

APPLICATION TO REGISTER LAND KNOWN AS THE GODFREY ERMEN PLAYING
FIELD, ABBEY HEY AS A TOWN OR VILLAGE GREEN
APPLICATION TG18

REPORT

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Recommendation: the Application should be accepted.

(1) INTRODUCTION

1. I am instructed in this case by Manchester City Council in its capacity as registration authority for town or village greens (“the Registration Authority”) in order to assist it in determining an application to register land known as The Godfrey Ermen Playing Field, Abbey Hey as a town or village green (“the Application”).
2. The Application was made by Emily Hulley of The Orchards, Ackroyd Avenue, Manchester, M18 8TL, Anne Hern of 27 Underwood Close, Manchester, M18 8UY, Caroline Martin of 22 Ackroyd Avenue, Manchester, M18 8TL and Terence Hulston of 8 Violet Street, Manchester, M18 8TU (“the Applicants) and was stamped as received by the Registration Authority on 31st May 2016.
3. My instructions were to hold a public inquiry to hear the evidence and submissions both for and against the Application and, after holding the inquiry, to prepare a written report to the Registration Authority containing my recommendation for the determination of the Application.
4. The inquiry was held at The Mechanics Conference Centre in Manchester and sat from 22nd to 25th May 2018. At the inquiry the case for the Applicants was presented by Mr Mathew Henderson of counsel and the case for The Greater Manchester Trust for Recreation (“the Trust”) as the objecting landowner was presented by Miss Ruth Stockley of counsel. Mr Trevor Mooney of 12 Ackroyd Avenue, Manchester, M18 8TL, the other objector to the Application, was called as a witness by Miss Stockley as part of the Trust’s case. I thank both advocates for their assistance at the inquiry. I also thank the Registration Authority and, in particular, Mr Justin Hobson and Mr Fraser Swift, for arranging the inquiry and providing all necessary administrative support.
5. I made an unaccompanied visit to The Godfrey Ermen Playing Field (hereafter “the Field”) before the inquiry and followed this up with a further unaccompanied visit after the inquiry had closed. On the latter occasion my visit was guided by a list of features of the Field identified on an agreed list provided by the parties. I have walked

extensively around and over the Field. My second site visit also took in a walk around Debdale Park and Gorton Reservoirs as the Trust had requested. On each of my visits I took the opportunity to drive around the surrounding area and make myself thoroughly familiar with it.

(2) THE APPLICATION

6. In this section of the report I provide a broad overview of the Application and the course taken by the process up until the inquiry.
7. The Application sought the registration of the Field under section 15(1) of the Commons Act 2006 (“the 2006 Act”) on the basis that section 15(2) applied. Section 15(2) applies where -
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
 - (b) *they continue to do so at the time of the application.*
8. The relevant 20 year period in this case is from 1996 to 2016.
9. The Application was supported by over 140 completed evidence questionnaires, a Land Registry extract in respect of the register of title for the Field, photographs, aerial imagery, an Ordnance Survey plan of the Field showing various tracks thereon and a plan of the neighbourhood relied on.
10. The Registration Authority received two objections to the Application, one (dated 4th November 2016) from the Trust and the other (dated 13th August 2016) from Mr Mooney. The Trust’s objection was supported by photographs and correspondence. In due course (in January 2017) the Applicants responded to the objections.
11. Thereafter the Application has proceeded to the inquiry in accordance with directions given by the Registration Authority. Both the Applicants and the Trust submitted a bundle of documentation for the inquiry. Where references are made in this report to tabs or pages in the respective inquiry bundles, I use the abbreviations “AB” for the

Applicants' inquiry bundle and "OB" for the Trust's inquiry bundle (the "O" representing the Trust's status as objector), followed by a backslash and then, in the case of the Applicants' inquiry bundle, the particular tab number, thus "AB/1", and, in the case of the Trust's inquiry bundle, the particular page number, thus "OB/1".

