Herne Bay UDC wrote to the Regional Manager of the Central Land Board by letter dated 12th November 1957 stating that the land was intended to be no more than a ground for the village football and cricket teams.[35] The Regional Manager replied by letter dated 19th November 1957, inquiring as to what statute and particular section the land had been acquired, and asking for copies of resolutions of the Council and any of its committees, together with correspondence with the parent Government Department demonstrating that the intention at the time of acquisition was to use the land as public open space.

4.122. The City Council produced two statements apparently drawn up in connection with the proposal to compulsorily acquire the land as a playing field, which set out something of the history of the application land: the first a statement of Stanley Frederick Oliver[36], and the second a statement of Major Herbert Alfred Brett[37]. The statements suggest that the land was used for sports (including cricket (for which there was a pitch laid out), football, tennis (for which there were two courts), hockey (for which there was a pitch) and golf), both before and after the First World War, until the Second World War, when the south part of the field was ploughed up under compulsory cultivation. At that time the field was owned by the Squire, Major B. Prescot-Westcar, who lived at Strode Park. He took only a nominal rent in respect of the field.

4.123. The City Council provided a very poor quality copy of some minutes of what I assume was a meeting of a committee of Herne Bay Urban District Council, which took place on 7th November 1956[38], and at which a report of the Surveyor on the subject of the application land was considered. It appears from those minutes that the land had not at that date yet been laid out as football or cricket pitches but was in irregular use. The committee resolved to seek information about the cost of the various options which it was considering for laying the ground out. There are further minutes, the date of which is illegible, but which appear to relate to a later meeting[39] from which it appears there was a concern, three winters after acquisition, that the ground was not being much used. The ground had a hole running across it, which the committee resolved to have filled in.

4.124. The City Council provided correspondence dating from the 1950s and 1960s which suggested that the application land had been used for various events by various organisations, with and without charge, during those years. The events included parking for Cripplecraft's annual fete (1955[40], 1956 and 1957[41]), a St Martin's Fair in 1956[42], at least two annual shows by the Herne

[34] A/328
[35] A/329
[36] O/39
[37] O/42
[38] O/43
[39] O/45
[40] O/36
[41] O/26
[42] O/29

& District Village Produce Association (1957[43] and 1958[44]), and a friendly game of cricket organised by the Women's Institute in 1956[45], the start of the Herne to Herne Bay Walk in December 1964[46], and at least two annual shows by the Herne Horticultural Society (1964[47] and 1965[48]),

4.125. A grant application was discussed for a grant to erect a changing-room on the application land in 1957[49].

5. Closing submissions

5.1. At the conclusion of the inquiry I invited the representatives for the Applicant and for the Objector to make closing submissions. Both counsel had produced written opening submissions and amplified those by submitting written closing submissions and orally.

6. Objector's closing submissions

6.1. Mr Ground submitted that this application was an application pursued by an applicant who does not herself know the effect the application would have on the use of the land and on which she has not sought advice. If successful, the application would threaten the use of the land as a recreation ground. On any view it would make it much more difficult to use it for a recreation ground and possibly impossible. The applicant had not explained this to those who professed support for the application because she neither knew about it nor had taken advice on its effect. Mr Ground submitted that the application land should be left under the regime that it is run under at the moment, which has been successful and does not jeopardise its use as a recreation ground. The application, if successful, would restrict the right to go onto to the land from the many, to only those within the neighbourhood

6.2. Mr Ground submitted that the application was doomed to failure for the following reasons:

> (i) The issue had already been determined by the County and determining this in favour of the applicant would be re-opening issues fundamental to the decision contrary to the House of Lords decision in *Thrasyvoulou*.
> (ii) Looking at this matter from the point of view of the landowner and its licensees it would not have appeared to them that the local inhabitants were asserting a right to use the land because they always or overwhelmingly deferred and adjusted their behaviour in favour of the landowner/its licensees. This applies to all the land.

[43] O/25
[44] O/22
[45] O/27
[46] O/17
[47] O/20
[48] O/19
[49] O/23

(iii) The alternative way of putting this is that every time there was deference to the user with permission there was interruption of the use by inhabitants for other LSP without permission.
(iv) The alternative way of putting this is that there was implied permission brought about by the conduct of the landowner.
(v) The applicants have failed to show that the use was trespassor. It was thus by right.
(vi) The burden is on the applicants and they have failed to show that there is a locality that they rely on which has existed for the 20 year period. They have also failed to show a neighbourhood with any cohesiveness.
(vii) Use was not predominantly by people from within pink line showing the neighbourhood, or even from within the wider area (the locality). The applicant has not shown that the land has been used by a significant number so far as the wider area is concerned.
(viii) So far as the buildings on the land are concerned they quite clearly have been used by permission and have been closed at night.
(viii) Finally, the Objector relied on section 123 of the Local Government Act 1972 and the dicta of Lord Scott in *Beresford*.

Res judicata

6.3. Mr Ground submitted that the matter has already been decided by the County Council and the authority should not re-open matters fundamental to the disposal of the first application. This is an application which is made on precisely the same grounds as the previous application of 2002 which the County Council rejected on 21 March 2003. There have been no changes of circumstances since then alleged by the applicant apart from the decision in *Beresford*. The reasons for the rejection of the original application was that "…local people have not used this Playing Field as of right but with permission"[50]. It is clear that the observations of Lord Bridge in Thrasyvoulou v Secretary of State for the Environment[51] are applicable to decisions under the Commons Registration Act 1965. This is the view of Vivian Chapman QC.[52] The same logic of res judicata should be applicable to these decisions as to decisions of a planning authority when an inspector had made a finding. In fact a previous decision on an identical application[53] by the identical body is even more deserving of a finding of res judicata. Mr Ground referred me to *Thrasyvolou* at 289C-D and submitted that Mr Chapman's opinion was correct. On the facts in *Thrasyvolou*, the planning authority was bound by an inspector's decision on a previous application, which is a less obvious application of the principle than the factual position here. The basis of the decision is set out in the opinion of Mr Petchey at page 60 and was that the use was not as of right because of the basis it was held under and because of the hirings of the fields. Nothing has changed in the law to disturb either finding. Neither Beresford nor the Trap Grounds changes that sound decision.

[50] See 21 March 2003 Regulation Committee Panel report quoted by Mr Petchey at O60.
[51] [1990] 2AC 273 at p 289
[52] See O637.
[53] That was the applicant's case in examination in chief

Thus following *Thrasyvoulou*[54] this application should be refused because the matter has already been decided.

Deference The Law

6.4. Mr Ground submitted that in *Regina (Lewis) v. Redcar and Cleveland Borough Council*[55] it was held that where the users deferred to the owner's use, then this was not likely to convey to the reasonable owner the impression that they are claiming the right to use the land. It is quite apparent from the judgment of Dyson LJ that the user needs to be such as to be an assertion of a public right. See paragraph 36 reliance on Lord Hope in Cumbernauld and see paragraph 38 where he quoted the point from Lord Bingham in Beresford that:

> *"Lord Bingham was not casting doubt on the need to establish that the user was sufficient to bring home to the reasonable landowner that the local inhabitants were asserting a right."*

The way that Dyson LJ then sets the test is at paragraph 40 where he says:

> *"In principle, however, the question remains the same: has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land? That will depend on an analysis of the manner and extent of the user."*

6.5. Mr Ground submitted that it was apparent that one looks at matters from the point of view of the landowner. The landowner if he can use the land for his own purposes and people defer to that use is not put on notice that people are using the land as of right. The owner does not need to use all of his land. The landowner cannot be required to speculate what the reason may or may not be for the deference. He is not required to be mind readers but can take the deference at face value. It is in the determination of this issue that deference and interruption is relevant [para 41]. In *Redcar* the local inhabitants voluntarily desisted from interfering with the owner's activities but were not physically prevented from doing so.

6.6. One of the hallmarks of deference is whether the recreational users adjust their behaviour.

> *"The inconsistency will manifest itself where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees). By adjusting their behaviour, they give the impression to the owner that they are not claiming a right to do what they are doing. That leads the owner not to regard the users as acting as of right."*[56]

[54] As applied by Vivian Chapman QC
[55] [2009] EWCA Civ 3
[56] Paragraph 45

6.7. The use by the landowner does not need to be that frequent. We know that because Dyson LJ approved[57] expressly of what was said by Sullivan J at the end of paragraph 85 of Laing Homes[58] and found this to be consistent with what Lord Hoffmann had said in the Trap Grounds. In paragraph 85 of Laing Sullivan J said:

> *"It would not be "as of right", not because of interruption or discontinuity, which might be very slight in terms of numbers of days per year, but because the local inhabitants would have appeared to the landowner to be deferring to his right to use his land (even if he chose to do so for only a few days in the year) for his own purposes."*

Dyson LJ held:

> *47 ....."But in a case where there is a conflict between the activities of the owner and the local inhabitants, and the activities of the local inhabitants can only be accommodated with those of the owner by the local inhabitants deferring to the owner's use, then the activities of the local inhabitants may not have the appearance of asserting a right against the owner. On the contrary, those activities may have the appearance of an acknowledgment by the local inhabitants that they have no right at all. Those who always defer to the owner whenever his competing use of the land threatens to interfere with their use of the land are not likely to convey to the reasonable owner the impression that they are claiming the right to use the land.*
>
> *48 In the present case, the question of whether the local inhabitants were using the land "as of right" depended on the extent to which they deferred to the golfers where there was a conflict between the two uses. There was no doubt that the local inhabitants indulged in sports and pastimes continuously over the land for a period of more than 20 years. Their use was not trivial or sporadic and it was nec vi, nec clam, nec precario. The full extent of their user of the Application Site is set out by the Inspector at [171] and [172] of his report dated 14 March 2006 and summarised by the judge at [33] of his judgment. The manner of their user in relation to the user by the golfers is set out by the Inspector at [175] of his report and repeated at [3.2] of his report dated 9 June 2006. It is summarised and interpreted by the judge at [39] to [41] of his judgment. In short, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers. Crucially, the Inspector found that the local inhabitants "overwhelmingly deferred" to the golfers.*
>
> *49 As I have said, it was a question of fact and degree to be resolved by the decision-maker whether the local inhabitants did sufficient to bring home to the reasonable owner of the Application Site that*

[57] At paragraph 46
[58] See paragraph 46 of Redcar

they were asserting a right to use it. In making that finding, the extent to which they deferred to the rights of the owner (ie, the golfers) was a relevant factor. The greater the degree of deference, the less likely it was that it would appear to the reasonable owner that they were asserting any right to use the land."[59]

6.8. It is interesting to note the view of Vivian Chapman QC in the Ryebank case where he found that where there was deference to the authorised use for playing fields that:

> *"I consider that the unauthorised use by local people does not appear to the landowner as the assertion by local people of a legal right to use his land"*[60]

6.9. This analysis is entirely consistent with the way the law was put later in Redcar and so correctly anticipated the analysis of the Court of Appeal. The Vivian Chapman QC decision in Jenny Lane is also consistent with the way the law was put in Redcar and the approved of parts of Laing. The reasoning there was as follows:

> *"It seems to me that it follows from the* Laing Homes *case that the fact that the North Field was used for rugby training and hay-making and that informal recreational users deferred to the rugby and hay-making use interrupted informal recreational user as of right. I think that this makes good sense. It would be very curious and unfortunate if a landowner makes use of his land and tolerates informal recreational use which does not interfere with his own use, only to find that, as a result, the land becomes subject to public rights which prevent him from continuing to use his own land in the way in which he has previously used it."*[61]

6.10. Charles George's report in the *Hythe* case[62] was written without the benefit of Redcar and without knowing that the Court of Appeal clearly took the view that deference can clearly defeat a village green application because the owner would take the view that the user was not as of right. We can see that he was hampered by not having Redcar because at paragraph 61 he asks himself the question of what then survives of the principle of deference and then analyses it differently from the Court of Appeal. His conclusion is that the argument is highly questionable based on deference and recommends the registration authority not to base it decision on that ground, whilst recognizing that the arguments are finely balanced.[63] Not much weight should be placed on his non-recommendation on the deference point.

6.11. Thus in terms of the law, it is clearly better to follow Redcar and Mr Chapman whose analysis is consistent with Redcar and who made a decision on this basis rather than saying it was finely balanced.

---

[59] See page 431 OB
[60] See O599 at paragraph 313.
[61] See O639/
[62] A459 dated 15th February 2008, at A517.
[63] See page 517/518 AB

The Facts here

6.12. Mr Ground submitted that the principle of deference is applicable here because the use of the local inhabitants for recreation overwhelmingly deferred to the use of those with permission of the City Council. The applicant does not allege that local inhabitants interfered with football or cricket matches. Use of the football pitches was a regular event with many teams playing there and many hirings. The same logic applies in this case as in Redcar. Looked at from the point of the landowner and his hirers, the use that they were making of the Cherry Orchard playing fields was use for playing fields. Since there was always deference to that use, the use by the inhabitants was not sufficient to bring home to the landowner that the inhabitants were asserting a right to use the land.

6.13. The witnesses for the Objector were entirely clear that there has always been deference to the playing field use. The playing field use is the use of the owner as defined by Dyson LJ in *Redcar* at paragraph 39 (where he includes use by the owner, his lessees or licensees).

Robert Scales was secretary of the Broomfield Crusaders since January 2000. He has attended many matches at Cherry Orchard over the years and was clear that:

> *"they do not walk across the pitches whilst games are being played. I have not known a match to be disrupted by the general public in any way.."*

Chris Sear is the contract lead with Serco at Canterbury. Serco have been running the maintenance and bookings for Cherry Orchard Playing fields. He would have heard if there had have been a complaint regarding interruptions with games from a hirer and there was not one. So far as he is aware cricket and football has never been interrupted.

Julian Vaughan has played football and cricket at Cherry Orchard between 1985 and 2005 and he has never observed an interruption to either football or cricket game.[64]

Richard Davidson has put in considerable evidence (from the Serco computer) of about 100 games per year occurring at Cherry Orchard Playing fields. He is similarly not aware of any interruption or lack of deference.

6.14. The evidence of the applicants was entirely consistent with this deference and adjustment of behaviour.

Mrs Bowley had not heard of any complaints made to Serco or Canterbury CC of lack of deference. She had not observed personally any match. She also gave evidence that the 1999/00 season on O89 was typical. That shows plenty of matches on Saturdays and Sundays.

Mrs Bissett said that all users

[64] See page 316

Would adjust behaviour so all activities outside of football and cricket field. That is all the activities mentioned in paragraph 4 of flying remote controlled model aircraft, dads flying kites, small children with parents, boys with remote controlled cars and mini Wimbledon

She said that

She would not interfere with cricket or football and local people would not interfere with it.

There has been no interference with football or cricket to my knowledge.

Any dog going on to the field was not so significant as to interrupt the game.[65]

Mrs Brown gave evidence that there was one occasion when her dog went on to the pitch. She made every effort to get the dog off as quickly as possible. [66]After that she kept dog on the lead when going past matches or children playing.[67]. She explained that:

She adjusted her route to go around if a game was going on

Imagine others did the same[68]

Mr Moore's evidence generally was less straightforward and had more of the hallmarks of being given with a purpose in mind. He took for example a distinction between people paying to use a football pitch and the fee being for the hire of the equipment. This is a distinction without a difference because of course the equipment would be no use without a pitch to put it on. He accepted that

"no-one deliberately interfered with a game apart from an elderly gentleman"

He did not know when this was or how many spectators were there that day. He did not speak to the man. Tellingly he did remember that the referee did not stop the game. Thus even if he is correct that it was deliberate it was not a serious interruption because the ref did not have to stop the game. It did not give rise to a complaint. We do not know if it was even in the 1984-2004 time period. His own walking across the cricket outfield was most certainly not in the relevant period.

Mr Beer on day 2 said :

Always between 1 and 3 pitches in use[69]

[65] See cross-examination Mrs Bissett
[66] See cross-examination
[67] See cross-examination and re-examination.
[68] See cross-examination
[69] Examination in chief

Those not playing respected games going on[70]

Always a pleasure to play in Herne very privileged to play there people respected the games going on that was part of the pleasure it would have lessened it if not respected[71]

Mr Nutt was consistent with this. In examination in chief he said:

People would stand back so linesman could go up and down

When a game was going on we would do something on another part, so no conflict

Mrs Angela Beer was aware of the football being played on the Cherry Orchard on Saturdays and Sundays in the winter months and the cricket being played in the summer. She respected any game taking place on the Cherry Orchard and stated that all the users of the Cherry Orchard respected each other. She again gave consistent evidence and said in examination in chief that:

I would respect game and walk around the area

That was a clear example of adjustment of behaviour.

Mr Keys' evidence was clear that he deferred to the users of the playing fields. He confirmed in answer to the Inspector's question seeking clarification that

I would not walk across a football pitch, no, no.

(as if it was obvious)

Mr Tait's evidence in cross-examination when he gave a more detailed account of what was in his mind was entirely consistent with all the other witnesses. He said in cross-examination that

Have been a couple of occasions of dogs crossing over a number of years

Definitely a couple 1 springs to mind

Then he covered the 1 that sprung to mind and said that it was an accident by the owner who got his dog as quickly as possible. He said that:

Generally local people respected football games

Fair to say that people with dogs on lead would walk elsewhere

6.15. Thus the conclusion from the evidence is that there was overwhelmingly deference with the use that the owner and their licensees put the land to. The inhabitants deferred and adjusted their behaviour. There was not a single

[70] Examination in chief
[71] Beginning of cross-examination

incident where the licensee complained about interference which would have put the landowner on notice of interference and that someone was claiming a right to use the land.

6.16. Mr Ground submitted that the idea that the land around the outside can be registered separately was entirely spurious. The landowner has used this land for playing fields and that majority use has been deferred to. There is no requirement that all of the land has been used for the landowner's purpose. Rather, the burden is on the applicant to show that their use is such that it would put the landowner on notice that they were claiming a right. Quite clearly if they deferred to the primary purpose of the land that would not put the landowner on notice. There is no requirement that the landowner should use every part of his land.

6.17. The amount used for the formal pitch use is much greater than the applicant says because the applicant has failed to allow for:

> (i) The fact that the pitches get moved;
> (ii) The fact that there has been an area for linesmen/assistant referees which the local people have deferred to;
> (iii) The fact that there have been spectators around the pitches to which local people have deferred;
> (iv) The fact that play has gone outside the pitches and not been interrupted. For example cricket balls go outside the boundary with 4s and 6s but the ball has not been interfered with. Similarly in football, players and the ball leave the field and neither have been interfered with. Many witnesses accepted that cricket balls outside the boundary have never been interfered with. The evidence of Mr Tait was that players could easily kick a football from pitch 1 closest to the pavilion into the play area. The football was then not interfered with. Thus virtually all of the fields was in fact used by the playing field formal use and people deferred to it with the exception of perhaps part of the sloping area in A3 area.[72]
> (v) Corner kicks and throw-ins are further examples.
> (vi) The fact that there has been an area behind the goals where people would not walk. [73]
> (vii) Umpires in cricket would have to have a line of site to the scorers near the pavilion.
> (viii) The batting team who were not batting would sit near the pavilion and were deferred to by the locals. [74]

6.18. Thus the correct starting point is to look at the landowner's use of the land and whether people defer to that it is not necessary that he uses every last part of the land. If there is always deference in the areas where the conflict arises this is sufficient to let him know that no-one is claiming a right.