12. The Applicants' inquiry bundle in particular comprised a comprehensive collection of evidence, extending to eight ring binders with a further ring binder containing the skeleton argument on behalf of the Applicants and relevant authorities. As well as containing the original material put forward to support the Application, the Applicants' inquiry bundle also included a good deal of extra evidence, including further documentation and many additional witness statements. A small additional clip of material was also supplied by the Applicants in the immediate lead up to the inquiry to respond to an issue raised by the Trust in its skeleton argument concerning access to the Field before the construction of the Fallowfield Loop Line (a footpath and cycle way on the southern side of the Field created after the infilling of a former railway line in cutting)¹.

13. I should also mention in this section of the report that the Applicants' inquiry bundle formally put forward a revised boundary for the neighbourhood relied on to support the Application (AB/7) although the possibility of doing so had first been raised in the Applicants' response to the Trust's objection (AB/65). The revision to the neighbourhood consisted of the drawing of a fresh western boundary for the same so that this boundary ended not at Jetson Street (as originally was the case) but further to the west along the line of the former railway chord ("the Gorton Curve") to the west of Vine Street (now largely comprising Vine Street Park). The other boundaries of the claimed neighbourhood remained as previously drawn: the active railway line to the north, the Fallowfield Loop Line to the south and the Manchester/Tameside boundary to the east. No objection was taken by the Trust (or Mr Mooney) to the revision of the neighbourhood boundary and the inquiry proceeded on the basis of the revision. I therefore assess the Application by reference to the revised boundary.

¹ The documentary evidence and aerial photography establishes that the infilling of the railway cutting alongside the southern boundary of the Field was substantially completed by 1996. The evidence does not establish when the footpath and cycle way was subsequently installed and opened but a Manchester City Council letter of 16th July 2001 (included in the additional clip of material) makes no reference to the Fallowfield Loop Line so I infer that it would probably have been opened at some time after this date in the early 2000s.

(3) THE FIELD

14. I next provide an overview of the history of the Field and a describe its characteristics.

15. The Field was originally conveyed to the Trustees of the Manchester and Salford Playing Fields Society in 1928 and was inaugurated as a playing field in 1931. The purchase money for the Field came from a charitable bequest left by a wealthy Manchester merchant, Godfrey Ermen, whose beneficence was honoured in the naming of the Field. As for the Manchester and Salford Playing Fields Society, it became the Trust in 1997 when it merged with another charity. The Trust also operates under the name of Boys and Girls Clubs of Greater Manchester and as well as sometimes being known as the Greater Manchester Federation of Clubs for Young People. I will, for convenience, continue to refer simply to the Trust unless the context requires otherwise.

16. The Field enjoyed a relatively long life as formal playing fields which were equipped with at least one pavilion and were the home of organised sporting activities including football matches. For a time the Field was the home of Abbey Hey Football Club. The last tenant of the Field was GEC who relinquished their interest in the Field in 1985 on account of drainage issues. Thereafter the Field was no longer used as formal playing fields and was not maintained as such.

17. The Field is quite large, perhaps about 4ha² in size, and is, to all intents and purposes, flat. Its western half is roughly rectangular in shape and its eastern half takes the form of a wedge which tapers in width to the east. The Field is considerably longer on a west to east axis than it is wide on a north to south axis.

18. The Field is bounded to the north by Ackroyd Avenue. In the western part of the Field its northern boundary is marked by fences separating the Field from the rear gardens of houses on the south side of Ackroyd Avenue; in the middle part of the Field its northern boundary is separated from the Ackroyd Avenue allotments by a fence; and in the eastern part of the Field its northern boundary is marked by the rear garden fences of a

² The site area given in a 2016 planning application for the Field (but including also the site of 10 and 12 Ackroyd Avenue) is given as 4.39ha. I refer further to this planning application in paragraph 22 below.

house known as Abbeyville and then, further to the east, a house known as The Orchards. The short eastern boundary of the Field is located in a small wooded area beyond which is estate housing development in Tameside on Boothdale Drive. The southern boundary of the Field in its western half is adjacent to the fenced rear gardens of houses on the north side of Underwood Close and, in its eastern half, adjacent to the Fallowfield Loop Line. The eastern half of the southern boundary is also marked by a good number of trees and there are remnants of the former railway fence (which was of concrete post and wire construction). Wright Robinson College and its grounds lie to the south of the Fallowfield Loop Line. The western side of the Field is bounded by the curtilages of houses on Violet Street and, further north, Coram Street, which are short cul-de-sacs running off Abbey Hey Lane.