---

[72] See 3 13 AB
[73] See Richard Davidson evidence examination in chief . Julian Vaughan also said that people would stand well back.
[74] ibid

6.19. Further or alternatively the area the landowner and his licensees have not used is small when properly looked at. Any registration of the other parts would make any village green a ridiculous unworkable shape not fit for registration. It would as Philip Petchey said:

> *".. be a nonsense to consider registering small strips of land between the pitches"*[75]

Interruption.

6.20. Mr Ground submitted that interruption is really another way of looking at the same issue. Under section 22 Commons Registration Act 1965 it is quite clear that the use must continue up to what has now been held to be the date of the application. However in this case there has been interruption of the user every time the pitches are hired out. This was pointed out correctly in the advice for the County Council of Philip Petchey that:

> *"as regards the pitches there is a break in the required continuous use every time they are used for organised sport"*[76]

6.21. In *Redcar* interruption and deference were said to be similar concepts. During periods of deference the court of appeal were comfortable with describing use by local inhabitants as being interrupted during those periods. Dyson LJ said:

> *"As Mr Laurence puts it, it is not a misuse of ordinary language to say in such cases that the use of the local inhabitants is "interrupted" during such periods, in the sense that they are not using the land while the owner is doing so. Equally, it is not a misuse of language to say that if the users refrain from using the land while the owner is doing so, they are "deferring" to the owner. What matters is not what label one puts on it, but how it would have appeared to the reasonable owner of the land at the time, and in particular whether it would have appeared to the reasonable landowner that the local inhabitants were asserting a right to use the land for the sports or pastimes in which they were indulging."*[77]

6.22. The application does not proceed on the basis of the area around the pitches being applied for. It would be a nonsense to register such an area. The pitches moved and were used in conjunction with an area for the line judges. The geographical area would be a nonsensical village green. It does not allow for the implied permission to use the land. It does not approach the matter from the point of view of the landowner.

Implied Permission

6.23. It is possible to infer a permission to use the land from the conduct of the landowner. That is apparent from the judgment of Lord Bingham in Beresford where he said:

---

[75] See page 66 OB para 26
[76] see paragraph 25
[77] See page 430 OB

> *"A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."*[78]

6.24. This is also set out in the judgment of Lord Walker (with whom Lords Bingham, Hutton and Rodger agreed) where he said:

> ***"83** In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the city council or its predecessors) justifying the conclusion of an implied licence in this case."*

6.25. Mr Ground submitted that that is exactly what has occurred here. There are several overt acts of the landowner that give rise to an implied licence. Firstly on the occasions when the landowner has permitted football or cricket teams to use the pitches the council are effectively excluding the inhabitants at large from the playing pitches. He is asserting his right to exclude by hiring it exclusively to one club for that period. That is the only sensible way of interpreting the hire agreement: the team needs exclusive possession of the pitch for the duration of the game. In addition the City Council asserts its right to exclude by shutting off for maintenance. Secondly the County of Kent Act signs and the no golf signs are further examples of overt action of the landowner from which to infer an implied permission. The Kent Act sign is an implied permission to use the land if you have not been asked to leave. It could not be clearer that the landowner can require someone to leave and so the permission is revocable. It in the words of Lord Walker demonstrates that when they do have access it depends on the landowner's permission. It is an overt act of the landowner that justifies an implied permission being inferred. The no golf sign is again an implied permission to come on for other purposes which are not covered by this sign: you can come on as long as you do not hit golf balls at people.

[78] see para 5

Not trespassory therefore not as of right.

6.26. Lord Walker (with whom Lords Bingham, Hutton and Rodger agreed) set out the position in Beresford as follows:

> ***"87*** *After that approach had been suggested there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."*

The Facts

6.27. Here there is clearly no doubt that there is much from which an acquisition for the purpose of public recreation can be found.

6.28. First the land was held for the relevant period for the purposes of section 19 of the Local Government (Miscellaneous Provisions) Act 1976. We know this from the chronology. The Urban District Council who were the previous authority to Canterbury City Council purchased land by a conveyance dated 17 April 1957. The conveyance recites that:

> *"The Council requires the said property that it may be used for the purposes stated in the Physical Training and Recreation Act 1937"*[79]

6.29. There was also correspondence referring to obtaining a grant from the Ministry of Education under the Physical Training and Recreation Act 1937[80]. Any land held under the 1937 Act changed to being held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 after its appointment on 14 February 1977 by virtue off section 19(5).[81] Thus we can say that this land was acquired for recreational purposes and was held by the authority at all relevant times for recreational purposes. Section 19 is after all entitled recreational facilities. There was no need or ability to appropriate it to that purpose because it was always held for that purpose, having been acquired for that purpose.

6.30. The way the land has been treated since is that it has been advertised and treated as open space. Disposals have been treated under 123 Local Government Act 1972 and advertised accordingly. Thus the advice of Philip

[79] See page 404 OB
[80] See page 59 OB para 10 PP advice
[81] See OB 438.

Petchey to the County was correct on this issue that this land should be treated as by right can be distinguished from Beresford.[82]

6.31. The position is fairly and squarely within what Lord Walker said at paragraph 87 namely that it had effectively been appropriated to public recreation. In those circumstances it would be very difficult to regard the people who used it as trespassers. It can be distinguished from the facts of Beresford because on the actual facts there was no appropriation and nothing to infer an appropriation, so there was no evidence that the land was held for recreational purposes.[83]

6.32. It is interesting to note that this is consistent with the analysis of Martin Carter.[84] That was a live issue in the case because there was an appropriation under the 1937 Act.[85] (Although there does not appear to be any mention of the 1976 Act in that report).

The pavilion and the wcs

6.33. The unchallenged evidence of Mr Sear was that the pavilions and changing rooms were only generally opened and unlocked 45 minutes before the game[86] for which it was hired and then closed/locked about 30 minutes after finished. They are clearly hired by most teams and permission is given to use them. They are locked the majority of the time. They obviously cannot be village green. The applicant was given an opportunity to take this out of the application but took instructions and refused. There was no evidence of any use by the residents of these facilities without permission.

6.34. Similarly the toilets are locked at night every night as Richard Davidson said in evidence which was not challenged. They cannot be village green. Closure every night must be sufficient to negative that even if all other points are found in favour of the applicant.

Locality

6.35. The applicant relies upon a locality which did not exist prior to 1996 namely the Herne and Broomfield Parish Council boundary. Section 22 CRA 1965 requires the users to come from a neighbourhood within a locality for the 20 year period. Here the locality did not exist for that period. Mr Ground submitted that this was fatal to the application. For 1984-1996 the users cannot have been from a locality that did not exist. The locality needs to be known to the law and to exist for the whole of the relevant period.

Neighbourhood.

6.36. The only suggested neighbourhood is that suggested by the yellow line on A10A. There was no evidence in any of the applicant's witness statements to explain why the original pink line, still less the yellow line, was a cohesive

[82] see paragraph 24 at O65
[83] See OB468 at para 90
[84] See AB at 448 at paragraph 8.9.7.1.3 [that is the paragraph number]
[85] See 8.9.3.2
[86] Sometimes more when sides keen

area as is required.[87] Mr Ground submitted that the evidence of the applicant on this topic in cross-examination was revealing. She said:

> *Herne Common is quite separate from the rest of Herne with a separate identity*
>
> *Impossible to find a … line separating Broomfield and Herne*
>
> *I did not know where Herne ends and Broomfield starts*
>
> *The pink line does not represent anything but a line on the map* [this must also be true of the yellow line]
>
> *Broomfield people use the playing field*
>
> *No idea whether more people from Broomfield use the site.*

6.37. This was consistent with the measured reliable evidence of Carol Davis. She said in evidence in chief that:

> *we tried to work out where Herne is - impossible due to the built up nature*
>
> *there is nothing on the ground that tells you where Herne finishes and Broomfield starts*
>
> *in May 1996 when the PC was formed we could not find a defining place to cut in half - it had just joined up together over the years* [the work done to separate the two must have been in the lead up to 1996]
>
> *Herne common outlying part of Herne separated by fields*
>
> *Pink area is not cohesive does not make sense to me.*
>
> *The extended area not cohesive*

6.38. Mr Ground submitted that the applicant had not discharged the burden of showing that the users come from a neighbourhood which is cohesive. The essence of the village green application is that the applicant and her supporters want to take the land away from the benefit of everyone as it is currently being used and run by the City Council and for it to be used only by those in the neighbourhood. There is very little reason why those in the pink area or the yellow area should get that benefit at the expense of the wider community.

6.39. In relation to the amended case and the suggestion that the applicant could rely on the locality of the area of Herne and Broomfield Civil Parish: that area did not exist prior to 1996. There is no evidence that the numbers, as judged from the number of people living in the locality (10,000), are significant. They have not shown that there is any match between the claimed locality and the users: that the users spread across the locality. This is a result of the way the evidence has come forward.

[87] See Cheltenham Builders at paragraph 85 per Sullivan J AB 711

Use not predominantly by people from within the neighbourhood or locality

6.40. Mr Ground submitted that it is clear that the users have to be predominantly from the locality or neighbourhood chosen. That can hardly be surprising if those are going to be the ones with rights to sue in the future. The House of Lords has made this clear in the Trap Grounds page 690 E[88] and Sunningwell.

6.41. He said that it must be the users for any lawful sports or pastimes that must be predominant. The applicant cannot be in a better position by excluding those with permission. Mr Ground submitted that one should look at all use for lawful sports and pastimes, not just the qualifying use. One should look to see if the predominant use for lawful sports and pastimes is from inhabitants of the chosen locality or neighbourhood. It cannot be right that the effect of an application should be to exclude those whose use prior to the application was in the majority in favour of those who used the land as of right.

6.42. Mr Ground referred me to *Sunningwell* at 357E-G. and 358B: Lord Hoffman says "used predominantly" not "used as of right predominantly". Lord Hoffman expressly said that he was not deciding the point in *Sunningwell* itself, but then repeated it in *Oxfordshire* as if he had decided it at 690E. A sensible construction has to be that the relevant use includes permissive use as well as non-permissive use.

6.43. Mr Ground submitted that in any event the users predominantly came from outside the pink line[89]. The evidence of Mr Whiffen was that predominantly dog walkers would come from outside of the claimed neighbourhood because many of those within the pink area would have better places and there were lots in Broomfield who would not. There were more children and family accommodation in Broomfield making it more likely that predominantly the users taking children to the playing fields would be from outside the neighbourhood. It is obvious that most of the footballers would be from outside the pink line. Most teams that play their home games are from outside Herne.[90] Away teams are from all over.[91] The amount of parking on football days is consistent with this. Mr Ground referred to Mr Scales' evidence: only one of his players was from Herne.

6.44. The applicant did not produce any evidence that the use was predominantly by people within the pink line or the extended line. They did no survey on the playing fields of user and the applicant did not know where users were of the field were predominantly from. They have not discharged the burden on them.

The effect of the section 123 procedure was to trump village green status

6.45. There is a further argument that applies to the two areas that were disposed of to the Parish council having gone through the section 123 Local Government

[88] OB 486
[89] AB p 10
[90] See examination in chief of Julian Vaughan referring to OB 85-87
[91] ibid

Act procedure which is that going through that procedure trumps any village green status that would now otherwise be seen to have been created up to the date of the application. Lord Scott said in paragraph 52 that:

> *"I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion."*

6.46. Here there was a disposal of 2 parcels of land in 2005 and 2009 which went through the section 123 of the 1972 Act procedure. If that disposal is not to be frustrated it must bring about the effect of overriding any public rights to use the open space as Lord Scott explains in paragraph 28 which must include village green rights.

6.47. In reply on points of law to the Applicant's submissions Mr Ground responded to the point that a TVG application would only create determinative rights if it were decided to register the land: he submitted that if the procedure is to have any credibility, a failed application must mean that a landowner is entitled to continue using the land in the way that he has been using it: it preserves a right. That preservation should be treated as a determination. Mrs Bowley could have applied for judicial review. There needs to be finality: the decision does create rights, unless there is some extraordinary change of circumstances.

6.48. There must as a matter of inference have been lots of occasions on which people were on the fields when a football team came along. Deference was not a two-way process.

6.49. If there is no locality, then the whole reason for the customary right arising does not exist. When the neighbourhood amendment was brought in, the locality provisions were not amended: Parliament must have decided that the effect of *MOD v. Wilts* was satisfactory.

6.50. Even a neighbourhood has to be cohesive: it cannot be right that it only needs to be cohesive for the whole of the 20 year period. That is why rights are given to a particular group of people to use the land.

7. <u>Applicant's closing submissions</u>

The Requirements for Registration

7.1. The application to register the Cherry Orchard Playing Field, Herne, Kent ("the application land") as a town or village green was made on 6 January 2004 pursuant to section 13(b) of the Commons Registration Act 1965 ("the 1965 Act"). The application should be determined in accordance with the 1965 Act and not its successor, the Commons Act 2006 (Article 4(4) The Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) Order 2007).

7.2. The registration authority must decide whether the application land, as at the date of the application (6 January 2004), qualified under the definition of a town or village green in section 22 of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000, namely:

> *Land … on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and … -*
>
> *(i) continue to do so…*

7.3. The use needs to continue to the date of the application (6 January 2004), not the date of registration[92].

7.4. The burden of proof is on the applicant. The applicant does not however need to prove that the entire area of the application land has been used for lawful sports and pastimes for the relevant period 'as of right' for the land as a whole to be registerable[93].

7.5. In the alternative, the registration authority is entitled, without any amendment of the application, to register any part of the land which the applicant proves satisfies the requirements in section 22 of the 1965 Act (as amended).[94]

7.6. The relevant twenty-year period is from 6 January 1984 until 6 January 2004.

7.7. Lawful sports and pastimes (LSP) is a composite rather than a cumulative phrase. It includes those activities that would be so regarded in our own day, assuming there is an established pattern of use and it is not "trivial and sporadic".[95]

7.8. 'Significant' does not mean a considerable or a substantial number of people. The test is whether the number of people using the land is sufficient to indicate that their use signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.[96]

7.9. 'As of right' means *nec vi*, *nec clam*, *nec precario*, which has been translated by the House of Lords as "not by force, nor stealth, nor the license of the owner".[97]

7.10. The principle issue in this case whether the use of the application land is *nec precario*.

---

[92] *Oxfordshire County Council v. Oxford City Council and another* [2006] 2 AC 674 at [44].
[93] Oxfordshire at [67]; Re Gleaston Green, Aldingham (20/D/3) (20 July 1972).
[94] Oxfordshire at [62].
[95] Sunningwell at 356G – 357E.
[96] R (Alfred McAlpine Homes Ltd) v. Staffordshire County Council [2002] 2 PLR 1 at [71].
[97] Sunningwell at 350H.

7.11. Use pursuant to permission will not always be inconsistent with use 'as of right'. It will depend on the nature of the permission, objectively assessed and construed.[98]

7.12. There are four ways in which the use of land can be *precario*:

(1) Use 'by right';
(2) Express permission from the landowner, communicated to local inhabitants;
(3) Express permission, un-communicated;
(4) Implied permission.

Use 'by right'

7.13. It has been suggested that the meaning of 'as of right' is closer to 'as if of right'.[99] Inhabitants who have a right to use land (i.e. use land 'by right' or 'of right') are not in a position to acquire a prescriptive right by user for a stipulated period. As a consequence, land used 'by right' rather than 'as if of right' cannot be registered as a town or village green.

7.14. Where open space land is vested in a local authority on a statutory trust, the "inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers" (Beresford at [87] per Lord Walker). The applicant does not seek to argue the contrary. The applicant accepts that the use of land by the public that is held by a local authority on a statutory trust for the public benefit is 'by right'.

7.15. An example of such a statutory trust is provided for in section 10 of the Open Spaces Act 1906 ("the 1906 Act").

The Legal Basis for the Objector's Acquisition of the Application Land

7.16. The application land was purchased in 1957 by Herne Bay Unitary Development Corporation for the purposes stated in section 4 of the Physical Training and Recreation Act 1937 ("the 1937 Act").

7.17. Herne Bay UDC ceased to exist in 1974 and its duties and responsibilities passed to a newly constituted Canterbury City Council. Both bodies are local authorities for the purposes of section 9 of the 1937 Act.

7.18. Section 4(1) of the 1937 Act provides (so far as is relevant; numbering and paragraphs added for clarity):

> *A local authority may acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands … for the purpose of …*
> *(i) gymnasiums, playing fields, holiday camps or camping sites, or*

[98] R (Beresford) v. Sunderland City Council [2004] 1 AC 889 at [51].
[99] Beresford per Lord Walker at [72] citing Cumbernauld and Kilsyth District Council v. Dollar Land (Cumbernauld) Ltd 1992 SLT 1035, 1043.

(ii) for the purpose of centres for the use of clubs, societies or other organisations having athletic, social or educational objects…,
and may manage those lands and buildings themselves, either with or without charge for the use thereof or admission thereto, or may let them, or any portion thereof, at a nominal or other rent to any person, club, society or organisation for use for any of the purposes aforesaid.

7.19. The provisions of the 1937 Act do not of themselves render land acquired for the purposes in that Act held under a statutory trust. In particular, the references to charging for the use of and admission to lands, and letting lands at a nominal or other rent, show that the 1937 Act does not require the local authority to admit the public onto the land. Thus, inhabitants who used land held under the 1937 Act did *not* do so 'by right' as beneficiaries of a statutory trust.

7.20. Support for this interpretation is found in the Inspector's report to Bromley London Borough Council recommending registration of land at Magpie Hall Lane, Bromley, following a non-statutory local public inquiry in March and April 2004 at [205]. Mrs Graham Paul invited me to give substantial weight to the Magpie Hall Lane Report as it concerned land held under the 1937 and later the 1976 Acts.

The Legal Basis for the Objector's Holding of the Application Land during the Relevant Period

7.21. On 14 February 1977, section 4 of the 1937 Act was repealed by section 81 of and Schedule 2 to the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act"). Land previously held under the 1937 Act became held by the local authority for the purposes of section 19 of the 1976 Act (see section 19(5) of the 1976 Act).

7.22. During the relevant period, the application land was held by the objector for the purposes in the 1976 Act. The objector is a local authority for the purposes of section 44 of the 1976 Act.

7.23. Section 19 of the 1976 Act provides (so far as is relevant):

(1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and ... those powers include in particular powers to provide –
(a) ...
(b) outdoor facilities consisting of pitches for team games, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding;
(c) ...
(d) premises for the use of clubs or societies having athletic, social or recreational objects;
(e) ...

(f) ...
and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind.

(2) A local authority may make any facilities provided by it in pursuance of the preceding subsection available for use by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit.

7.24. The wording of the 1976 Act does not require the authority to hold land on trust for the public or to admit the public onto it. The authority's powers are entirely discretionary: they *may* make facilities available for use by such persons *as the authority thinks fit* (section 19(2)). Thus, inhabitants who used the application land during the relevant period did *not* do so 'by right' as beneficiaries of a statutory trust. Support for this interpretation of the 1976 Act is found in the Magpie Hall Lane Report at [226].

Possible Application of the Open Spaces Act 1906

7.25. Section 10 of the 1906 Act provides as follows:

10. A local authority who have acquired any estate or interest in or control over any open space ... under this Act

(a) shall, subject to any conditions under which the estate, interest, or control was so acquired –

(i) hold and administer the open space ... in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and
(ii) may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

7.26. As a consequence of section 10(a)(i), where a local authority have acquired any open space under the 1906 Act, they hold that land on trust to allow for the enjoyment of the land by the public as an open space, and the public's use of such open space is 'by right'. The objector did not acquire the application land under the 1906 Act.

7.27. However, the applicant concedes the following:

(1) The application site is "open space" as defined in section 20 of the 1906 Act;

(2) The objector is a "local authority" for the purposes of section 1 of the 1906 Act;
(3) By virtue of section 12 of the 1906 Act, the objector may exercise all the powers given to it by the 1906 Act in respect of the application land (as land vested in it in pursuit of another statute).

7.28. Section 12 of the 1906 Act provides (as far as is relevant):

> *A local authority may exercise all the powers given to them by this Act respecting open spaces ... in respect of any open spaces ... of a similar nature which may be vested in them in pursuit of any other statute, or of which they are otherwise the owners.*

7.29. Section 12 relates only to powers, and does not extend to duties. Powers would include those in section 10(2) of the 1906 Act to lay out and improve the land and those in section 15(1) to make bye-laws regulating the use of it. In contrast, the provision that local authorities hold open space land on statutory trust in section 10(1) of the 1906 Act is a duty and not a power (compare the mandatory words of section 10(1) with the discretionary words of section 10(2)). As a consequence, the application land is *not* subject to a local authority's duty to hold certain open space land on trust in section 10 of the 1906 Act. Support for this interpretation of the 1906 Act is found in the Magpie Hall Lane Report at [215] – [216].

7.30. It is submitted that it would be illogical were the position otherwise. The duty to hold open space land on trust results in the public having a right to use the land, as beneficiaries of the statutory trust. This is wholly inconsistent with the powers given to the local authority by the 1937 and 1976 Acts to make facilities available to such persons as they think fit and to charge for use of such facilities.

7.31. Further, the objector's actions themselves, in charging for the use of facilities and purporting to have the right to ask people to leave through erecting a sign reciting section 32 of the Kent Act 1981, indicate that neither they nor the public believed the application land was held under a statutory trust or that the public had an automatic right to be there. Were the objector the trustee or guardian of the application land, they would be bound to admit any member of the public onto the land, unless he or she were to break the general law or one of their bye-laws (Hall v. Beckenham Corporation [1949] 1 KB 716 at 727 and 728).

7.32. To the extent that the *obiter dicta* of Lord Scott in Beresford at [30] suggests that section 10 of the 1906 Act applies to land acquired by a local authority for the purposes of recreation, it should not, with respect, be followed. There was no argument that section 10 applied to the land in Beresford and thus the point was not properly debated. It is submitted that very little weight should have been placed on the approach of Sir Wilfrid Greene MR in Attorney-General v. Poole Corporation [1938] 1 KB 716 at 728. In that case, Sir Wilfred asked counsel: "Do you say that section 10 applies to land not bought under the 1906

Act?", to which counsel responded simply "Yes. See s. 12; further, s. 5 of the Act of 1881 contained a similar provision. There is thus no power under the 1906 Act to erect buildings on an open space though there is no express prohibition". The judgment thereafter proceeded, without further argument, on the basis that section 10 applied (see also [221] of the Magpie Hall Lane Inspector's Report).

Implying a Statutory Trust in Other Circumstances

7.33. On the basis of current authority, it is not possible to imply that land is held in such a way as to provide for the public to be there 'by right' in cases where there is no trust expressly provided for in the relevant Act. Although Lord Walker states *obiter* in Beresford that: "The position would be the same [as land vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906] if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation", he immediately qualifies that this is an issue and *not* a comment on the status of the law: "Those situations would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion" (at [87] – [88]). No such occasion has as yet presented itself.

7.34. There is therefore no authority that land held under the 1937 and 1976 Acts should be treated in the same way as land held under the 1906 Act. For the reasons given in paragraphs 18 – 19 above, it is inappropriate to view the 1937 and 1976 Acts as operating in the same way as the 1906 Act. Under the 1976 Act the discretion given to local authorities as to how they may make their land available to people is wholly inconsistent with that by right principle. Mrs Graham Paul sought to draw a distinction between charges permitted by bylaws, and charges allowed for in the principal act, which are contrary to the spirit of there being a statutory trust. It is inappropriate to imply a statutory trust where there is a power to levy charges in the Act itself.

7.35. The comments contained in the Inspector's Report to the registration authority in respect of an application to register the South Road Recreation Ground, Hythe, following a non-statutory inquiry between 16 and 18 October 2007, concerning what is described there as 'category five' ([41] – [42]), should be treated with caution for the following reasons:

(a) the land at Hythe had never been held under either the 1937 or 1976 Acts (in contrast to the land at Magpie Hall Lane, Bromley);
(b) the recommendation was *not* made on the basis that land provided as a recreation ground under a local authority power that does not itself give rise to a statutory trust should be treated in the same way as land expressly held under a statutory trust;
(c) the report reaches no conclusions as to whether 'category five' is or should be any more than a "possible" fifth form of permissive use (see [41]).

Express Permission Communicated to Users

7.36. The test when considering the effect of signs or notices was set out by Sullivan J (as he then was) in R (Lewis) v. Redcar and Cleveland Borough Council [2008] EWHC 1813 (Admin): "the key question is whether, given their wording, the notices erected on the land were prohibitory notices, i.e. whether they made sufficiently clear to local users that the defendant was not acquiescing in their use of its land for recreational purposes" (at [16] NB the notices ground did not form part of the appeal to the Court of Appeal). The same test should apply to a permissory sign or notice.

7.37. In concluding whether signs or notices on the application land made sufficiently clear to local users that the landowner was not acquiescing in their use of its land, the Inspector is invited to take into account the physical state of a sign or notice (including its location) and the effect its words would have on a reader.

7.38. The approach recommended by Sullivan J in Lewis at [21] should be adopted in relation to the latter:

> *I accept that the wording of the notices should not be considered in the abstract. The surrounding context, including any evidence as to their effect upon those to whom they were directed, should also be considered. The response to the notice may well be an indication as to how it was understood by the recipient. Moreover, the notices should be construed in a common sense rather than a legalistic way because they were addressed not to lawyers but to local users of the land.*

7.39. Use of land can still be 'as of right' even if there is communication to users that certain activities are prohibited or permitted. It is a question of fact and degree. Further, some signs or notices that regulate the use of the land are not examples of communication that use is *precario*, such as when the understood motivation for the regulation is for 'health and safety' or other amenity reasons. This concords with the long-established principle in Fitch v. Fitch (1797) 2 Esp 543 that: "if the inhabitants came in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded" (per Heath J at p. 544).

Express Permission not Communicated to Users

7.40. Where there is an express license for the use made by local inhabitants of the land, the land is used pursuant to that right and there can be no question of any additional rights being established (R v. Hereford and Worcester County Council & Hayden ex parte Ind Coope (Oxford and West) Limited, 26 October 1994 (unreported) CO/1461/93 per Brooke J; [1995] JPL Apr B41-42, but note that in that case it was questionable whether or not users were aware of the license). An analogy can also be drawn with rights of way cases where, when the use of the land is expressly permitted by a deed, no right of way can arise, regardless of whether users of the land were aware of the deed

or not (R v. Secretary of State for the Environment ex parte Billson [1999] QB 374).

7.41. There is no evidence of any deed, license or other express permission in relation to the use of the application land by inhabitants for LSP. The reference to the purposes contained in section 4 of the 1937 Act in the conveyance is limited to 'playing fields', which indicates that permission was granted expressly for organized sport but not for other informal LSP (see Magpie Hall Lane Report at [202]).

7.42. Support for a narrow interpretation of the words 'playing fields' is found from the purpose of the 1937 Act envisaged by Parliament, which was not to provide the public with general open space, but rather to provide the facilities needed for a better and fitter Britain (see comments of the supporting Minister introducing the Second Reading of the Physical Training and Recreation Bill in the House of Commons: HC Deb 7 April 1937 Hansard vol 322 cc 193 – 258).

7.43. Further, the verbal context of the words 'playing fields' next to 'gymnasiums', 'holiday camps' and 'camping sites' restricts by implication their meaning to matters of the same limited character (*ejusdem generis* principle of statutory interpretation: see Bennion on Statutory Interpretation (5th edn) at Section 379 (p. 1231).

Implied Permission

7.44. Permission can in some circumstances be implied where actions are taken by the landowner to communicate to users that their use is conditional and may be terminated at any time. The conclusion whether the circumstances are sufficient to imply permission is an evidentiary one; not a rule of law (Beresford at [51]).

7.45. Actions constituting implied permission must be overt (e.g. charging a fee for entry to the land, or locking gates at night). Mere acquiescence or toleration, or even encouragement to use the land for sports and pastimes, are insufficient to imply permission (Beresford at [50]).

7.46. It is a material consideration that land is publicly owned. In such a case, the local authority landowner is expected to provide recreational facilities to the inhabitants of the locality or neighbourhood in line with the discharge of its functions for the benefit of the public. The provision of such facilities is not indicative of an implied permission (Beresford at [48] – [50]).

Res judicata

7.47. Mrs Graham Paul said that it was questionable whether an estoppel per rem judicatum could arise in a village green case. She said that although Mr Chapman concluded that it could, his report is not binding on me. Mrs Graham Paul said that the approach in Thrasyvolou was not appropriate in a TVG case.

7.48. A decision refusing to register land as a town or village green is the determination of a prescriptive right and so is not akin to a decision not to grant planning permission, which is no more than a decision that in existing circumstances and in the light of existing planning policies that the development in question is not one which it would be appropriate to permit. A planning decision is a policy decision. A TVG decision cannot give rise to an estoppel per rem judicatum (p. 290F-G).

7.49. A planning decision is a 'one way or another decision' concerning the legal status of alleged development, whether it be through an appeal against an enforcement notice on grounds (b) – (e) or the obtaining of what is now a CLEUD and was then an established use certificate, which is final. These decisions are final: the decision is whether or not the use is lawful. The landowner has certainty that they can rely on a CLEUD for all time (p. 292F), and equally if they have won an appeal against an enforcement notice, they will be immune from further attack in respect of that breach (p. 292G).

7.50. A decision whether to register land as a town or village green is final if the decision is made to enter land onto the register. But, a decision not to enter land onto the register is *not* a final determination that that land is not a town or village green. It is simply a decision that the applicant at that time and on the basis of the evidence submitted *has not satisfactorily proved* that the land is a town or village green. This is a fundamental distinction, it is submitted, between the decision not to register a land as a town or village green and an enforcement appeal decision or CLEUD application decision.

7.51. There is nothing in the language of the 1965 Act to suggest that an applicant cannot come back in the future and make another application. I submit that the principle of an estoppel per rem judicatum is therefore an inappropriate one to apply in a village green case. These arguments were not made in the Jenny Lane case: had they been, he may well have come to a different conclusion on the point.

7.52. In any event, Mrs Bowley's evidence was that she made the second application on the suggestion of the Chairman of the Registration Authority's committee because the *Beresford* case was pending. There was therefore a change of legal circumstances that prompted the second application. *Beresford* was decided in 2003 ([2003] UKHL 60), before the second application on 6 January 2004.

7.53. Further, this Inquiry has heard oral evidence from three witnesses for the applicant, Cllr Evelyn Bissett, Mrs Doreen White, and Mr Peter Tait, who confirmed they had no knowledge of the first application and no involvement with it. Quite apart from the fact that no non-statutory public Inquiry was held to investigate the evidence, and accordingly no witness statements were prepared, this in itself demonstrates that the evidence you have heard is not a 're-run' of the first application.

Was the user not 'as of right' after the 1st application decision because CCC were an objector?

7.54. Vivian Chapman QC adopted an approach when reporting on the land at Jenny Lane that the effect of a second application was that it seemed to him "quite impossible for user to be as of right if it is user at a time when the landowner is making it quite clear that it does not accept that there is any such right" (p. 38). He continued: "I therefore consider that ever since it became *common knowledge* in Basildon that the RC church was opposing the registration of the Fields as a village green, recreational user of the Fields by local people cannot have been as of right" [emphasis added].

7.55. That reasoning should not apply to the Cherry Orchard. Mrs Bowley gave evidence that the main protagonists in the first application were considered locally to be the applicant and the Parish Council. She could not remember CCC making any public statement in relation to the first application. The objector did not give any evidence to the contrary. Cllr Whiffin exhibited three articles from the local press which made reference to the rejection by KCC of the first application (27 March 03, 24 July 03, and undated (p. 330 at bottom)). None of these articles mentioned that CCC objected to the first application. He told the Inquiry that there were no members of the local press present at the KCC hearing to determine the first application. He himself did not know why the first application had failed and he agreed that local people would not necessarily have known whether CCC had objected to the first application.

7.56. This evidence suggests that it did *not* become common knowledge in Herne that CCC was opposing the registration of the Cherry Orchard as a village green. The circumstances in Herne can thus be distinguished from those in Jenny Lane. Accordingly, this is not a case the landowner made it quite clear that it did not accept that there was any right for local people to use the land, so as to put an end to any 'as of right' use that had taken place up to the rejection of the first application.

Neighbourhood within a Locality or Locality

7.57. The boundary of Herne and Broomfield Parish has now been identified. This is a civil parish, and as such is a locality, being a legally recognised administrative division of the county (R (Laing Homes) v. Buckinghamshire County Council [2003] 3 PLR 60 at [81]). The neighbourhood of Herne village, which is relied on by the applicant in the alternative, is within this locality. Herne village has a sufficient degree of cohesiveness to be describable as a neighbourhood (R (Cheltenham Builders) v. South Gloucestershire DC, 10 November 2003, [2003] EWHC 2803 (Admin) at [81]). The applicant does not rely on any ecclesiastical parish as an alternative. It is submitted on behalf of the applicant that the Registration Authority is also entitled to have regard to information as to relevant localities which is available to it. Ultimately, it is for the registration authority to determine the appropriate locality or neighbourhood, and the application should not be treated as though it is a pleading in private litigation (Laing Homes at [143]).

7.58. In relation to the Objector's point that the footballers' use falls to be considered as part of the use for lawful sports and pastimes, Mrs Graham Paul

says that this is not relevant use for the purposes of the application: those individuals are on the land by permission of the landowner. They are not as of right users: they are there because their club has hired the pitch. Their use should not be considered when considering whose use is predominant. They cannot both be there for the local users to defer to and counted as part of the potentially relevant local users. In any event on the facts, there was no evidence that the predominant use was by those teams: it might have been the predominant use while the match was on at the weekend, but the land was used on a regular basis by local people throughout the week.

Submissions on neighbourhood

7.59. Mrs Graham Paul referred to the evidence from Mr Moore that the applicant's choice of boundary for Herne village derived from where the Herne Residents' Association considered they would operate. Mill Lane, the only road that runs the whole length north to south within the built up area, was chosen as the cut-off point for the Herne area. Once you got beyond Mill Lane, it was considered you were in Broomfield. This was, according to Mr Moore, because of the architectural difference between the houses, those in Broomfield being newer. Cllr Davis added that there were older properties in Broomfield but agreed that these were more sporadic than in Herne.

7.60. Cllr Davis did not agree that the Herne Residents Association view of the boundary between Herne and Broomfield was correct. In her view, a person who lived in Broomfield Road up to Gorse Lane would say they lived in Herne. This too seemed to be based on an architectural distinction. She also thought that Herne village was only a very small area centred around Herne Street, which wouldn't include the application land.

7.61. Mrs Graham Paul submitted that it is difficult to rely on any one particular individual's view as to where the Herne is and where Broomfield starts. Postcodes do not assist and, as Cllr Whiffin agreed, people can be idiosyncratic in how they write their address. But, people did seem to have clear views that they were separate places. Mr Tait, for example, who had lived in Blenheim Close near the application land and also latterly in Magnolia Rise was clear that Blenheim Close was in Herne and Magnolia Rise was in Broomfield (NB this was without any reference to the 'locality map' and without any knowledge that this was in issue at the Inquiry). The fact that the residents' association operated in the neighbourhood identified was good evidence that this is where Herne as opposed to Broomfield is.

7.62. The question to be determined for the purposes of s 22 of the 1965 Act is satisfied is whether the application land serves a cohesive neighbourhood. Mrs Graham Paul submitted that cohesiveness is not equivalent to everyone needing to know each other or know of each other, as possibly suggested by Cllr Davis. The fact that there is a residents' association operating in the Herne part of the parish in itself is good evidence that this is a single, cohesive neighbourhood.

7.63. It is not necessary for use of the land to be exclusively by people from the locality or neighbourhood within the locality (R v. Oxfordshire County

Council and another, ex parte Sunningwell Parish Council [2000] 1 AC 335 at 357G – 358B). The objector's witnesses seemed to suggest that people who lived to the south of the area served by Herne Residents' Association, in particular Herne Common and the area around Ridgeway Road would not use the Cherry Orchard for recreational activities, preferring instead to walk their dogs in either Goldspots or Curtis Wood (Cllr Whiffin). But Cllr Whiffin agreed that dog walking was only one recreational activity, and he agreed that for other recreational activities, such as taking children to a play area, people to the south of the neighbourhood would use the Cherry Orchard. In the end, he couldn't say that people who lived near him in Ridgeway Road would choose Curtis Wood or Goldspots over the application land for LSP. Mrs Graham Paul submitted that people to the south of the neighbourhood identified are in fact users of the application land, maybe not every day for dog walking in the same way as somebody who lived e.g. in Woodrow Chase would be, but certainty for other LSP.

7.64. The objector also argued that the Cherry Orchard would be used just as much by the people of Broomfield as by the inhabitants of Herne. Cllr Whiffin explained that he had taken a 'snapshot' view on this by interviewing 8 young people who were on the application land on one occasion, half of whom he thought came from Broomfield, but he had no written record. This extremely limited 'survey' possibly should not be given much weight. Cllr Moore, who knows many people in the local area both in Herne and Broomfield, said that he knew lots of people from what he called Herne (i.e. within the Herne Residents' Association operating area) who used the Cherry Orchard, but could not positively say that he knew anyone from Broomfield who used the land. The people of Broomfield have other facilities available to them, such as children's play areas, unlike the residents of Herne Common and the south part of the neighbourhood identified. Mr Tait's use of the Cherry Orchard had decreased since he moved to Broomfield, mainly because his boys were older, but also because of where he was living.

7.65. Mrs Graham Paul submitted that it was absolutely clear that the Cherry Orchard served a local community. The use of the land by outside visiting teams from as far away as Canterbury to play football and cricket is not the predominant use of the land. These teams are only on the CO for a few hours on a weekend, or very occasionally on a weekday evening. Mr Scales confirmed that there wouldn't be more than one match on the Cherry Orchard for a particular team per week and football matches only last c 90 min. While they are there, local inhabitants also use the Cherry Orchard for their own activities (dog walking, informal kick-about, spectating etc.). Some of the spectators would have come to support their team; but there would also be 'quite a lot' of local people (Mr Scales' evidence). Considering the small number of hours paying teams are on the land in comparison with local people who can be there all the time and the evidence of use for LSP by local people, the paying teams' use of the Cherry Orchard is not the predominant use of the land.

Submissions on locality

7.66. Ms Graham Paul submitted, without conceding the point, that if I considered that the use of the application land had not been predominantly by the residents of Herne, but in fact by the residents of Herne and Broomfield, I should consider whether the predominant use of the application land was by people from that locality.