19. The Field is, as to be expected of former playing fields, largely grassland. The grass was generally about knee height at the time of my site visits. Apart from the trees I have already mentioned along the eastern part of the southern boundary of the Field and the small wooded area along the eastern boundary, there are some scattered trees on the other boundaries of the Field and another small wooded area on the northern boundary next to the allotments. The boundaries of the Field are also characterised by dense scrub (including brambles) while there are also a few isolated patches of the same towards the boundaries of the site but separated therefrom rather than being a boundary feature as such. There is some Japanese Knotweed on the northern boundary of the Field.

20. There is an obvious, informal entrance on to the Field affording easy access thereto from the south via an earth path leading from a hard surfaced route connecting a parking and turning area at the eastern end of Underwood Close to the Fallowfield Loop Line. This entrance is somewhat less than halfway along the length of the Field from west to east. There is also an obvious informal entrance affording easy access to the eastern end of the Field from the Fallowfield Loop Line via an earth path which slopes down from the Loop Line to the Field. There is a formal entrance to the Field at the end of Violet Street but this consists of locked steel palisade gates and no public access is available at this point. The majority of the houses on the southern side of Ackroyd Avenue which back on to the north side of the Field have gates on to the Field in their fences. There is also a gate on to the west side of the Field from the house at 8 Violet Street.

21. There is a very obvious well-worn path which broadly follows the perimeter of the Field but which is inset from the boundary scrub. It forms an elongated loop. There are also a number of other obvious well-worn paths, including: one which leads north from the entrance off the end of Underwood Close (as described in the preceding paragraph) to the northern boundary of the Field and the section of the perimeter path in that location: a diagonal path which runs from the section of the perimeter path in the north west part of the Field in a south easterly direction to the section of the perimeter path about half way along the southern boundary of the Field; and a path which takes a curving alignment from the section of the perimeter path first encountered after entering the Field from the entrance off the end of Underwood Close and then runs roughly west to east in the middle of the eastern part of the Field before rejoining the perimeter path in that section of it towards the eastern side of the Field.
22. On 18th May 2016 a planning application was made for the erection of 170 dwellings on the Field (to be accessed via the site of 10 and 12 Ackroyd Avenue, which it was proposed to demolish). The application was made in the name of Parkleigh Developments (Manchester) Limited, who had been given an option over the Field by the Trust, MCI Developments Limited (who, in turn, had an option from Parkleigh Developments), the Trust and Messrs Mooney. The planning application was not first publicised until 1st June 2016 and thus no trigger event (excluding the right to apply to register the Field as a town or village green) arose under Section 15C of, and Schedule 1A to, the 2006 Act. In the event, the planning application was refused by Manchester City Council on 26th August 2016.

(4) THE EVIDENCE IN SUPPORT OF THE APPLICATION

23. In the following paragraphs I provide a summary of the oral evidence I heard at the inquiry. I do not consider it necessary to summarise the written evidence, all of which is available to the Registration Authority and all of which I have taken into account in writing this report. The summary of the oral evidence is precisely that. It does not purport to be a verbatim or full record of everything which was said. Mr Henderson called 15 “live” witnesses in support of the Application.

24. **Vicky Kirby** of 17 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that she had lived in Abbey Hey for 40 years and in her present house since 1984. Over the time she had lived in Abbey Hey she and her family had used the Field mainly for walking dogs. She had always owned dogs and walking them on the Field had taken place every day. She liked to go all round the edges of the Field but also varied her walks, sometimes doing a figure of eight route and sometimes going across on paths made by ramblers. If it was wet, she wore wellingtons to go on to the Field. She had seen bonfires on the Field regularly in the past on Bonfire Night and had been to about three herself. Mrs Kirby described their location as being near the Violet Street end of the Field. Lots of children had used The Field over the years. This and dog walking had been the primary use. She had seen bike riders, ramblers and blackberry pickers on the Field and had met a lot of dog walkers there. The brambles were quite near the path but one had to go off it to reach them. Parties had been held on the Field at the back of the houses on Ackroyd Avenue. She had seen others walking both the perimeter route on the Field and across it. Her access to the Field had normally been obtained from the end of Underwood Close. It had never been gated or fenced off at this location. The infill works to the former railway cutting in the 1990s were separate from, and had not interfered with, this access. Mrs Kirby had never seen a sign saying that the Field could not be used and she had never been told that she could not use it or that it was private property. The Fallowfield Loop Line, Debdale Park and Gorton Reservoirs were all well used for recreational purposes.

25. There was a strong sense of community in Abbey Hey. Fund raising events were held at the allotments on Ackroyd Avenue (where she had a plot). She had been a member of the Abbey Hey Residents' Association ("the Residents' Association") from 2000-2002 and, although she was not aware of any formal definition of the boundaries of the area covered by the Residents' Association, would say that about two thirds of its members lived within the claimed neighbourhood. She was not aware of any denial of access to the Field by the Trust as referred to in a letter of 10th March 2004 written by Gerald Kaufman MP to the Trust's chief executive (OB/44)³.

³ I deal with this letter and other relevant correspondence in detail later in this report.

26. **Terence Hulston** of 8 Violet Street, Abbey Hey, Manchester, M18 8TY said that he and his wife had moved to that address six years ago in 2012. Before then, since being married in 1985, they had lived in a number of different houses in the area, including Walter Street and (for some 20 years) Peterborough Street. When living at these properties, their main use of the Field had been for dog walking every day. Mr Hulston had gone on the circular route on the Field lots of times when doing this (as others did as well) but had also criss-crossed it. Mr Hulston's last dog had recently died but he still went on to the Field every day. 8 Violet Street had a gate on to the Field giving direct access to it. Before then he and his wife had used the Underwood Close entrance or the eastern entrance from the Fallowfield Loop Line. Since his grandson, who was now six, could walk, Mr Hulston's main use of the Field was taking his grandson on to it for adventure. Mr Hulston took him on treasure hunts and fruit picking (blackberries, raspberries, cherries and apples) as well as helping him climb trees. This was what his use of the Field was now mainly about. The treasure hunts (which had taken place for the last two years) took place all over the Field. The blackberries were near the allotments and also near his house, the cherry tree was in between the allotments and the end of the Field and the apple tree was near the Japanese Knotweed (which is found in stands on the northern boundary of the Field). An oak tree for climbing was located on the western side of the Field as one turned right if coming out of Mr Hulston's gate. Mr Hulston had also taken his son (who was now 32) on to the Field since the latter was six or seven years old up to the age of 12 when he went there on his own until this stopped when he started seeing girls at about 16. When he took his son riding a bike there, that took place round the edge of the Field.

27. There was not an occasion when Mr Hulston had been on the Field without seeing others there as well. There were always other dog walkers and he had got on quite well with a lot of them. He knew a few of them from Ackroyd Avenue. He had also seen bike riding (including racing on mountain bikes across the Field), kids playing tag, kite flying (but not very regularly, about ten times in all), horse riding and fireworks every Bonfire Night. Mr Hulston did not know where the children who he saw playing were from. He had seen a bonfire every year in the western part of the Field but he had not attended one himself (as he did not like bonfires). About once a year a man would come to spray weeds there, although Mr Hulston had not seen him for a year or so. Mr Hulston had asked him for a key to the padlocked gate at the end of Violet Street and the man

told him he could not have one because Mellands (another playing field) owned the land. He did not mention to Mr Hulston that he should not be on the Field and had, in fact, sprayed weeds on Mr Hulston's property. Mr Hulston had never been unable to access the Field, access had never been blocked off, he had never seen any signs (whether saying "private property" or otherwise), he had never been told not to use the Field and he had never had to climb over a fence. Wellingtons were needed if the Field was muddy. He liked to get his grandson muddy. Abbey Hey was a good community. He and his wife used local shops and facilities (such as Raja's, the Polish baker's, Yummy's Café and the Hare and Hounds pub). He had been involved in local fund raising at the Hare and Hounds (attended by people from all over the area) and had been to events at the allotments. He was not aware of the Residents' Association.