7.67. In response to the Objector's submission that the claimed locality could not be relied upon because it had not existed for the whole of the relevant period, Mrs Graham Paul submitted that emphasis on locality is in the statute to define who the inhabitants are: it is not a requirement that the locality has existed for the 20 year period, as long as the inhabitants are of a locality or a neighbourhood within a locality and those inhabitants can be identified, it does not matter that the locality itself may not have been in existence at the earlier time. Mrs Graham Paul submitted that I should adopt a purposive approach and consider what Parliament intended in this respect. It is unlikely that Parliament intended that a technical change in the boundary of a clearly identifiable locality would defeat an application that would otherwise have been successful. The emphasis is on the inhabitants' use, and that they must come from a specific place. The emphasis is not on the continuity of the place itself.

7.68. In relation to the question of whether there had been a significant number of users from the locality, rather than the claimed neighbourhood, Mrs Graham Paul submitted that *McAlpine* said that significant did not mean a considerable or substantial number of people. Although some witnesses for the applicant said that users did not come from Broomfield, there were others who said that they did. There was a sufficient spread and fit of users.

Continuity and Deference

7.69. Mrs Graham Paul referred me to paragraph 57 of Lord Hoffman's speech in *Oxfordshire* and to his remarks as to whether land which has a dual use can be registered as a TVG. Land that has a 'dual-use' (i.e. the landowner uses it, or his lessees, licensees or agents use it, as well as the inhabitants of the locality or neighbourhood) can be registered as a town or village green (Oxfordshire at [57]). She submitted that the issue is whether the uses of the landowner and the local inhabitants can happily co-exist, or whether one dominates the other. If there is give and take on both sides, dual use can exist. The position has to be looked at from the landowner's point of view, and following *Redcar* one has to consider whether from the landowner's point of view it looks as though the inhabitants are asserting a right. She submitted that it was not necessary for the inhabitants to have exclusive use of the land, in order for their use to have the appearance of the assertion of a right: the landowner might also use the land as well. For use to be 'as of right' the inhabitants must show that the user is "sufficient to bring home to the reasonable landowner that the local inhabitants [are] asserting a right" (R (Lewis) v. Redcar and Cleveland Borough Council [2009] EWCA Civ 3 at [37] – [38] and Laing Homes at [85]). Where there are competing uses, the conclusion as to whether the inhabitant's use is sufficient will be an evidentiary one based on matters on

fact and degree. The guidance given by Dyson LJ in Lewis at [49] should be followed:

> *Relevant to that issue is whether in practice the activities of the owner make no difference to the activities of local people, or whether local people adjust their activities to allow for those of the owner … The greater degree of deference, the less likely it [is] that it would appear to a reasonable landowner that the users were asserting any right to use the land.*

7.70. The use of the land for LSP must be continuous throughout the relevant period. If the recreational user defers to the landowner (or his lessees, licensees, or agents), this does not indicate interruption or discontinuity (Laing Homes at [85]). In relation to the question of whether interruption was an alternative way of looking at deference, Mrs Graham Paul referred me to *Laing* at paragraph 85 and submitted that the evidence in relation to use of the pitches by paying teams was better looked at as an issue of deference/interruption for as of right purposes rather than an issue of continuity.

7.71. Turning to continuity, the applicant's witnesses were unanimous in giving evidence that there was never in their memories a time when they or anyone they knew had been unable for whatever reason to access and use the Cherry Orchard. Entrances had been continuously open and the several residents with gates onto the application land from their properties had never experienced a time when they couldn't use them. None of those residents, when asked, said that they had ever been told they couldn't use them or that there were any conditions of their use.

7.72. The objector did not provide any evidence that the Cherry Orchard had ever been used in its entirety by the landowner or someone who had sought their permission. There was evidence that permission was sought and gained from Canterbury CC to use the Cherry Orchard for overflow car parking in connection with the 'Yours for a Day' charity even held on the new Thanet Way on 25 May 1998. Although Cllr Davis provided evidence that this was the 'proposed use' of the CO (OB p. 138) and that it 'was to be used' as such (O137), she could not categorically state that it was in fact used for overflow parking (c.f. W/S Davis [13]). The evidence of Mr Cant was that there was car parking on Thanet Way designated for use and he saw no signs directing people to park in the Cherry Orchard. None of the witnesses asked were able to recall any car parking on the Cherry Orchard on that day. The evidence was inconclusive as to whether it was used, and if it was, to what extent it was used. It was confirmed during Mr Hawkins's evidence that the June 2002 Jubilee Event did not take place. He wasn't able to say what happened in relation to the August 2003 Neighbourhood Wardens Summer Programme: again there is no evidence whether the land was in fact used for this event, and, if it was, to what extent it was used.

7.73. There therefore can be no argument that the land has been used for LSP anything other than continuously throughout the relevant period.

Deference

7.74. Mrs Graham Paul said that the objector gave evidence that parts of the pitches were closed off to local users for maintenance related reasons, such as to allow re-seeded grass to grow. Mr Sear from SERCO gave evidence that in the late 1990s SERCO used to fence off the cricket square to prevent damage but they no longer do that as the fencing itself attracted games of informal football, which damaged the square (W/S Sear [6]). This was not a permanent fence and people could still go into the area without removing or damaging the fence. He confirmed that when this happened SERCO didn't do anything about it and didn't think about putting up a more robust fence. It was put to him that ultimately the children won; the fence went rather than them, and he replied in XX: 'well, their loss really'. The landowner was adjusting its behaviour in response to what was going on: here because the children were playing on the square. SERCO, as the landowner's agents, would have had the opportunity to stop local children making use of the land as they thought fit. The fact that they didn't and in fact adjusted their behaviour in response to that of the local residents is strong evidence that they were acquiescing in local people's assertion of a right to use of the land.

7.75. The goal posts stayed on the pitches throughout the season and local people would use them for informal kick-abouts (see e.g. Brian Macdowell with his nephew). Evidence that if a team turned up to play, people would move away from that pitch area. However, this is not a 'knock-out blow' to registration. It is a question of fact and degree as to whether it would appear to a reasonable landowner that local residents were nevertheless asserting a right to use the land.

7.76. Mrs Graham Paul asked me to bear in mind the evidence that local people did not feel that they would have to leave the Cherry Orchard altogether and normally they would in fact stay on Cherry Orchard (see e.g. Raymond Beer). There was plenty of space on the remainder of the site for local residents to conduct their own activities, even to the extent of having their own games of cricket and football. In this connection Mrs Graham Paul submitted that when Mr Petchey wrote his advice, he did not know to what extent there was space on the application land for the local people to continue their activities when the pitches were being used[100]. This wasn't a case when local people were cramped around the boundaries of the land, unable to use the land in a free way while a match was going on. The inquiry did not hear of a single activity that local people would normally use the Cherry Orchard for, that they weren't able to carry out while an organized match was taking place: the activities maybe were not carried out in the same place, but in terms of the activity itself, there was no activity which had to cease because of the matches. And, as Mr Sear said for the objector, someone walking their dog on the Cherry Orchard would be more be more likely to walk their dog around the perimeter in any event to give it the longest walking route, rather than cutting across the CO (and the pitches), so there was no or little difference made to dog walking activity. Mrs Graham Paul accepted that walking along the right of way

[100] O57, at paragraph 26.

should be excluded from consideration, but dog walkers would not have been confined to the right of way: they could have walked on the grass around the edge of the application land. Mrs Graham Paul submitted that in practical terms there was no real conflict between the dual uses. The activities happily co-existed.

7.77. As such, the evidence was that there was no conflict between the dual use and matches and local peoples' activities were able to 'happily co-exist' (e.g. David Nutt). No one said, when asked, that they had ever been told that they shouldn't be on the Cherry Orchard while an organized match was taking place. No one said, when asked, that they were ever told that they should regulate their behaviour in any way when an organized match was taking place, such as by refraining to take their dog onto the Cherry Orchard. One might have expected that in other circumstances: for instance a school might tell people to leave a school playing field when the children are using it.

7.78. If I were to conclude that people did not go onto the pitch out of common courtesy and for fear of their safety, then the landowner would not necessarily conclude that that was deference: people would behave in the same way for any informal match or practice. Mrs Graham Paul pointed to the evidence of Mrs June Brown said that it sports games would make her put her dog on the lead, but the same would be the case if children were using the pitches. The landowner's permitted users were not getting preferential treatment.

7.79. Mrs Graham Paul accepted that children or un-booked users would have moved off when a booked game arrived, but said that it was a matter of fact and degree, and the evidence of Mr Tait was that they would stay on the application land, although they might move to another unused pitch or to another area: they were not forced to abandon their play. As a matter of fact and degree that did not amount to overwhelming deference.

7.80. Car parking in the surrounding streets when a football and cricket match is taking place: Mr David Nutt said that car parking in the surrounding streets did not annoy the locals, only if their drives were blocked. Mr Sear, who is Head of Environmental Services and Contract Lead with Serco at Canterbury confirmed that CCC had never received any complaints from local residents about car parking, perhaps with the exception of the service road adjacent to the CO, but not in Herne village. So, again, there was no conflict between the dual use.

Layout and area of the pitches

7.81. Mrs Graham Paul said that the calculations of Mrs Bowley's son (an architect) were not challenged. There was evidence that the positions of the pitches on the OS map were a reasonable representation of where they are in reality. The pitches were also marked in very similar positions on a CCC internal plan, which was given to maintenance staff for identification purposes. The evidence is that the majority of the CO is not taken up with pitches.

7.82. It is accepted that there is a white line around the cricket pitch during the cricket season.

7.83. Mr Davidson who is Assistant Contract Manager at CCC who provided the CC plan, gave evidence that in fact the area used for formal sports was rather larger than that shown on the plan (W/S Davidson [5]) because provision has to made at each match for a run-off area around the pitch which he said would typically be a strip 10 meters wide behind each goal and up to 5 meters wide down the sidelines; and added in oral evidence that there was a whole range of additional things going on outside the pitch area. It became apparent that this was not due to any personal knowledge of what happened during matches at the CO (Mr Davidson had never been to the CO while a match was taking place and confirmed that he would have no idea what may or may not have happened at the CO) and was rather his assumption based on what he considered sensible and reasonable and bearing in mind the layout of the pitches on the plan. Mrs Graham Paul accepted that those requirements would on the evidence, be borne in mind when considering an appropriate layout for the pitches. Outside the red line drawn by Mr Davidson there is no question of deference.

7.84. There was evidence that there is no area beyond either the football pitches or cricket pitches marked out by line or barrier to indicate where the linesmen would run and the spectators would stand. Cllr Moore, who had personal experience of being a linesman, said that he had to run inside the pitches because the spectators were standing so close to the pitches there was no space for him to run outside the pitches. Raymond Beer, who has experience of playing football on the CO for Bishopsbourne FC between 1976 and 1993, said that people would quite happily stand behind the goal posts.

Interruption of matches

7.85. The applicant's witnesses provided evidence that they would not normally interfere with an organized football and cricket match because it would be dangerous and discourteous to the players. Mrs Angela Beer, a dog walker, explained that if local children were using a pitch for an informal kick-about she would not walk into their game, but would respect their game. She said that her behaviour would not really be any different if children were playing or if it were an organized game, because in either case we would have respect for each other. This is sense in which the organized fee paying games make little difference to the activities of the users of the CO. The same can be said about Mrs Brown putting her dog on a lead when play was in progress.

7.86. Mr Sear from SERCO confirmed in cross-examination that his only concern if matches were interrupted was on health and safety grounds (see also W/S Sear [8]). When asked if interruption was a concern on the ground that no one else from the players had a right to be on a hired pitch, he replied 'no, not at all'.

7.87. The Objector's witnesses who said they had no knowledge of interruption of matches on the CO had limited experience of matches taking place at the CO (they were not local residents who regularly play / watched matches on the CO). They therefore could only give limited evidence about what happened during matches. See e.g. Mr Vaughan – football 2/3 times a season on the CO, and cricket twice in his life there. Most often he was involved in games on

other pieces of land around the Canterbury area. He said in chief that he was 'fairly' confident that there wasn't interruption at the CO. But he couldn't categorically state that people had not gone onto the pitches at other times.

7.88. There was, however, evidence from local people that people had wandered onto pitches and dogs would sometimes wonder onto a pitch or cut across a pitch while matches were in play, sometimes causing a game to have to be stopped, or footballs would end up there from other local people using other areas of the CO to play informal games of football at the same time (see e.g. Cllr Moore and Mr Tait (W/S [4] and who said that it didn't happen every game but 'quite a few' but note did qualify in XX that he couldn't say exactly how often a game had to stop but definitely one occasion springs to mind)

7.89. There may not have been any formal complaints made to CCC about interruptions to games, but players confirmed that they wouldn't have complained in these circumstances (e.g. Mr Tait who said he didn't think about making a formal complaint because it's a public area). The fact that there were no complaints to CCC does not show that the applicant's witnesses are untruthful that such incidents occurred. What it shows rather is that teams who had paid money to CCC, and so were in a sense their agents, accepted that local people would also have a right to be on the CO and use it for their own activities, regardless of what mishaps (whether accidental or in a couple of isolated incidents perhaps deliberate) may have occurred as a consequence. As Mr Scales said, no complaint would be made, even if a match had to stop because there was a good relationship with local people and the players respected them. This is evidence of dual use happily co-existing and must be weighed in the balance when considering how the matter would have appeared from the landowner's perspective.

7.90. Mrs Graham Paul submitted that the evidence was *not* that a ball kicked from a pitch could end up anywhere within the Cherry Orchard (see Mr Tait). There was no evidence that during an organized match players were deliberately kicking balls outside the pitch: that in itself I would submit would rather defeat the object of the game. The evidence was that local people wouldn't hi-jack a team's ball for example by running off with it. Equally, it was Mr Scales' evidence that organized teams would return a dog or a ball to local people were either to end up on their pitch. He agreed that there was 'give and take' on both sides. This was all just part and parcel of the happy co-existence of paying teams and local people on the CO. Mr Tait confirmed that, equally, balls could fly into peoples' gardens from organised games.

7.91. In terms of cricket there was evidence that cricket is generally concentrated in one area of the pitch and the game did not at all times take up the whole of the cricket circle. There is thus even more possibility that people, dogs or balls would encroach onto the cricket pitch.

7.92. Finally, the applicant has confirmed VGS is applied for in relation to the whole of the CO, including the buildings. The applicant does not however need to prove that the entire area of the application land has been used for lawful sports and pastimes for the relevant period 'as of right' for the land as a

whole to be registerable (Oxfordshire at [67]; Re Gleaston Green, Aldingham (20/D/3) (20 July 1972)).

7.93. In the alternative, the registration authority is entitled, without any amendment of the application, to register any part of the land which the applicant proves satisfies the requirements in section 22 of the 1965 Act (as amended) (Oxfordshire at [62]). In this regard, Mrs Graham Paul asked me to recall that the red line on Mr Davidson's plan was said by him to indicate the area within which the pitches would always be located, even if they do move slightly from year to year. It is submitted, that within the exception of the buildings, there can be no allegation of deference outside this red line.

7.94. Mrs Graham Paul submitted that implied permission was an alternative way of putting the deference and interruption arguments.

The "No Golf" signs

7.95. Mrs Graham Paul said that Cllr Davis had confirmed that from her understanding the Council's erection of these signs was a specific measure to tackle the specific problem of people practicing golf on the CO. This would pose a danger to people and property.

7.96. This is not an example of a sign to regulate peoples' use of the land like a sign in a park that states no ball games (put to Cllr Davis) or no dogs, which by implication may be said to permit all activities it does not prohibit.

7.97. It is not the case that in order for land to become a town or village green, local inhabitants must have been able to do absolutely anything they liked on it. See *Fitch v. Fitch*: "if the inhabitants came in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded".

7.98. Carrying out an activity such as golf on land that is clearly too small to be suitable, such that danger is posed to personal safety and property for which CCC were most likely concerned they may be liable for if it occurred, could be seen, in my submission, an improper use of the CO.

7.99. The erection of the 'No Golf' signs was in order to deal with this, and had nothing to do with impliedly permitting other activities. Mr Griffith from the CCC confirmed that the Council as landowner would be concerned about health and safety on the land.

Section 123 of the Local Government Act 1972

7.100. In relation to the s.123 point Mrs Graham Paul stated that the objector relied upon the *dicta* of Lord Scott in R (Beresford) v. Sunderland City Council [2004] 1 AC 889 at [28] and [52] to argue that, if the Council's disposals are not to be frustrated, it must bring about the effect of overriding any public rights to use the open space, which must include village green rights, and such a disposal would therefore trump any village green that would otherwise be

seen to be created up to the date of the application. She submitted that Lord Scott's *dicta* should not be followed for the following reasons:

a. the point was not argued in Beresford (see [28]);

b. Lord Scott's comment fails to grapple with the fact that a village green cannot be used for any other purpose than as a village green (section 19 Commons Act 1876). It can be disposed of by compulsory acquisition under section 19 of the Acquisition of Land 1981, but he Secretary of State must be satisfied (and issue a Certificate to the effect) that there has been or will be given in exchange for such land, other land, not being less in area and being equally advantageous to the persons entitled to rights of common, and that the land given in exchange has been or will be vested, and subject to the like rights, trusts and incidents as attach to the land purchased;

c. it is pertinent that in Beresford Lords Roger and Walker did not agree with the judgment of Lord Scott (at [69] and [92]);

d. if the effect of section 123 of the 1972 Act is to enable any local authority to defeat an application to register their land as a town or village green simply by disposing it after the application (or indeed the registration), this cannot have been what Parliament intended.

7.101. In any event, the objector's disposals relate only to two small parcels of land, not the whole of the application land. There has been no local authority disposal of the vast majority of the site.

Registration of part

7.102. In the alternative, the registration authority is entitled, without any amendment of the application, to register any part of the land which the applicant proves satisfies the requirements in section 22 of the 1965 Act (as amended) (Oxfordshire CC v. Oxford City Council [2006] 2 AC at [62]).

7.103. In relation to the buildings on the land and the site as a whole: Mrs Graham Paul submitted that it was open to the Registration Authority to register any part of the land which satisfies the requirements in the Act. Were I to find that the use of the pavilions and toilets did not satisfy the requirements, it would be open to the RA to register the remainder of the land.

7.104. In the final alternative Mrs Graham Paul said that there would be no nonsense in registering the areas outside the red line, if the application were to fail in respect of the remainder of the land and asked that the RA should consider registering that area alone, with or without the buildings.

8. The Law

Which definition applies?

8.1. The Commons Act 2006 received Royal Assent on 19th July 2006. Section 15 of the Act was brought into force by the Commons Act (Commencement No.

2, Transitional Provisions and Savings) (England) Order 2007[101]. By paragraph 4(4) of the Order, where an application is made before 6th April 2007 to a registration authority, pursuant to section 13(b) of the Commons Registration Act 1965, for the amendment of the register of town or village greens as a result of any land having become a town or village green and the registration authority has not determined the application before 6th April 2007, the registration authority shall continue to deal with the application on and after 6th April 2007 as if section 13(b) had not been repealed. The applicable definition for the purposes of this application is therefore that contained in the Commons Registration Act 1965.

8.2. The application therefore falls to be determined under the provisions of the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000.