28. **Selina Gray** of 7 Underwood Close, Abbey Hey, Manchester, M18 8UY said that she and her family (her husband and three children aged 14, 8 and 5) had moved to that address in 2010. Since that time they had used the Field twice a day, every day of the week. She and her younger daughter walked their dog there from 2014. They did not take a fixed route every time and whether they followed a path or not would depend on their mood and the weather at the time. They had walked around the perimeter of the Field but went across it as well. Her husband used the Field for running once a week, as did her elder daughter. Her elder daughter also went on to the Field with friends just to hang out. As well as that, the children used the Field simply for playing and kicked a ball there once or twice a week with friends from Underwood Close. They generally stayed in the south west corner of the Field. The children had flown kites on the Field. Their elder daughter had started playing there about five years ago when she was nine. The middle and youngest children went on to the Field with Mrs Gray. Once a month Mrs Gray looked for insects in the long grass on the Field with her son. Her husband let fireworks off on the Field on every Bonfire Night. They had never built or attended a bonfire on the Field although she had seen them there every year in the past with the last year having been a really big one. To enter and exit the Field the family all used the entrance at the end of Underwood Close or the access at its eastern end. These had never been blocked. They did not have a gate on to the Field from their property.

29. She often saw people on the Field when looking out through her bedroom window. She had seen different things taking place on the Field: fruit picking; walking or training

dogs; a few kids with a ball; and a horse being walked (not ridden). Some people used the worn paths. She had seen a person with a German Shepherd go into other areas. She had seen dens built on the Field at the far end from Underwood Close and north towards Ackroyd Avenue. There were some muddy areas on the Field. Mrs Gray herself always wore wellingtons. The family had never been told that they could not use the Field. The Field had always been open and there had never been any signage for as long as she had known it (save for “no trespass” signs which had been put up in 2017, and no longer remained). They had never asked for permission to use the Field. There were great local amenities including shops, a chippy, a pub and a hairdresser’s. However, the schools she had referred to – St Clement’s Primary School and Wright Robinson College – were not within the claimed neighbourhood and the same was also true of the doctor’s surgery (Florence House), which was on Ashton Old Road. She had been to fundraising events at the allotments. She had not been a member of the Residents’ Association.

30. **Catherine Warner** of 5 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that she had known the Field since her family first moved to Abbey Hey from Openshaw around 1975. At that time the Field was used by local football teams. Mrs Warner moved away when she started her own family in 1978 before returning to live in Ackroyd Avenue in 1994 with her husband and four daughters. Her daughters were now aged 40, 38, 37 and 25 and each had left home except for one, Gillian, who had a complex learning disability. By 1994 the Field was not being maintained and she had never seen anyone undertaking maintenance. Mud on the Field did not bother her and it was not always muddy anyway. The family occasionally (sometimes once a week, sometimes once a month) went walking on the Field, accessing it by the entrance on Underwood Close, and usually followed the path around the perimeter although the children would wander off from the path when they were younger. If Mrs Warner was spending a longer time on the Field (as opposed to simply taking a stroll), she would go off the perimeter path. The family sometimes went to Debdale Park. They had joined local residents on the Field to celebrate Bonfire Night, probably about three times. Every Bonfire Night someone had a bonfire on the Field. In a couple of years Mrs Warner had been to bonfires on the allotments. Samantha, Mrs Warner’s youngest daughter, had spent a lot of time on the Field during the summers of 2000 to 2006, making dens, playing cricket, climbing trees and such like with her friends. This had

taken place quite a few times a week and every day in summer. The Field also afforded Gillian the freedom to play out in a safe, enclosed space. Local children included Gillian in their play on the Field from about 2000 to 2013 until they grew out of den building. Gillian enjoyed making dens and would also spend hours looking for bugs and making “insect boxes”. The children accessed the Field through the gardens of neighbours living opposite at number 14 and, more frequently, number 12 when they played with the children from those houses. They also accessed the Field from number 38 where they had other friends. Mrs Warner herself had always used the Underwood Close entrance. She had never been unable to access the Field there. When she went on the Field with Gillian to look for things to put in the “insect box”, they would go all around it. She had seen others (apart from her family) using the Field, walking there, walking with dogs there and children playing in the form of chasing about or making dens at the back of Ackroyd Avenue. She sometimes saw others using the perimeter path. Mrs Warner had never been told not to use the Field or (prior to 2017) seen any signs telling her she was not allowed on it or that it was private property. She had never had to climb or damage a gate or fence to get on to the Field. She never had to request permission to use the Field.