8.3. It is convenient to divide the law into substantive law and procedure.

Substantive law

8.4. The Commons Registration Act 1965 provided for each registration authority to maintain a register of town or village greens within its registration area. There was a period expiring on 31st July 1970 for the registration of greens. By s. 1(2)(a) of the 1965 Act, no land which was capable of being registered as a green by the end of the original registration period "shall be deemed to be…a town or village green unless it is so registered". Section 13 of the Act provides for the amendment of that register where any land becomes a town or village green after the end of the original registration period.

8.5. The expression "town or village green" is defined by s 22(1) of the Act. The definition has three limbs:

- statutory greens (i.e. greens created by statute),
- customary greens (i.e. greens based on immemorial use) and
- prescriptive greens (i.e. greens based on 20 years' use).

8.6. It is the third limb of the definition, i.e. prescriptive greens, which is relevant in this case. The applicable definition of a prescriptive green is contained in section 22 of the Commons Registration Act 1965 as amended by section 98 of the Countryside and Rights of Way Act 2000:

> "…land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

8.7. No regulations were ever made to implement paragraph (b).

---

101 SI 456/2007

The Legal Issues

8.8. The main legal issues that have been decided by the courts are as follows:

What is a town or village green?

8.9. A town or village green is land which is subject to the right of local inhabitants to enjoy general recreational activities on it. Activities are not limited to those which have been historically enjoyed[102].

What is the effect of registration?

8.10. The effect of registration can be summarised as follows:

- The fact that land is registered as a green is conclusive evidence that it was a green as at the date of registration[103].
- The fact that land is not registered as a green is conclusive evidence that it is not a green
- The fact that land is a registered green (a) gives local people recreational rights over the green and (b) subjects the land to the protective provisions of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876[104].

What is the meaning of the CRA 65 definition as amended by CROW 2000?

8.11. The meaning of the definition contained in the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000 has been extensively considered by the courts.

Land…

8.12. Land is defined as including land covered by water.

…on which for not less than 20 years…

8.13. Subject to any regulations to the contrary (and there are none at present) the 20 year period under the definition contained in the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000 is the 20 years immediately before the section 13 application[105]. It is not relevant that the land was subject to 20 years' recreational user before 31st July 1970 because any land not registered as a green by that date lost its status as such and can only reacquire that status by a further 20 years' user.

…a significant number…

8.14. "Significant" does not mean considerable or substantial. What matters is 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[106].

---

[102] Oxfordshire [2006] UKHL 25, paras 3-16, 37-39, 115 & 124-128
[103] Commons Registration Act 1965 s. 10
[104] Oxfordshire [2006] UKHL 25.
[105] Oxfordshire, para 44.
[106] R (McAlpine) v Staffordshire CC [2002] EWHC 76 (Admin) at para. 77

…of the inhabitants of any locality…

8.15. A "locality" cannot be created by drawing a line on a map[107]. A "locality" must be some division of the county known to the law, such as a borough, parish or manor[108]. An ecclesiastical parish can be a "locality"[109] but it is doubtful whether an electoral ward can be a "locality"[110]. The users must be predominantly the inhabitants, although the land need not be used exclusively by the inhabitants.[111]

...or of any neighbourhood within a locality…

8.16. By contrast with a locality, a "neighbourhood" need not be an administrative unit known to law. A housing estate can be a neighbourhood[112]. A neighbourhood need not lie wholly within a single locality[113].

8.17. In my judgment, despite Lord Hoffman's comment that the phrase "any neighbourhood within a locality" had been drafted with a deliberate imprecision which contrasted with the insistence of the old law upon a locality defined by legally significant boundaries, it cannot be correct that a neighbourhood may be either an imprecisely defined area, or any area drawn on a map.

8.18. In my judgment in order for the word "neighbourhood" to have any meaning, it must import some further requirement above and beyond an area drawn on a map. In my judgment for an area to constitute a "neighbourhood" it must, as suggested by Sullivan J in *Cheltenham Builders* have some degree of cohesiveness:

> "a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a locality… I do not accept the Defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority have to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise, the word "neighbourhood" would be stripped of any real meaning. If parliament had wished to enable the inhabitants of *any* area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."[114]

8.19. Further, in my judgment, the area defined as the neighbourhood must have defined and definable boundaries, rather than "woolly" or "fuzzy" edges. The question of whether a "significant number of the inhabitants" has used the

---

[107] R (Cheltenham Builders Ltd) v South Glos, DC [2004] 1 EGLR 85 at paras 41-48
[108] Ministry of Defence v Wiltshire CC [1995] 4 All ER 931 at p 937b-e, R (Cheltenham Builders Ltd) v South Glos. DC at paras 72-84 and see R (Laing Homes Ltd) v Buckinghamshire CC [2003] 3 EGLR 69 at para. 133
[109] R (Laing Homes) Ltd v Buckinghamshire CC
[110] R (Laing Homes) Ltd v Buckinghamshire CC
[111] R v Oxfordshire CC ex p Sunningwell PC[2000] 1 AC 335 at p.358
[112] R (McAlpine) v Staffordshire CC
[113] Oxfordshire para. 27 disapproving R (Cheltenham Builders Ltd) v Sth. Glos. CC at para. 88
[114] R (Cheltenham Builders Ltd) v Sth Glos. CC at para 85

application land is linked to the area to which the application relates: the question "a significant number of the inhabitants of where?" is answered by reference to the locality or the neighbourhood claimed. The gloss that was put on the statute by the House of Lords in *Sunningwell*, that the users need not all be inhabitants of the locality in question, but only predominantly the inhabitants of that area, can only properly be applied if the locality or neighbourhood on which the applicant relies is clearly defined.

8.20. This interpretation is supported by the decision of the majority of the House of Lords in *Oxfordshire* that registration confers rights on the relevant inhabitants[115], rather than on the general public, for instance. The owner is not altogether excluded from the land. He has the right to use the land in any way which does not interfere with the recreational rights of the inhabitants.[116] The owner may properly be concerned to know who has the right and whom he may exclude.

8.21. In my judgment there must also be some degree of fit between the claimed locality or neighbourhood, and the users of the application land. If no element of fit were required, then in any application where the users came from such a wide area as to raise the objection that it appeared that they were members of the public rather than inhabitants of the locality or neighbourhood, it would be possible to increase the size of the locality relied upon (to a county, or perhaps to the whole of England) to achieve the result that the predominance of users came from the claimed locality, albeit they were scattered unevenly and widely across the area. In my view, such an approach would remove the relationship between the local area and the claimed land that is clearly intended by the statute.

…have indulged in lawful sports and pastimes…

8.22. The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play. Those activities which would today be regarded as sports or pastimes are included, and in modern times, dog walking and playing with children tend to be the kind of informal recreation which may be the main function of a village green[117]. Walking of such a character as would give rise to a presumption of dedication as a public right of way is not a lawful sport or pastime[118]. Use incidental to such walking, such as stopping to pass the time of day with another walker does not convert the walking into lawful sports and pastimes.

…as of right…

8.23. Use of land "as of right" means use without force, stealth or permission ("nec vi nec clam nec precario") and does not turn on the subjective beliefs of users[119]. User "as of right" must be use as a trespasser and not use pursuant to

---

115 Lord Hoffmann, paras 50-51; Lord Rodger, para 114; Lord Walker, para 124.
116 Lord Hoffman para 51.
117 R v Oxfordshire CC ex p. Sunningwell PC at pp 356F-357E
118 Oxfordshire CC v Oxford CC [2004] Ch 253 at paras 96-105
119 R v Oxfordshire CC ex p Sunningwell PC

a legal right[120]. An application should not be refused merely because the witnesses do not depose to a belief that the right attaches to them as inhabitants of the village[121].

8.24. "Force" does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates, if it involves ignoring notices prohibiting entry, or if it is under protest[122].

8.25. "Permission" can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner[123]. Toleration is not inconsistent with user as of right.[124]

Beresford

8.26. In the case of *R v. City of Sunderland ex part Beresford*[125], the House of Lords considered the meaning of the phrase "as of right". It was accepted that the words "as of right" imported the absence of any of the three characteristics of compulsion, secrecy or licence – nec vi, nec claim, nec precario[126]. The appeal turned on the question of whether the inhabitants' use of the land had been by virtue of the implied licence of the council. The parties were invited to make written submissions on the question of whether the inhabitants had indulged in lawful sports and pastimes for the qualifying period of 20 years not "as of right" but pursuant to a statutory right to do so.[127] The undisputed evidence did not establish or give any grounds for inferring any statutory trust or any appropriation of the land as recreational open space[128]. However, in my judgment, it can be inferred from the fact that the House of Lords invited submissions on the point, that, where it is established that the local inhabitants do enjoy a statutory right to use the land for lawful sports and pastimes, this will preclude a finding that their user has been use "as of right", so the statutory test for registration as a town or village green will not capable of being satisfied in relation to that land.

8.27. On the facts in *Beresford*, the House of Lords was not satisfied that any statutory right existed which conferred on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes. [129] Counsel for the council disclaimed reliance on section 21 of the New Towns Act 1981 and the question of whether that section might confer a statutory right was not therefore open for determination by the House of Lords, although it appears

---

120 R (Beresford) v Sunderland CC paras 3, 9 & 30

121 R v Oxfordshire CC ex p Sunningwell PC

122 Newnham v Willison (1987) 56 P&CR 8

123 R (Beresford) v Sunderland City Council [2004] 1 AC 889

124 R v. Oxfordshire CC ex p Sunningwell at p.358F

125 [2003] UKHL 60, [2004] 1 AC 889

126 Para 16, taken from the headnote in *Jones v. Bates* [1938] 2 All ER 237, and described by Lord Hoffman in *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, as summarising the holding on this point in entirely orthodox terms.

127 Para 9.

128 Paras 9, 88.

129 Ibid.

that Lord Scott, at least, had the point been argued, might have been persuaded that that section did confer such a right.[130]

8.28. It was accepted by both parties that, had the council acquired the application land under the Open Spaces Act 1906, the local inhabitants' use of the land for recreation would have been use under the trust imposed by section 10 of the Act[131]. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965. [132]

8.29. Lord Walker addressed this matter at paragraph 87:

> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers)."

8.30. Counsel for the council accepted that the appellant applicant was correct in contending on the facts that the application land had not been acquired under the Open Spaces Act 1906, and that therefore section 10 did not apply. The question of whether the land had been acquired under the Open Spaces Act 1906 was therefore not open for decision by the House of Lords[133]. However, it appears that, had it been, Lord Scott (at least) might have been persuaded that it was not necessary in order to prove that land had been acquired under the Act for reference to the Act itself to be expressly stated either in the deed of transfer or in some council minute relating to the acquisition. Lord Scott commented:

> "*Attorney-General v Poole Corporation* [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation:
>
> > 'in fee simple to the intent that the same may for ever hereafter be preserved and used as a pleasure or recreation ground for the public use.'
>
> "There was no express reference in the conveyance to the 1906 Act, but the Court of Appeal thought it plain that the Act applied. Indeed, counsel on both sides argued the case on the footing that that was so: see Sir Wilfrid Greene MR, at p30. It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land

[130] Para 26.
[131] Para 30.
[132] Para 30.
[133] Ibid and paragraph 88.

> acquired by a local authority were use for the purposes of recreation, and if the land had not been purchased for some other inconsistent use and the local authority had had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply: cf counsel's argument in Poole Corporation, at p27."

Land held for the purposes of public recreation

8.31. There is some indication that Lord Walker's view was that, even if there is nothing from which acquisition or appropriation under section 10 of the Open Spaces Act 1906 specifically could be inferred, where land owned by a local authority has been acquired or appropriated for the purpose of recreation (for instance under section 19 of the Local Government (Miscellaneous Provisions) Act 1976), the use by the public will be use "by right" rather than use "as of right". Lord Walker continued in paragraphs 87 and 88:

> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.
>
> 88 Those situations would raise difficult issues, but, in my opinion, they do not have to be decided by your lordships on this appeal, and would be better left for another occasion."

8.32. Although Lord Walker referred solely to appropriation, there is no reason of principle why a different rule should apply where land has been acquired for the purposes of public recreation, so that there has been no need for an appropriation.

8.33. Lord Scott in paragraph 52 of his speech stated that although the point had not been argued before the House of Lords, he thought that there were strong arguments for contending that where "open space" land was within the ownership of a principal council, even if the Open Spaces Act 1906 was not applicable, the statutory scheme under the Local Government Act 1972 excluded the operation of section 22(1) of the Commons Registration Act 1965:

> "For these reasons, I would, on the basis upon which the case has been argued before your lordships, allow the appeal. I am, however, for reasons that will have appeared, uneasy about this conclusion. Where open space land comes into the ownership of a "principal council", I think there are strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons

> Registration Act 1965. But these arguments have not been addressed to your lordships. I think also, as at present advised, that the power of disposal of open space land given to principal councils by section 123 of the 1972 Act will trump any town or village green status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion."

8.34. However, Lord Walker, on the other hand, thought that counsel for the registration authority had been correct not to argue for some general implied exclusion of local authorities from the scope of section 22 of the Commons Registration Act 1965[134].

8.35. None of the other Law Lords expressed a specific opinion on this point. Lord Bingham gave his own reasons, and stated that he agreed with Lords Scott, Rodger and Walker. Lord Hutton agreed with Lords Walker, Bingham and Rodger. Lord Rodger gave his own reasons and agreed with Lords Bingham and Walker.

Assistance to be derived from taxation cases and legislation

8.36. In *Lambeth Overseers v. London County Council*[135] (the *Brockwell Park* case) the House of Lords held that land purchased by London County Council under the powers in sections 4 and 5 of the London Council (General Powers) Act 1890, which provided that once the land had been acquired the Council must hold the same and every part thereof as a park, and should lay out, maintain, and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation, was not rateable, because it was not occupied by the Council, the Council being merely custodians and trustees for the public, and being obliged to allow the public the free and unrestricted use of it.

8.37. In the decades following the *Brockwell Park* case, there were a number of cases in which the boundaries of the exemption were tested. A detailed account is given in Ryde on Rating at paragraph D[716]. In *Blake v. Hendon*[136] the Court of Appeal held that land purchased under the power contained in section 164 of the Public Health Act 1875 was held by the local authority on trust for the public to be used for the purposes set out in the section, and that the public had free and unrestricted use of it for those purposes (which right might be qualified by a limited exclusion for ancillary purposes).

8.38. The non-rateability of parks and public open spaces was made the subject of a statutory exemption for the first time in the Rating and Valuation Act 1961. Section 13 provided (as relevant):

> "(1) A park which has been provided by, or is under the management of, a local authority and is for the time being available for free and unrestricted use by members of the public shall, while so available, be

[134] Para 88.
[135] [1897] 1 AC 625
[136] [1962] 1 QB 283

> treated for rating purposes as if it had been dedicated in perpetuity for such use as aforesaid.
> (2) In this section-
> references to a park include references to a recreation or pleasure ground, a public walk, an open space within the meaning of the Open Spaces Act, 1906, or a playing field provided under the Physical Training and Recreation Act, 1937…"

8.39. The current provision is Schedule 5, paragraph 15(1) of the Local Government Finance Act 1988. The wording is similar in all material respects.

8.40. In my judgment the fact that the statutory exemption applies to playing fields provided under the Physical Training and Recreation Act 1937 suggests strongly that Parliament took the view that a statutory trust arises in respect of such land as well as in relation to land held under sections 164 of the Public Health Act 1875 and under the various private and local acts which had been the subject of the reported decisions, where the land is for the time being available for free and unrestricted use by members of the public.

Acquiescence as an essential element of user as of right

8.41. In *Sunningwell*[137] the essential element of acquiescence on the part of the landowner in considering whether use was as of right was emphasised in Lord Hoffman's speech at 351H:

> "It became established that such user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see Mills v Colchester Corporation (1867) LR 2 CP 476, 486). The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in Dalton v Angus (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:
>
> > "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.""

The effect of use by the owner (or those authorised by the owner) on whether user by local inhabitants is as of right

[137] [2000] 1 AC 335.

8.42. In *R (Laing Homes Ltd) v Buckinghamshire CC*[138] the local inhabitants had enjoyed substantial recreational use of the land for lawful sports and pastimes. A farmer, under a grazing licence granted by the landowner, had concurrently used the land for light grazing and an annual cutting of hay. Sullivan J quashed the registration authority's decision to register the land as a green. He commented[139]:

> "Gathering a hay crop, with the activities of mowing, bobbing, wind rowing, baling, stacking, loading and removal, will interrupt the use or enjoyment of a field "as a place for exercise and recreation". Not merely do people have to keep out of the way of the machinery when it is in use, they may not disturb the mown hay whilst it is drying, when it has been aligned in wind rows, and when it has been baled. Getting out of the way of machinery which is being operated so as to facilitate the use of land for lawful sports and pastimes (mowing/rolling a playing field) is wholly consistent with the assertion of a right to use the land as a village green. Getting out of the way of machinery which is being operated for an agricultural purpose, to facilitate the taking of a hay crop from the land which will inhibit its use for lawful sports and pastimes, whilst the grass is growing, whilst it is dried and aligned for baling after cutting, when it has been baled, and whilst the bales are collected is not consistent with the assertion of such a right."

8.43. Sullivan J held that the decision of the Registration Authority based on the reasoning in the Inspector's report that the use of the land by the owner for taking a hay crop was not incompatible with the establishment of village green rights should be quashed for two reasons: firstly, that although the use of land for growing a hay crop had not been incompatible with the existence of a customary right to indulge in sports and pastimes on the land prior to the enactment of section 12 of the Inclosure Act 1857[140], since the passing of that section it had not been possible to establish such conditional rights. The enactment of section 29 of the Commons Act 1876 made any effective agricultural use of a village green even more difficult. He therefore concluded that village green rights could not be established where land was being used for the growing and cutting, drying and baling of a hay crop: it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural purposes (such as taking a hay crop) would suffice for the purposes of section 22(1) of the Commons Registration Act 1965, because on registration, some, if not all, of those agricultural activities would become unlawful. Secondly, Sullivan J held that the proper approach was not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to as whether those using the fields for recreational purposes were interrupting the landowner's agricultural use of the land in such a manner or to such an extent that the landowner should have been aware that the recreational users believed that they were exercising a public right. The

[138] [2003] EWHC 1578 (Admin)
[139] at paragraph 59
[140] *Fitch v. Fitch* (1797) 2 Esp 543; *Fitch v. Rawling* (1795) 2 H Bl 394: the two rights co-existed. Each was conditional on its not be exercised in a way as to deliberately obstruct the exercise of the other.

starting point in considering whether user of the land had been "as of right" was how would the matter have appeared to the landowner. It would not be reasonable to expect the landowner to resist the recreational use of his fields so long as such use did not interfere with its licensee's use of them, for taking an annual hay crop. From the landowner's point of view, so long as the local inhabitants' recreational activities did not interfere with the way in which he has chosen to use his land – provided they always make way for his car park, campers or caravans, or teams playing on the reserve field, there will be no suggestion to him that they are exercising or asserting a public right to use his land for lawful sports and pastimes.

8.44. In the *Oxfordshire* case[141] the House of Lords was asked to consider whether registration as a town or village green created any rights in the local inhabitants. Lord Hoffman was of the opinion that the rights created by registration were not limited to those activities proved during the qualifying period, and also that the owner still had the right to use it in any way which did not interfere with the recreational rights of the inhabitants. There must be give and take on both sides. Lord Hoffmann commented on Sullivan J's decision in *Laing*[142]:

> "No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not."