31. Mrs Warner felt that there was a strong community spirit in Abbey Hey. This was demonstrated when local people from all around Abbey Hey had twice recently turned out to look for Gillian when she had got lost in the area. Mrs Warner had often taken part in community events in the area such as fun days, Britain in Bloom (when Abbey Hey had put in for this in (probably) 2006) and events at Abbey Hey Allotments (in the summer and at Christmas). From 2000 to 2006 her youngest daughter attended the local children’s clubs at St Paul’s and St John’s Church on Abbey Hey Lane and later the youth group held at the community shop. In 2005 Mrs Warner and immediate neighbours came together and created Abback Garden, a community garden, behind their terraced houses, taking advantage of an alley gating scheme and a community grant. Residents maintained the garden and held an annual “neighbours’ day” inviting local neighbours for a barbecue. More recently, as well as supporting the campaign to save the Field, Mrs Warner had become involved in the creation of the Abbey Hey Neighbourhood Forum, the area of which extended to the west of Vine Street and the claimed neighbourhood boundary, and also joined in monthly community litter picks alongside other residents. In 2017 she helped organise a fun day with the Friends of

Vine Street Park, which she thought drew from areas both east and west of Vine Street. Mrs Warner was aware of the existence of the Residents' Association but was not a member of it and did not know the area it covered.

32. **Samantha Warner** of 65 Boothdale Drive, Audenshaw, Manchester, M34 5JU, the daughter of the previous witness, said that she had lived in the Abbey Hey neighbourhood all her life and had grown up on Ackroyd Avenue. She had left home in June 2016 to move to her present address. Throughout her childhood her family used the Field on regular family walks. On these occasions the Underwood Close entrance was used to enter the Field. From 2000 to 2006 she used the Field to play with her friends in the summer (but not the winter, unless there was snow). The play consisted of building dens, climbing trees and playing cricket or rounders. Activities took place towards the top (Ackroyd Avenue) end of the Field, tree climbing was at the opposite end near the entrance off Underwood Close and there was also a section in the middle where they built dens and climbed trees. When she played with friends she entered the Field by going through the back gates at friends' houses at numbers 12, 14 or 38 Ackroyd Avenue. There could be between five to ten children from Ackroyd Avenue playing together. Her family and others on Ackroyd Avenue had also got together on the Field to celebrate Bonfire Night for two or three consecutive years when she was quite young. When Ms Warner was studying art at Ashton Sixth Form from 2009 to 2011 and then an art foundation course at Manchester School of Art from 2011 to 2012 she used the Field only occasionally (perhaps twice a year) to gain inspiration, collect flowers and leaves and photograph her work. From 2012 to 2016 she was away at university in Liverpool.

33. Since 2016 she and her partner used the Field to walk their dogs at least once, but usually, twice or three times a day, all year round and in all weathers. They entered and exited it through the trees near to Boothdale Drive. As well as people local to the Field, others came to use it from Openshaw, Gorton and Audenshaw. She regularly saw other walkers and dog walkers on the Field and she also saw horse riders and parents (or grandparents) with children. In the summer she had seen children climbing and making dens in the trees. She had also seen children running around and on bikes. The children on bikes had been on both the perimeter path and paths crossing the Field. She still saw people entering the Field through their back gates as well as using her present entrance

or the Underwood Close entrance. There was a path around the perimeter of the Field and several that crossed through it although she could not really remember their being there in her childhood. Ms Warner had never been told that that she was not allowed to access the Field nor had she seen any signs to that effect. She never had to request permission to use it. She never had to climb or damage a fence to get on to it. She had never seen anyone maintain the Field. While at primary school she attended PJ's (St Paul's and St John's) Youth Club on Wednesday evenings and during the school holidays. She also attended a weekly youth art club from 2004 to 2006 at a shop on Abbey Hey Lane. When she attended Wright Robinson College, she knew children there who lived outside Abbey Hey.