8.45. Lord Rodger (at 114) and Lord Walker (at 124 and 127) agreed with Lord Hoffmann. Baroness Hale (at 137) refused to make a ruling on the issue on the grounds that it was hypothetical. Lord Scott did not agree that registration gave rise to rights for the local inhabitants extending to sports and pastimes generally and not merely that use which had been the basis for registration.

8.46. In *R (Lewis) v. Redcar and Cleveland Borough Council*[143] Sullivan J again had to consider the issue of the effect of a landowner's own use of the land on whether use by local inhabitants had been as of right. The application land included a golf course. The Inspector had made a finding of fact that recreational use of the Report Land by local people had overwhelmingly deferred to golfing use. His conclusion had been that such deferral precluded user "as of right". If local recreational users overwhelmingly deferred to the golf club use, they did not have the appearance of asserting a right as against the landowner to use the land for recreation.

8.47. Sullivan J re-considered his own decision in *Laing* in the light of the decision of the House of Lords in *Oxfordshire*. He acknowledged that the first strand of his reasoning in *Laing* was disapproved in *Oxfordshire*, but said that all parties were agreed that the second limb of his reasoning was not disapproved, and

[141] para 57
[142] at para 56
[143] [2008] EWHC 1813 (Admin)

indeed appeared to be confirmed by Lord Hoffman as the proper approach. The question was therefore whether those using the land for recreational purposes were interrupting the landowner's own use of the land for his own purposes in such a manner or to such an extent that the landowner should have been aware that they were exercising a public right.

8.48. Sullivan J held that, although in practice low-level activities by the landowner may not be inconsistent with the use of his land for sports and pastimes for the purposes of section 15 of the 2006 Act, on the basis of the Inspector's findings of fact, the activities of the golf club could not sensibly be described as "low-level activities". The extent of the deference by local users was confirmed by the lack of any evidence that, from the golf club's point of view, its use of the land was being interfered with or inhibited by local people using the land for recreation.

8.49. Counsel for the Claimant submitted that there were good practical reasons for the deference found by the Inspector which had nothing to do with the local inhabitants deferring to the landowner's property rights, and therefore there was no proper basis on which the defendant could have assumed that no rights were being asserted by the public. It would be stupid and dangerous to walk across the line of play when a ball was about to be struck and most people would naturally defer to those using the land for other recreational pursuits, including golf, as a matter of common courtesy.

8.50. Sullivan J accepted that, when deciding whether or not to defer to golfers, the local users would have been concerned to ensure their own safety and to behave in a courteous manner towards other users of the land, and would have been most unlikely to have been in the least concerned with any question of competing legal rights, but he held that the motives of the local users for showing "overwhelming deference" to the golf club's use of its land as a golf course were irrelevant, relying on Lord Hoffmann's opinion in the *Sunningwell* case [2000] 1 AC 235 at pages 352 F to 356 E),. The question was: how would the matter have appeared to the golf club? It would not be reasonable to expect the club to resist the recreational use of the land by local users if their use of the land did not in practice interfere with its use by the club as part of a popular and well-used golf course[144]. What matters to the landowner is the fact of deference to his use of the land, not the reasons for it which might vary from individual to individual. Sullivan J accordingly dismissed the claimant's challenge to the Registration Authority's decision.

8.51. The Claimant appealed to the Court of Appeal[145]. Dyson LJ giving the leading judgment, dismissing the appeal, said that there was no longer any doubt as to the principles that should be applied in determining whether local inhabitants had indulged in lawful sports and pastimes "as of right" within the meaning of section 15 of the 2006 Act: it must be shown that their user is such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right. Where there are no competing uses by local

[144] Paragraph 82 of Laing and paragraph 57 of the Oxfordshire case.
[145] [2009] EWCA Civ 3

inhabitants and the owner, the answer to the question whether the local inhabitants' use of land has been nec vi, nec clam, nec precario will usually determine whether they have been using it "as of right". Where there are competing uses, the position may be factually more complicated, but the question remains the same: has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land? The answer will depend on an analysis of the manner and extent of the user. There are no principles of "interruption" or "deference". "Interruption" and "deference" are aspects of the "amount or manner" of the use, and may be relevant to a determination of whether the user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land. He said:

> "[41] …As Lord Hoffmann said in *Sunningwell* at p 357D, the user may be "so trivial and sporadic as not to carry the outward appearance of user as of right". Thus, user by the local inhabitants may be interrupted sufficiently often and/or for sufficiently long periods of time that it does not carry the outward appearance of user as of right. It is a question of fact and degree in every case. As Mr Laurence concedes, user of the kind required to found an entitlement to registration is in its nature intermittent. Thus, where the owner does not put the land to any competing use, a claim founded on activities such as walking, picnicking and kicking a football about does not fail just because those activities are not carried out all the time.
>
> [42] That is to be contrasted with the situation where the land is not used by local inhabitants at certain times by reason of the activities of the owner on the land at those times. Where that occurs, local inhabitants will usually not be physically prevented from indulging in lawful sports or pastimes despite the owner's competing activities. Thus, in *Laing Homes* the local inhabitants could have walked in front of the farmer's machinery had they chosen to do so. In the present case, they could have walked across the golf course while the golfers were playing if they chose to do so. The reality in such cases is that they voluntarily desist from interfering with the owner's activities, not that they are physically prevented from doing so.
>
> [43] As Mr Laurence puts it, it is not a misuse of ordinary language to say in such cases that the use of the local inhabitants is "interrupted" during such periods, in the sense that they are not using the land while the owner is doing so. Equally, it is not a misuse of language to say that if the users refrain from using the land while the owner is doing so, they are "deferring" to the owner. What matters is not what label one puts on it, but how it would have appeared to the reasonable owner of the land at the time, and in particular whether it would have appeared to the reasonable landowner that the local inhabitants were asserting a right to use the land for the sports or pastimes in which they were indulging.

> [44] I agree with Mr Laurence that this analysis is consistent with what Lord Hoffmann said at 57 of the *Oxfordshire* case. It is true that this paragraph contains obiter dicta and none of the other members of the House of Lords commented on it. Nevertheless, Lord Hoffmann clearly chose his words carefully and neither Mr Laurence nor Mr George suggested that we should not apply them. (As I have said, Mr Laurence reserves his right to argue on a future occasion that what Lord Hoffmann said about the Victorian statutes was wrong, but that is another matter). It is worth repeating what he said:
>
> > "No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'. But . . . I do not agree that low level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not."
>
> [45] In other words, there are cases where, in practice, the activities of the owner will be inconsistent with user by the local inhabitants of the land for sports and pastimes for the purposes of s 22 of the 1965 Act (and s 15 of the 2006 Act). The inconsistency will manifest itself where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees). By adjusting their behaviour, they give the impression to the owner that they are not claiming a right to do what they are doing. That leads the owner not to regard the users as acting as of right."

8.52. Rix LJ, agreeing, added that the facts relating to competing activities may well be relevant to, and thus possibly antithetical to, the establishment of the inhabitants' use "as of right": the inhabitants' use must demonstrate to the owner that they assert a right to do what they do. Those questions were matters of fact, the findings in relation to which might undermine the assertion of right.

Conclusions on "as of right"

8.53. In my judgment the conclusion to be drawn from the above cases is that in considering whether the use of the land by the local inhabitants has been "as of right", the Registration Authority must bear in mind that acquiescence is an essential element of use as of right. The Registration Authority must consider whether the use by the local inhabitants has been sufficient to bring home to the reasonable landowner that the local inhabitants have been asserting a right to use the land. Where the land owner has used the land himself (or the land has been used by those authorised by him), one of the aspects which will be relevant to that determination is whether the activities of the landowner were in practice inconsistent with the local inhabitants' use of the land for sports and pastimes. That question is a question of fact and degree. There is no separate principle of deference, rather the issue of the interaction between landowner's own use and the use by local inhabitants is part of the inquiry into the question of whether use has been as of right.

…and continue to do so.

8.54. The House of Lords held in the *Oxfordshire* case that the relevant user need only continue down to the date of the application: user need not continue to the date of registration. This reverses the Court of Appeal decision which had the effect that, after an application had been made to register a new green, but before the green was actually registered, the landowner was able to take steps, e.g. by fencing the land or erecting notices on the land, to prevent user "as of right" from continuing.

Procedure

8.55. The procedure in relation applications to register new greens made before 6th April 2007 continues to be governed by the Commons Registration (New Land) Regulations 1969. These regulations have proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications.

Who can apply?

8.56. Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application

8.57. Application is made by submitting to the registration authority a completed application form in Form 30. The form was not updated to take account of the new definition. The form asks a series of questions which are very hard in practice to answer.

- Part 3 asks for the "locality" of the application land. Few people completing the form are aware of the narrow technical meaning given by the courts to "locality".
- Part 4 asks the applicant to state on what date the land became a green. It seems that, after the *Oxfordshire* case, this will be the date of the application. Few applicants get this date right
- Part 5 asks how the land became a green. The technical answer is that the land became a green when it complied with the requirements of the second definition. Again, few applicants are in a position to work this out.

Accompanying documents

8.58. Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 4 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In most cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years

Evidence

8.59. The applicant is only required to produce evidence to support the application if the registration authority reasonably requires him to produce it under reg. 3(7)(d)(ii).

Preliminary consideration

8.60. After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(7). The registration authority can reject the application at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- Where Form 30 has not been duly completed, or
- Where the application is bound to fail on its face, e.g. because it alleges less than 20 years use or where the supporting documents disprove the validity of the application

Publicity

1.1. If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(4) to publicise the application:

- By notifying the landowner and other people interested in the application land
- By publishing notices in the local area, and
- By erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors

8.61. Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement

8.62. Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has a discretion to admit late objection statements.

Determination of application

8.63. The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The Commons Commissioners have no jurisdiction to deal with disputed applications to register new greens: *R (Whitmey) v Commons Commissioners*.[146] The regulations seem to assume that the registration authority can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, most recently by the House of Lords in the *Oxfordshire* case, whereby the registration authority appoints an independent legally qualified inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not.

---

146 [2005] 1 QB 282.

Procedural issues

8.64. A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[147]. However, in my view, this does not mean that the standard of proof is other than the usual flexible civil standard of proof on the balance of probabilities.
- **Defects in Form 30.** The House of Lords has held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form, e.g. where the wrong date has been inserted in Part 4, provided that there is no procedural unfairness to the objectors. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green
- **Withdrawal of application.** Also in the *Oxfordshire* case, the Court of Appeal held that the applicant has no absolute right to withdraw his application unless the registration authority considers it reasonable to allow withdrawal. Despite the applicant's wish to withdraw, the registration authority may consider that it is in the public interest to determine the status of the land. The House of Lords did not dissent from this view

8.65. There is no power to award costs.

9. <u>The facts of this case</u>

The application land

9.1. I carried out an accompanied site visit on the last day of the inquiry. I also visited the application land unaccompanied before the commencement of the inquiry.

9.2. The application land is owned by Canterbury City Council and is registered at HM Land Registry under Title Number K154706. The bulk of the application land (10.69 acres) was acquired in 1957 by the City Council's statutory predecessor under the powers contained in the Physical Training and Recreation Act 1937 for use as a playing field. The relevant section of the 1937 Act was not specified in the Conveyance, but I infer that the land must have been acquired under section 4. Land acquired under section 4 of the Physical Training and Recreation Act 1937 became held for the purposes of section 19 of the Local Government (Miscellaneous Provisions) Act 1976, without the need for any formal appropriation (by virtue of section 19(5) of that Act).

---

[147] R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in R (Beresford) v Sunderland at para. 2

9.3. Two small additional parcels (a triangle in front of numbers 46-62 Woodrow Chase and a strip along the north western side, including most of the area now occupied by the path from Canterbury Road to the path in front of the houses on Woodrow Chase) were acquired in 1962 by the City Council's statutory predecessor. The report on title produced by Canterbury City Council stated that these parcels were acquired under the statutory powers contained in the Physical Training and Recreation Act 1937, for use as pleasure grounds. The 1937 Act did not contain a power to acquire land for use as pleasure grounds: that power is contained in section 164 of the Public Heath Act 1875. It seems likely to me that these small parcels were acquired under the powers contained in the 1937 Act, rather than under the 1875 Act, or were appropriated to use under the 1937 Act following acquisition, and were held, together with the remainder of the land, under the powers contained in the 1937 Act and subsequently under the 1976 Act powers.

9.4. The application site is an open grassy site of just over 11 acres in area. It lies to the east of Canterbury Road and between the housing on Mill View Road, Woodrow Chase, School Lane and Benstede Close. There are a few trees around the edges of the land, along the top of the bank on the north eastern side, and in the eastern corner of the land.

9.5. Some of the houses on Woodrow Chase (numbers 22-70, even numbers) face onto the application land, and have front gates which give direct access to it. There are gates in the fences of other properties which share a boundary with the application land which give access onto it (12, 14 and 16 Mill View Road, 257 Canterbury Road and Benstede House and Grangemount House in Benstede Close.

9.6. A public footpath, CH43, runs along the south western side of the application land, near the boundary, giving access between School Lane and Canterbury Road. The path has a tarmac surface. A second public footpath, CH44, runs along the north western side of the application land and part of the north eastern side of the application land, around the edge of the land, giving access between Canterbury Road and Woodrow Chase. This path also has a tarmac surface. There is a third public footpath in the vicinity of the land, CH69, which runs between the houses and provides access between Woodrow Chase and School Lane. There is also a tarmac path which joins the second and third public footpaths and runs along the north eastern side of the application land in front of numbers 22-64 Woodrow Chase. None of the paths is fenced against the application land, and access to the land is available at any point off the paths. There are gates at various points designed to stop vehicles coming onto the land, but admit pedestrians, and it was common ground at the inquiry that these gates are never locked.

9.7. There are public toilets and two pavilion buildings on the south western side of the application land. The path runs behind those buildings (so that the buildings are between the path and the open part of the application land at that point). On the middle pavilion building, facing the path behind the buildings, there is a printed metal sign headed "County of Kent Act 1981.Trespass on

school and sports premises."[148] The sign is high up, and not immediately obvious to the passer-by.

9.8. In the south eastern corner of the application land there is a children's playground. The playground equipment has been changed since the application was made, in 2006. I was told that the area occupied by the new playground overlaps in part the area occupied by the old playground. The old playground was not fenced. A photograph of the old playground appears on page 74 of the Herne and Broomfield Parish Plan. The new playground is surrounded by fencing. To the north of the new playground area is some outdoor gym equipment, which was also installed after the end of the relevant period.

9.9. There are at least four benches situated around the perimeter of the application land, all facing inwards towards the sports pitches. The benches are on the grassed part of the land, but near the paths.

9.10. I visited the application site between the end of the football season and the start of the cricket season. It was common ground at the inquiry that three football pitches are marked out on the application land every season and that the position of the pitches is changed slightly each season to avoid causing areas of excessive wear in the ground. A cricket square was visible, and again it was common ground that a cricket pitch is marked out during the cricket season.

9.11. I could see the remnants of the lines of the football pitches used the previous season when I visited, and was able to gain a good impression of their position and size. I was told that the pitches are marked out within the maximum and minimum sizes prescribed by the Football Association and are approximately 50 metres wide and 100 metres long.

9.12. The goalmouths and centre circle area on the northern football pitch were very worn. The linesman's run at the side of the pitch was visible in the grass. The northern edge of the pitch (the side line) is about 25 metres from the path along the north eastern edge of the application site. The site slopes downwards quite steeply from the path, and it was apparent on the site visit that the slope means that the football pitch cannot go be moved too far to the north: it has to be positioned to accommodate the slope. The goalmouth on the south eastern end of the northern pitch was approximately 26 metres from the fence around the south eastern boundary of the application land.

9.13. The southern pitch is between the northern pitch and the pavilions. There were similar worn patches in the goalmouths and around the centre circle on the southern pitch. There was a visible strip worn away along the side of the lines. That area was very worn on the southern side (nearest the pavilions) and was visible on the northern side.

[148] A photograph of the sign appears at O/9

9.14. On the western pitch there were worn patches in the goalmouths and around the centre circle. The linesman's runs were visible but not very worn on both sides. There was about 14-15 metres between the linesman's area and the path on the western boundary.

9.15. A single goal was positioned next to the playground area. The goal was secured to sockets in the ground. I was told that this goal is moved from time to time to avoid excessive wear to the goal area. I was also told that squares are marked out in this area as required when requested for training.

9.16. In the summer months a single cricket pitch is marked out on the application land. The cricket square was visible as a raised area on my visit, and I was told that its height had been built up over the years with the addition of loam and topsoil. The current wicket was marked by more closely cut grass.

9.17. It was also common ground that in addition to the cricket pitch, the land is marked for rounders in the school holidays.

9.18. There are three "No golf" signs on the application land, one near each of the two entrances from Canterbury Road, and a third near the entrance between numbers 40 and 42 Woodrow Chase.

9.19. Parts of the application site are not covered by the pitches and the Applicant sought, by reference to an estimate produced by her son as to what percentage area the pitches occupied, to say that a substantial part of the application land is not occupied by the pitches. I did not think that this approach was helpful. Whilst it is the case that there are areas which are not physically occupied by the football matches, (for instance areas between the pitches, where the pitches have been spaced out to avoid the game on one pitch interfering with the game on the neighbouring pitch, across which it would be possible to walk without walking through a game), nevertheless in my judgment and as a matter of impression it can sensibly be said that during the football season when matches are taking place on all three pitches, the whole of the application site is being used for that purpose, except for the pathways around the sides, the playground area and a small area in the eastern corner. The position will be similar when a cricket match is taking place, although there is more space between the edges of the site and the edges of the cricket pitch at the north western end, in particular, when the land is used for cricket rather than football.

Use of the land during the relevant period

9.20. The football pitches on the land have been well-used throughout the relevant period. They have been booked through the City Council's booking system, for a fee, regularly at weekends throughout the season by a number of different clubs. The clubs and the players who use the application land as their home ground do not come predominantly from Herne: the application land attracts clubs from across the district.

9.21. The cricket pitch similarly has been well-used throughout the relevant period. It has been booked through the City Council's booking system, again for a fee,

regularly at weekends throughout the cricket season. Again, the clubs and players who use the application land as their home ground do not come mainly or predominantly from Herne, but come from across the whole district.

9.22. There has also been, throughout the relevant period, a substantial amount of use of the application land by local residents. The City Council has encouraged use by local residents by providing a children's playground on the application site, and by providing other recreational facilities for the use of local children, such as the single goal post which remains up all year, and the markings for rounders during the school holidays. There was also ample evidence that the application land had been used by a substantial number of individuals for dog walking and walking throughout the relevant period. The use by the local residents has been both during the week and at weekends.

9.23. When a football or cricket match is taking place, the local inhabitants adjust their activities to accommodate it. Mrs Bissett, Mrs Newman and Mrs Brown all gave clear evidence on behalf of the applicant that local inhabitants adjusted their activities so as not to interfere with the game or with people watching the game. Mr Beer said that those not playing respected the games which were going on. Mrs Brown made a distinction between a game being played by local children, when she would walk across the pitch if she could do so without disturbing the game, and an organised match, when she would not cross the pitch. Mrs Beer did not distinguish between organised and children's games but would walk around the area where either was taking place. Mr Keys would not walk across a football match. Mr Nutt's evidence was that a lot of people would turn up and watch football and cricket matches. People would stand back from the lines to allow space for the linesmen whilst watching football. When his family watched cricket, he and his wife might sit, whilst the children might run around or play ball in another part of the field, so it was not disturbing the match. Again, this was clear evidence in my judgment of people adjusting their activities to ensure that they did not interfere with the game. The Applicant's witnesses' evidence in this regard was supported by the evidence on behalf of the Objector.

The effect of the land being held under section 19 of the 1976 Act

9.24. Throughout the relevant period the application land has been held by Canterbury City Council under the power contained in section 19 of the Local Government (Miscellaneous Provisions) Act 1976. I turn now to consider the effect of this. The application land was not available for free and unrestricted use by members of the public. Use for organised football and cricket matches is restricted, in that it is necessary to book and pay for a pitch. Use of the land by people not playing in the match is restricted when organised football and cricket matches are taking place. I therefore do not consider that members of the public had a right to use this land under a statutory trust. Accordingly I do not consider that the use of the land by local inhabitants was "by right" because it was held under section 19 of the 1976 Act, as suggested by the City Council.

The "No Golf" notices

9.25. Three "No Golf" notices have been erected and maintained on the land since about 2001. I have to consider what effect the presence of these notices has had on the question of whether the use by the local inhabitants of the application land has been as of right.

9.26. In some instances in my opinion the presence of signs prohibiting particular activities can give rise to an inference that any use of the land other than for the use prohibited by the signs is by virtue of an implied permission. The signs do suggest that the landowner considered that it had the right and responsibility to regulate the use of the land by local inhabitants but I do not consider that the No Golf signs here were explicit enough in themselves alone to support the conclusion that all other use was by virtue of an implied permission. However, the signs, when taken together with the other evidence, support my conclusion that a reasonable landowner would not have considered that local people were using the application land as of right.

The County of Kent Act sign

9.27. For at least part of the relevant period, and, in my judgment in all probability for the whole of the relevant period, a sign setting out section 32 of the County of Kent Act 1981 was displayed on the wall of one of the pavilions on the application land. I heard no evidence as to the state of the sign during the period, but certainly by the time it was photographed, shortly after the end of the relevant period, its condition had deteriorated to the extent that only about half of its wording could be read easily. It seems likely to me that the sign was legible when erected and deteriorated gradually, so that for at least some of the relevant period it could be read in its entirety. I imagine that the position of the sign, high up on the wall of the pavilion, was chosen to minimise the risk of its being vandalised. However, because of its position, the sign was not obvious to a user of the land. Of the witnesses for the applicant who gave oral evidence to the inquiry, only Mrs Bissett had noticed it. I did not find it surprising that people were unaware of the notice.

9.28. I therefore must consider two questions: firstly, what would be the effect of a notice under section 32 of the County of Kent Act 1981 on the question of whether the use of the land on which it was displayed by local inhabitants was as of right if the notice were obvious to those users, and secondly, what is the effect of a notice which is not obvious to the users on the question of whether their use has been as of right.

9.29. Section 32 of the County of Kent Act 1981 provides (as relevant):

> "(1) This section applies to-
>
> (a)…
> (b) premises of a local authority or parish council being a playground, playing field, or premises provided by the authority or council under paragraph (a), (b), (c) or (d0 of section 19(1) of the Act of 1976 or

facilities by way of parking spaces provided under paragraph (f) of the said section 19(1).

(2) It is an offence to remain on premises to which section 32 applies after being requested to leave them, or without lawful authority to be on such premises within one month after being so requested.

(3) A person does not commit an offence under this section unless there is displayed on the playground, playing field or other premises, a notice setting up the effect of section 32.

(4) A person committing an offence under this section

(a) may be removed from the premises concerned and
(b) shall be liable on summary conviction to a fine not exceeding £50."

9.30. In my judgment the notice was of no effect at all during the period when it was illegible in part as a result of the deterioration of its condition over time. Although its positioning is not such as to make it obvious to users, it is legible from the ground, and, in my opinion would have been effective for some time during the relevant period under subsection 32(3). However, I am not satisfied that the effect of the section is to give those who use the land to which the notice relates an implied permission to use the land. The notice states that those entering the land may be requested to leave at any time. In my view the character of the right enjoyed prior to being asked to leave is not that of a permissive right: the section does not extend a permission which may be determined at any time, but that of a tolerated trespasser: a person who has no right to be there. No reasonable user reading this notice would in my view conclude that they were on the site by permission of the owner. I therefore do not consider that the presence of the notice during the relevant period is fatal to the applicant's case that the local inhabitants used the land as of right, as suggested by the City Council.

Has use of the land by local inhabitants been as of right?

9.31. Standing back and considering the matter in the round, in my judgment all these factors strongly indicate that the use by the local inhabitants of the land during the relevant period has not been as of right. The land is held by the local authority to provide recreational facilities for the public. It is managed to facilitate that use. Parts of the land are let out for a fee as permitted by the statutory powers under which the land is held, and when this occurs, other users implicitly acknowledge that those who have paid the fee have a superior right to be on the land and do not interfere with their use of the land. The local authority regulates the use of the land by signs forbidding the playing of golf on the land, and provides bins for the use of dog walkers. The essential element of acquiescence in trespassory use by the local inhabitants is not present here.

Res judicata

9.32. It appeared from the documentary evidence, and Mrs Bowley accepted, that Mr Bowley had made an application in 2002 to register land including the

land the subject of the present application. That application was rejected by Registration Authority' Regulation Committee Panel on 21st March 2003. The Objector's primary submission was that the authority should not re-open matters fundamental to the decision to reject the first application to register the application land as a town or village green.

9.33. The basis of the decision of the registration authority to reject the first application was not entirely clear on basis of the information contained in the bundle. The Officer's report to the Regulation Committee Panel meeting held on 21st March 2003 was not included within the Objector's bundle. The Objector relied instead on an extract from an opinion provided by Mr Philip Petchey of counsel in which a passage from that report was quoted[149] in support of the submission that the sole basis on which the application was rejected was because local people had not used the application land as of right but with permission. This submission was further supported by the statement in an Officer report to the meeting of the same Panel held on 2nd September 2008 on the subject of the present application that the first application was rejected on the ground that the use of the land was not as of right, because the land had been acquired by the local authority under the Physical Training and Recreation Act 1937 for use as a sports and recreation field[150]. Any conclusion that the land was used not as of right but with permission must have been a conclusion on a mixed question of law and fact. So far as conclusions of fact were reached, they were reached without the benefit of a public inquiry, such as has now been held, so therefore without the benefit of any oral evidence.

9.34. The applicant stated that she had been advised to reapply, following the decision of the House of Lords in *Beresford*. There have been a number of decisions relevant to the issue of whether use is as of right since 2003. Nevertheless, had it not been my view, for the reasons expressed elsewhere in this report, that the present application ought in any event to be rejected because (amongst other reasons) use of the application land has not been as of right), I would have considered it very doubtful whether it would be open to the Registration Authority now to conclude that use of the application land between 1984 and 2002 had been as of right, contrary to its earlier decision. Whilst there is some attraction in Mrs Graham Paul's argument that a decision not to register land is merely a decision that the applicant on that application has failed to prove that the statutory test for registration has been met, so that a fresh application by a different applicant in relation to the same period should be given the opportunity succeed, nevertheless, it seems to me that the public interest in the finality of litigation would lead a court to conclude that a landowner should not be subjected to repeated applications in relation to the same piece of land relying on the same period of use and the same facts. Where the law has changed, the applicant (or any other interested party)'s remedy is to apply for judicial review of the first decision.

[149] O60
[150] O368

9.35. I also incline to the view (although again, it is not necessary to decide this point) that, had the test in other respects been satisfied, nevertheless use during the period when the landowner was maintaining an active objection to the first application should not be regarded as use as of right.

Locality and neighbourhood

9.36. The locality relied upon by the Applicant is the Civil Parish of Herne and Broomfield. The boundaries of the Civil Parish as at 2004 are clearly shown on the map at the centre of the Herne and Broomfield Parish Plan. The Civil Parish was formed in May 1996. There were a number of historic maps in the bundles, from which I have derived the following information. The area now covered by the Civil Parish includes what were originally five settlements: Herne, Herne Common, Hunters Forstal, Broomfield and a small settlement at Bullockstone. By 1962 ribbon development along School Lane between Herne and Hunters Forstal. There was also some ribbon development along Hunters Forstal Road and Margate Road between Broomfield and Hunters Forstal. By the time the base map for the 1987 Definitive Map was produced a substantial amount of development to the north east of Herne had effectively joined Herne and Hunters Forstal. Broomfield remained separate, apart from the ribbon development along Margate Road. By the time the base map for the 2004 Parish Plan was produced, substantial development to both the north and south of Hunters Forstal Road had effectively joined Herne and Hunters Forstal and Broomfield. Herne Common and Bullockstone have remained at all times separate settlements.

9.37. The applicant relied in the alternative on a neighbourhood within the locality of the Civil Parish of Herne and Broomfield, the village of Herne, being part (about one half) of the Civil Parish of Herne and Broomfield, which is the locality relied upon. The area claimed to be the village of Herne was outlined on a map provided to the inquiry on the third day of the inquiry and inserted into the bundle at A10A.

9.38. The Civil Parish of Herne and Broomfield has since its creation in May 1996 been an area known to law and therefore an area capable of being a qualifying locality for the purposes of the 1965 Act. However, before that time the Civil Parish did not exist. In my judgment the area now identified as the Civil Parish was not a qualifying locality during the period before it existed. I am not persuaded by Mrs Graham Paul's submissions that it would be appropriate to adopt a purposive approach to the legislation and not interpret it as requiring that the locality has existed for the whole of the relevant period. I therefore conclude that no relevant qualifying locality which satisfies the requirements of the Act has been identified by the applicant. I do not think that the comment of Sullivan J in *Laing Homes* that the application form is not to be treated as though it is a pleading in private litigation, and that the Registration Authority ought, subject to considerations of fairness towards the application and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence was intended to suggest that the Registration Authority had an inquisitive role in this regard, particularly in a case which has been presented at a public inquiry. The burden of proof is on

the applicant demonstrate that the test for registration has been met, and she has not discharged that burden in this respect.

9.39. In view of the difficulties with the locality identified above, it is not necessary for me to decide whether the area identified as the neighbourhood is a neighbourhood within the meaning of the Act or not, or whether the users of the application land did come predominantly from the identified neighbourhood, but I set out my views on those points for the sake of completeness. In my judgment the area identified by the Applicant and described by her as the village of Herne cannot sensibly be described as a neighbourhood. The settlements of Herne and Broomfield have merged together through development to such an extent that, whilst the original centre of each settlement might still be separately identifiable, it is no longer possible, in my view, to draw a line between the two and say that the properties on one side are Herne and on the other Broomfield. In this respect I prefer the evidence of Mrs Davis, that the two areas have joined together over the years, to the extent that when in 1996 she and others were seeking to set up the Civil Parish, it was decided that there was no defining place to separate Herne and Broomfield, and therefore that the appropriate area for the new civil parish was a combined Civil Parish of Herne and Broomfield.

Where did the users come from?

9.40. I turn now to the question of where the users of the application land, other than the sports teams who booked the pitches, came from. Most of the evidence before the inquiry was of use by those closest to the land. No survey of people using the application land had been carried out. The evidence of use had been collected by Mr and Mrs Bowley asking people who lived near them whether they used the land and if they did obtaining questionnaires from them. Mrs Bowley had no clear idea as to where the users came from an agreed that she did not know whether people came predominantly from within her claimed neighbourhood, or whether people came from outside it.

9.41. There is a substantial risk that the geographical distribution of users suggested by the evidence collected in this way is not representative of the true distribution of the users. I accept the Objector's contention that dog walkers who live in Herne Common or the eastern end of Broomfield were unlikely to come to the application land to walk their dogs, whereas those who live in the houses which surround the land, were likely to use the land. In this respect the distribution of users suggested by the evidence accords with common sense.

9.42. However, there is no other playing field within the Civil Parish. It seems likely to me that the application land and the children's playground in particular must be a draw to residents of the whole of the Civil Parish (or at least to residents with small children), despite the fact that this was not reflected by the applicant's evidence. I conclude therefore although it is likely that although the most frequent users (and probably all the dog walkers) are those who live closest to the land, nevertheless it is likely that it could sensibly be said that the land is in use by the population of the whole of the Civil Parish. I think it likely, even taking into account the use by the football and

cricket teams, that the user of the application land are predominantly the residents of the Civil Parish of Herne and Broomfield.

Should the Registration Authority register part of the application land?

9.43. Even had an appropriate locality been established, I would not have considered it appropriate to separate off those parts of the application land which are not physically used for football or cricket matches and recommend those parts for registration. The thrust of the evidence was that local people used the whole of the land, but moved to accommodate organised games. There was no evidence of activity which was specific to the areas which are not occupied by the football matches. If all three pitches were being used, those local people using the land would confine themselves to the areas not being used by the football. If only one football match were being played, local people would be using the other two pitches as well as the areas which are not physically used for football. In my judgment a landowner looking at the use of his land would look at the use of it as a whole and would conclude that the local people were not using the land as a whole as of right. He would not characterise the use of the areas which he did not require for football matches in a different way from those areas which are used. This approach is consistent with the approach in the *Redcar* case: in that case, the whole of the application land was not occupied by the club house, tees, fairways, greens and practice grounds, there were substantial areas of rough ground beside and between those features. The question of whether the application land was used as of right was considered in relation to the land as a whole. It was not suggested that those parts which were not physically occupied by the golfing activities should be separated off and considered for registration.

Should those parts of the application land which have been demised to the Parish Council be excluded from consideration

9.44. The Objector argued that the two areas which had been demised to the Parish Council: the area now occupied by the MUGA, which was the subject of a lease dated 16th September 2005, and the area now occupied by the outdoor gym equipment, which was the subject of a lease dated 9th February 2009, in any event could not be registered as village green, because their disposal pursuant to section 123 of the Local Government Act 1972 trumped any potential village green status. In view of my conclusions in relation to whether the test for registration is met, it is not necessary for me to decide this point, but my preliminary view is that had the statutory test for registration been satisfied during the whole of the relevant period, the land would have been registrable as a green, in spite of these later dispositions.

10. **Applying the Law to the Facts**

Land…

10.1. In my view, the application land has been sufficiently clearly defined to constitute "land".

…on which for not less than 20 years…

10.2. The House of Lords determined in the Oxfordshire case that the relevant 20 year period is the period ending with the date of the application for

registration. In this case the relevant period therefore is 7th January 1984 to 6th January 2004.

…a significant number of the inhabitants…

10.3. In my judgment the whole of the application site has been used by a substantial number of local inhabitants, sufficient to indicate to a reasonable landowner that the whole of the application land was in use by local inhabitants generally for recreation.

…of any locality or of any neighbourhood within a locality…

10.4. The applicant has failed to identify a qualifying locality which has existed for the whole of the relevant period. The locality upon which she relied, the Civil Parish of Herne and Broomfield, has only existed since 1996. I was not satisfied that the area within that locality, relied upon by the applicant in the alternative as a neighbourhood was a neighbourhood within the meaning of the statute. The onus lies on the applicant to show a qualifying locality. She has not discharged that burden, and in my judgment the application must fail for that reason. I was satisfied that the users of the application land came predominantly from the Civil Parish of Herne and Broomfield.

…have indulged in lawful sports and pastimes…

10.5. There was ample evidence of use of the application land by local residents over the whole of the relevant period for dog walking, walking and children's play.

…as of right…

10.6. The applicant must show that the application land has been used by the local inhabitants as of right. She has not succeeded in showing that use has been as of right. In my judgment the application must fail for this reason. During the whole of the relevant period the landowner marked out football and cricket pitches on the land, according to season, and let those pitches and the associated facilities to teams for organised games at a fee. The behaviour of the local inhabitants has been such as to communicate to a reasonable landowner that they understand and accept that the teams who have booked to play are entitled to exclusive use of the pitches and associated facilities at the times when they have booked them. The local inhabitants ensure that they conduct themselves at such times so as not to interfere with the matches, and adjust their own activities accordingly. A reasonable landowner would not therefore have apprehended that the local inhabitants were asserting a right to use the land at all times for recreation. In my judgment the use of the application land for recreational purposes by the local inhabitants has therefore not been as of right because it would not have had the appearance to a reasonable landowner of being as of right.

…and continue to do so.

10.7. The use of the application land by local inhabitants continued down to the date of the application.

11. Conclusion and Recommendation

11.1. I conclude that the application fails. Accordingly, I recommend that the Registration Authority should refuse the application. I recommend that the Registration Authority should give all parties to the inquiry written notice of its reasons for refusing to the application. I recommend that the reasons are stated to be "the reasons set out in the Inspector's Report dated 18th September 2009".

Lana Wood
18 September 2009
Lincoln's Inn

Evidence of witnesses on behalf of the Applicant who provided written witness statements, with or without other documents

Name	Address	Dates	Use
Mrs G Bean	106 Woodrow Chase	1977-date	Watching cricket matches with a picnic, walking across, walking son's dogs. Uses the land every day
Mrs A Beer	251 Canterbury Road	1972-1987 1996-date	To entertain daughter, and to walk her to school. Daughter used to have picnics with friends on the land. Also used the application land for dog walking, and to watch local teams play football and children enjoying themselves.
Mrs J Benjamin	12 Mill View Road	1999-date	Has a gate which opens onto the application land from her back garden. Her two children (teenage in 2009) used the gate frequently when younger, and still do sometimes, to go and play on the land or to meet their friends there. The land is well-used by dog walkers and children playing various games.
Ms B Biske	257 Canterbury Road	1970-date	Daily dog walking. Watching cricket played by local teams and football on Saturday or Sunday afternoon.
Mrs K Brett	19 Herne Street	1952-date	Evidence in witness statement relates to memories from 30 years ago. Still using the land for dog walking in 2002/3 and watching football and cricket, and playing with visiting grandchildren.
Mr B Clifton	22 Mill View Road	1991-date	He used to take his daughter over to the Cherry Orchard. They would have picnics there and enjoy family days there. He particularly remembered playing informal games of football there. He now takes his grandchildren over to the Cherry Orchard. He said that he had used the Cherry Orchard extensively over the last 18 years, and supported the application to have it registered as a village green. His house almost backs onto the land. He has a good view of it. He often watches other locals walking their dogs, playing ball games and also local teams practising their football. Mr Clifton stated that he had been made aware of the Kent Act sign, but in 18 years previously had not been aware of its existence. He used to get golf balls in his back garden until the "No Golf" signs were put up.
Mrs D Hills	25 Lower Herne Road	40 years +	Evidence relates to memories from 40 years ago.
Mrs D Howell	45 Norton Avenue	1973-date	Playing with grandchildren. Organised football and cricket are played there, but do not

			interfere with her enjoyment of the land. Had not noticed the Kent Act sign.
Mr & Mrs Lawrie	11 School Lane	26 years +	Seen local teams playing football and cricket, school fetes, children playing with their families and dog walkers on the land. Have used the land themselves.
Mr A Parriss	18 Norton Road	28 years +	Manager of three football teams between 1991 and 1998: Beltinge, Cosmos and Herne. All three teams played their home games on the application land and trained there twice a week. They paid a fee for the games, for the changing rooms and showers and access to the nets for the goals. They did not pay for the training sessions or seek permission for them. Dog walkers and members of the public would not interfere with the games, but would walk across the pitches, which was slightly annoying but not a major problem.
Mr R Pay	24 Woodrow Chase	1968-date	Mr and Mrs Pay first moved to Herne in 1968. They moved to their present address in 1983. As a young man Mr Pay played football and cricket on the Cherry Orchard pitches. Their children attended various activities on the land. As a family they used the area when the children were young, playing games and having picnics at the weekends. The children are now married. Currently they walk their dog on the land and watch other people playing, picnicking, learning to cycle, playing football, cricket and rounders, flying model aircraft and kites, the occasional pony rider and snowballing and sledging. The Parish Council holds a village fun day on part of the land.
Mr & Mrs Webb	8 Woodrow Chase	27 years	Walk across or through the and every day to collect newspaper and sometimes to go shopping. Often took grandchildren there when young (about 16 years ago) to play on the swing and slides and in and on some huge concrete pipes (since removed). The grandchildren sometimes flew kites. They have seen children tobogganing in winter. There are always people walking their dogs ont eh land.
Mrs M Webster	20 Mill View Road	18 years	Walking, approximately twice a week. Cutting across to get to School Lane. Playing with grandchildren. Son when visiting has gone there to watch footballers. Seen plenty of dog walkers, and frequently children flying kites. It is unusual to see the land free of people: there is usually some form of activity taking place.
Mr D White	2 St Martins View		When he was a child his mother used to take him to the application land. He now has his own children and takes them to the application land, and has done so for many years. He

			has walked his dogs and has seen countless other locals doing the same. As a child he used the play equipment, and now his children use it.

Evidence of witnesses on behalf of the Applicant who provided letters or evidence questionnaires only

Name	Address	Dates	Use
Mrs P Adams	22 Westcliffe Drive, Herne Bay		Travels from Herne Bay to use the land. Supports application.
A Andrews	75 School Lane		Supports application.
Councillor M Attwood	25 Lesley Avenue, Canterbury		Rural Councillor for Canterbury City Council. Supports application.
Mrs D Baldock	249 Canterbury Road		Local adults, children, local clubs and out of town clubs enjoy cricket and football on the land. There is a special play area for children. Children also play with other children and their parents and grandparents. Kite flying is a favourite pastime. Adults and children walk and play with their dogs on a daily basis. People of all ages walk and meet people for a chat and to pass the time of day.
Mrs A Bosher	57 Strode Park Road		Letter in identical form to Mrs Baldock's letter.
Mr C Bowley	40-41 Radigunds Street, Canterbury	1960-1973	Son of the applicant. Played on the land as a child. Ceased to have any real connection with Herne in 1973, apart from visiting his parents.
Councillor R Bright	63 William Street, Herne Bay		Supports application.
Mrs B Browning	68 School Lane	1953-	Memories relating to childhood in 1950s and 1960s. Moved away. Has been back 20 years. Still uses land for dog walking. Her children used to play tennis football and sledging. Her son still plays football on the land on a Sunday. Her grandchildren take their bikes and scooters there, and their kites and footballs, and play on the swings and slide. One grandson lives in Herne, the others use the land when visiting. Football and cricket teams come every weekend to play matches on the land, which is a social event for her husband.
Mr & Mrs Burchell	110 Woodrow Chase	5 years	Dog walking, strolling.

Mr C Byrne	16 Pigeon Lane		Opposed to MUGA
Mrs M Cooker	26 Woodview Close		Supports application.
Mrs A Castle	21 The Downings	19 years	Taking grandchildren to land. Used swing and played rounders, flew kites and watched cricket. The grandchildren now play on the land for a team. Mrs Castle walks the dog and plays ball with her on the application land. She has also trained her dogs there for obedience.
Ms Y Coburn	13 Albion Close		Supports application.
L P Crompton	4 Strode Park Road	1978-2003	Walking, cricket watching, football teams, 2-3 times a week. Seen: children playing, rounders, dog walking, team games, football, cricket, picnicking, kite flying, people walking, bicycle riding.
Mr T Croucher	41 Woodrow Chase	7 years	As a short cut to the village. Son plays football and cricket (for Longport Cricket Club) on the land. Grandchildren use the swings and play football and cricket when they visit. The grandchildren have used the field for games arranged by their football club. Seen: dog walkers, children playing football, using swings and people having picnics in summer.
Mr D Darby	25 Albion Lane	mid 1950s-	Converted to a playing field in mid-1950s. Never any restrictions against entry, walking there or other outdoor activities, other than golf, for obvious safety reasons. In the early years it was used regularly for annual fetes and fairs. Football and cricket matches have been played there every year. The nearby Herne C of E school used it for sports before they had their own field. The area has always been available for children to play on, with swings and slides for the younger ones. For many years there have been several benches around the perimeter for people to sit and watch the activities going on.
Mrs J Dilnot	223 Canterbury Road	1941-date	Before the land was made into a playing field, as far as she can remember, it was arable. Present use: walking through possibly once a week. Previous: ran a Guide Company at the beginning of the 1950s – used land weekly if the weather was fine in the summer for games and tent pitching, and occasionally in the winter for games and star gazing. She also used the land daily when she had dogs. Her immediate family uses the land for dog walking. The land is used by organisations for football and cricket. Seen: children playing, rounders, dog walking, community celebrations, fetes (during the 1950s and

			1960s), football, cricket, kite flying, people walking, bicycle riding.
Mrs C Doll	12 Albion Close		Supports application.
Mr K Doll	12 Albion Close		Walked dog over the land for years. Supports application.
Mrs P Edwards	45 Herne Street	1961-date	There are tarmac paths on parts of the perimeter, but none across because it is an open playing field. Use: to walk and watch football and cricket matches. Occasionally take children to the swings. Several times a year. The land is used by football clubs and cricket clubs. Seen: children playing, dog walking, team games, football, cricket, picnicking, kite flying, people walking and tobogganing. Supports application.
Mr N Farage MEP	Lyminster, West Sussex		Supports application.
Mrs R Fiander	23 Windmill Road	20+ years	Used land a good many times, taking dogs also grandchildren to play, short cut to the village.
Mr & Mrs Filmer	62 Woodrow Chase	2000-date	Sees football, cricket, rounders, kite flying, children, including their grandson, using the swings. Regularly walk their dog on the land, along with all other dog owners in the area. Use the land as a short cut to the village.
Mr & Mrs Flint	10 Mill View Road		Support application.
Mr & Mrs French	42 Woodrow Close		Support application. Opposed to ball court
Mrs S Girling	7 Ellis Way		Uses field regularly to exercise dog and children (aged 12 and 7 in 2004). Sees cricket matches and regular football games. Supports application.
Mr P Green	81 Strode Park Road		Supports application.
Mr P Hadley	28 The Downings, Herne Bay		Supports application. Opposes any development other than for basic requirements or minor improvements to existing structures.
Mrs J Hall	64 Woodrow Chase	1988- date	Watches football and cricket. Hasthree grandchildren who enjoy playing on the land and on the swings. Supports application.
Mr & Mrs Hampshire	39 Mill View Road		Support application.
Mr & Mrs Hampson	3 Mill Lane		Support application.
Mr & Mrs	110 Mill Lane		Support application.

Harrington			
Ms E Harris	73 Lower Herne Road	1923-date	Uses land as a short cut to the village. Does not take part in any activities. Played on the land as a child. Use to take part in dog walking (dates not specified). Land is used by organisations for football and cricket.
Mrs M Hayes	235 Canterbury Road	1984-date	Uses land occasionally for walking. Land is used by organisations for football and cricket. Takes grandchildren to land.
R Hayes	Mill View House, Benstede Close		Local residents use the area for walking, meeting friends, playing games. There is a cricket pitch used by visiting teams. Supports application.
Mrs M Henwood	61 School Lane		Supports application.
Mrs D Hills	1 Mill View Road	1959-date	Use: to take children of her son's friends to play there, most days. Community activities: football cricket. Use by organisations: local football club, local cricket club. Swings for the children. Seen: children playing, dog walking, team games, football, cricket, kite flying, people walking.
Miss V Hockley	16 Mill View Road	1981-date	For walks to visit the village, to go to church, most days. Community activities: football, cricket. Seen: children playing, rounders, dog walking, team games, football, cricket, picnicking, kite flying, people walking and bicycle riding.
Ms N Hodgson	Case officer OSS		Supports application.
Mrs W Holmes	54 Woodrow Close	10 years	Use as a short cut to the village, walking and sitting with visitors and with husband. Football and cricket matches provide entertainment and exercise for participants and spectators. It is used as a place for toddlers and children of school age to play, for giving dogs a run away from the road, as a picnic area, for kite flying, and as a beautiful spot in which to sit or stroll and watch the world go by, for playing boules, physical jerks and jogging, and as a meeting and chatting venue for the village as a whole.
Mr L Hooker	80 Woodrow Close	22 years	Use as a short cut to the village, and walks round there sometimes. Wants it left as it is.
Mrs S Iddeneden	33 Lower Herne Road	1970-1973 then 1978-2003	Use: to play on football pitch, fly kite, use swing area, cycle, play cricket and tennis, regularly with young boys for recreation, daily in the school holidays. Immediate family uses the land for organised planned football matches with local football club team. Community activities organised by the Scout Group 1994-1997: rounders game, running, football, once a week in summer. Use by organisations: Herne Millers Football Club and

			Herne Scout Group. Seasonal activities: football, cricket. Seen: children playing, rounders, dog walking, football, cricket, picnicking, kite flying, bicycle riding.
J D Ingram	2 Shephersgate Drive, Herne Bay		Supports application.
Mr & Mrs R Kenward	19 Ashe Close	1982-2003	Occasionally over past 20 years. Use for exercise and access to School Lane previously daily, now weekly. Community activities: football weekly and cricket seasonally. Seen: children playing, dog walking, team games, football, cricket, kite flying and people walking.
Mr A Knott	38 Streetfield		Supports application.
Mrs J Knox	17 Woodrow Close	17 years	Associated with Herne for 17 years either living there or visiting relatives. Uses application land every week to take her dog for a walk or to take her children to play.
I Lansdown	67 School Lane	1956-date	Use: recreation, previously several times a week, now rarely. Used to take part in childhood activities and tobogganing. Seasonal activities: sports. Seen: children playing, rounders, dog walking, team games, picking blackberries, fetes, football, cricket, picnicking, kite flying, people walking.
Mrs B Lee	259 Canterbury Road		Supports application.
Mrs D Lee	259 Canterbury Road		Supports application.
Mr K Lee	259 Canterbury Road		Supports application.
Mr & Mrs F Leppard	6 Links Close, Pigeon Lane		Support application.
Mr W Macdonald	9 Hill View Road	1978-date	Use: dog walking, watching football and cricket, mostly daily. Community activities: football and cricket. Seen: children playing, dog walking, team games, kite flying, football, cricket, people walking.
Mr & Mrs B Manuell	11 Hawe Farm Way	1978-date	Dog walking almost on a daily basis. 1988- pushing granddaughter in pram on the land, and as she became older, taking her there to play on the play equipment. Watching cricket and football matches, and when younger, playing cricket. Children use the land for playing in the snow and tobogganing. Support application. Believe that status of land was by way of a deed of gift for public amenity use.
Miss B Marshall	35 Woodrow Chase	14 years	Use: dog walking twice a day, visiting with friends on a Saturday to play ball with the

			dog, walk around and sit and watch others enjoying themselves, as a short-cut to the village. Sees 3-7 dogs when on the application land, families getting together, fathers playing football with their young sons, mothers pushing babies and children swinging, kite flying. Wants land to stay as it is, and no ball court.
Councillor R Mathews	42 Beltinge Road, Herne Bay		Herne & Broomfield Parish Council approached the developers of Ruskins Close in about 2001/2002 seeking to obtain extra land in order to increase the width of the footpath between Cherry Orchard and School Lane, in order that access to the Cherry Orchard for vehicular traffic could be secured. The Parish Council wished to build a community centre on the Cherry Orchard, and suitable access was required. The developers refused to sell the land, and as a consequence the project was abandoned.
Councillor G Mavers	48 Pigeon Lane		Founder member of the PC (9 years in 2002) and Canterbury CC Councillor. Objects to ball court. Wishes to protect land from development. Believes land is in danger of being insidiously eroded if left without protection. Supports application.
Mr J Medhurst	2 Mill View Road	1990-date	Use: walking dog and taking grandchildren to play on the swings and slide, watching cricket matches, and some of the football games, cutting across on the footpath and across the field to the Post Office.
Mr C Miles	79 School Lane		Supports application if it is the only way to preserve the space as it was in 2002.
Mr & Mrs Mock	40 Woodrow Chase		Supports application.
Mrs D Moss	59 School Lane		Supports application. (Letter in identical form to that of Mrs Henwood).
Mrs Mummery	3 Orchard Row, School Lane	20 years	Use: children use land for football, cricket and picnics. She uses the land every day to walk her dog, and at other times to watch the activities going on.
Ms J Niles	5 Lindridge Close	9 years	Use: dog walking every day. Sees football and the children's corner, and in better weather, people just come to sit, also children playing games.
Mr G Notman	14 Mill View Road	1970-date	Use: previously dog walking, to visit the village for shops, walks, from time to time. Used to take part in ball games. Community activities: football, cricket. Seen: children playing, rounders, dog walking, team games, football, cricket, picnicking, kite flying, people walking.
Mr N Oakes	1 Pettman Close, Herne Bay		Supports application.

Mr & Mrs O'Donovan	50 Woodrow Chase		Watch anything up to 12 football matches at the weekends and the cricket, people dog walking, children playing. Enjoy pleasant view and open space. Supports application.
Mr & Mrs Parsons	Not photocopied		Use: picnicking, dog walking, taking grandchildren to the land to use the recreation facilities or walk the dogs. Often play games, picnic or just sit and watch the sports going on. Want land left as it is.
Mrs D Powell	69A Mill Lane	8 years	Lived in Herne Bay 26 years, at present address for last 8 years. Use: dog walking every day. Seen: use by wide range of age groups: mothers using it as a short-cut to take children to school and perhaps exercise the dog on the way home, older residents use it to walk to the village, young children, including Mrs Powell's grandchildren when they visit enjoy the swings or a game of football. Football practice and matches are a frequent sight in the colder months. Cricket is played there.
P R Pragnell	44 Mill Lane	5 years	Use: every day dog walking and meeting up with friends. Grandchildren use land to play when they visit. Likes to watch cricket and relax in the summer time.
Mr & Mrs Rodda	59 Windmill Road		Horrified at prospect of the land being taken away. Sees many different activities there: artists, family picnics, an area of safety for children to cycle off the roads. Counted 200 odd people enjoying three football matches at the same time in 2002. Cricket matches are a regular entertainment for players and spectators. Tobogganing in winter. Elderly people sit there.
E A Roethenbaugh	91 Mill Lane	22 years	Use: watching football, dog walker, in later years taking grandchildren to play on the swings and for other activities. Supports application.
Mrs H Rowe	14 Windmill Road	43 years	Use: playing ball, children using swings, watching football matches, 3 dogs enjoyed running around.
Mr & Mrs Rhodes	8 Mill View Road		Any encroachment on the land is a retrograde step: opposes ball park. Supports application.
Mrs D Russan	11 Albion Close		Supports application.
Mr W Russan	11 Albion Close		Supports application.
Mrs J Rouse	28 Woodrow Chase		Use: walks around the land every day. Sees: football and cricket at the weekends, children playing and people strolling with their dogs. Supports application.
Mr P Sands	11-13 Avenue Road,		Supports application.

	Herne Bay		
Mr and Mrs Saunders	32 Peartree Road, Broomfield	18 years	Use: their children used the land for tobogganing in winter, football and cricket. Mr Saunders used to play and referee football matches before and after moving to Broomfield, and also played cricket there. Supports application.
Mrs G Scotchbrook	286 Canterbury Road		Supports application.
J V Shaw	12 Ashdown Close, Broomfield	7 years	Supports application. Use: dog walking on a daily basis. Grandchildren use the playing field. Walk would be ruined by a ball court.
Mrs JJ Shippey	69 Mill Lane	6 years	Use: dog walking on regular basis, taking grandchildren to play, as a short cut from the Canterbury Road, watching cricket in the summer and football in the winter, meeting friends and chatting.
Mrs K Smith	Ruskin Cottage, Ruskins View		Supports application. Wants land protected from any further development.
Mrs B Spears	245 Canterbury Road	1975-date	Use: walking regularly (daily). Organisations: football and cricket. Seen: children playing, dog walking, team games, football, cricket, bird watching, picnicking kite flying, people walking, bicycle riding.
Mr J Stephens	247 Canterbury Road		Objection to planning application for MUGA. Better to designate area as a village green. Supports application.
Mrs L Stephens	247 Canterbury Road	6 years	Use: dog walking, taking grandsons to play, kicking a ball or flying a kite, picnicking, watching cricket and football at leisure. Supports application.
Mr and Mrs Symons	8 Douglas Avenue, Whitstable		Supports application.
R Tanner	1 Strode Park Road	21 years	Use: dog walking, amusing young of the family, often in the children's area, walking across to get to the School.
Mrs C Thomas	24 Shepherdsgate Drive, Herne Bay		Supports application.
Mrs L Thrupp	14 Pigeon Lane		Supports application.
D W Thompson	38 Lower Herne Road	1971-date	Use: relaxation in watching cricket matches in the summer and football matches in the winter, taking 2 Alsatian dogs there for exercise.
Mrs D Trapella	42 Herne Street,		Opposed to building sports stadium on the land.

	Herne Bay		
Mrs J Tyrrell	48 The Grove, Greenhill		Supports application. Opposes ball court.
Mrs B Vincent	16 Broomfield Road	10.5 years	Use: walking across almost every day, walking dog, or taking grandchildren to the play area. Vandalism has been a problem, and would be encouraged by the building of a ball court.
M Vincent	34A Broomfield Road	11 years	Use: often takes three small children to the small play area on the Playing Field. Vandalism has been a problem, and would be encouraged by the building of a ball court.
Mr & Mrs D Wadmore	5 The Hamels, Sturry		Supports application.
Ms E Wakefield	14 Herne Street, Herne Bay	1940-date	Use: walking, taking grandchildren to play area, several times weekly, watching football matches. Community activities: football, cricket, visiting school parties and sports days. Organised football and cricket teams use the land. Seen: children playing, rounders, dog walking, team games, community celebrations, fetes, football, cricket, picnicking, kite flying, people walking, bicycle riding.
G R Wanstall	OSS East Kent Rep		Supports application.
Mrs K Wenzel	35 Mill Lane	12 years	Use: dog walking and running, most days. Bringing grandchildren, when they were younger, to play on the swings etc.
Mrs D Whale	82 Woodrow Chase	27 years	Has taken father through the land to catch a bus and sit on a bench overlooking the land. Has taken her nieces and nephews there. Wants it to stay as it is.
Mr G Woods	44 Woodrow Chase		House overlooks application land. Seen: all sorts of activities from radio controlled electric cars to Frisbees, (recently) a wind-propelled buggy using a large parachute-type kite, cricket, football, jogging, kite flying, snowballing on the rare occasions there is snow. It is used for playing football on weekends, but is also used by the local residents as common land. Supports application.
Councillor Ian Wright	Canterbury City Councillor for Herne & Broomfield Ward		Supports application.