34. **Julie Reid** of 1 Midgley Avenue, Abbey Hey, Manchester, M18 8XP, a Manchester City Councillor for Gorton South, said that she had known the Field for as long as she could remember. She had lived in Abbey Hey at 5 Compstall Grove from 1959 to 1977 and, after briefly living in Audenshaw and Openshaw, moved back to Abbey Hey in 1986, since when she had lived at her present address. In the 1990s she ran a youth group in Abbey Hey (at the north end of Abbey Hey Lane) and in the early 2000s she was the chairperson of the Residents' Association, having taken up that position in 2002. She had witnessed the Field being used by local football teams and for recreation by many people. In respect of the latter she instanced, cricket, rounders, bird watching, picnics, walking, running, sitting or people talking to one another there. People who lived in Openshaw or Audenshaw rarely used the Field. Residents of Boothdale Drive used it from time to time. She always believed the Field had been purchased for the people of Gorton and Abbey Hey as a recreational asset. It had even been mentioned in Parliament in those terms by the former local Member of Parliament, Sir (as he became) Gerald Kaufman.

35. In terms of personal use of the Field, Councillor Reid said that her family had occasionally gone walking there, using the entrance on Underwood Close, which she had never been unable to use, and usually following the path around the perimeter although the children (who were now aged 33, 30 and almost 24) would wander off it when they were younger. She would not just walk with her children but also encourage them to be interested in nature. Her personal use of the Field had primarily been for walking but she had run there and walked dogs there as well. The family had also joined

local residents on the Field to celebrate Bonfire Night. She could not remember precisely when this was but said (in evidence in chief) that she attended a few bonfires although this was modified (under cross examination) to only having been aware of one bonfire on the Field (as opposed to ad hoc bonfires on the allotments). Her son and 2 daughters spent a lot of time on the Field with friends from local streets during the summers of 1995 to 2007, making dens, playing cricket and rounders, having picnics and climbing trees. She had never been told that she was not able to use the Field, had never seen any signs telling her that she was not allowed on it and had never needed to ask permission to be there. She had never had to climb or damage a fence to get on to it.

36. Councillor Reid said that there was a strong community spirit in Abbey Hey. She had often taken part in community events in the area such as fun days, Britain in Bloom and events at Abbey Hey Allotments (which were held there three or four times a year). From 2000 to 2006 her youngest daughter attended the local children's clubs at St Paul's and St John's Church on Abbey Hey Lane and later the youth group held at the community shop. More recently, as well as supporting the campaign to save the Field, Councillor Reid had become involved in the creation of the Abbey Hey Neighbourhood Forum and she had also joined in monthly community litter picks alongside other residents. In 2017 she helped organise a fun day with the Friends of Vine Street Park. Compstall Grove (where she had originally lived) was outside the red line showing the claimed neighbourhood of Abbey Hey but, when she resided there, Councillor Reid regarded herself as living in Abbey Hey. The area to the west of the (western) boundary of the claimed neighbourhood was part of Abbey Hey but the majority of Abbey Hey lay to the east of this boundary. The community spirit she had referred to related to a wider area than the red line boundary of the claimed neighbourhood but to only a small part of the area to the west of the boundary line. It extended to the bridge just past Abbey Hey School near the community centre. Abbey Hey School was part of Abbey Hey. The Abbey Hey Neighbourhood Forum area corresponded with the red line marking the claimed neighbourhood and did not go to the west of Vine Street.

37. As to matters concerning the Residents' Association, Councillor Reid said that she had succeeded Bernadette Newing as chairperson. Prior to that, Councillor Reid had been on the Residents' Association's steering group comprised of some eight or twelve

members. The majority of the members of the Residents' Association came from within the claimed neighbourhood. She was not really able to say how many members there were but it might be some ten to twenty. Councillor Reid said that she had never before seen a letter of 17th November 2003 (OB/39) from solicitors acting for The Greater Manchester Federation of Clubs for Young People ("the Federation", another name for the Trust) addressed to Mrs B Newing of the Residents' Association and was not aware of its contents (which referred, *inter alia*, to a refusal of permission for any rights to be exercised over the Field). Similarly, Councillor Reed said that she had not seen before a letter of 15th August 2000 (OB/41) from the chief executive of the Federation, a Mr Kelly, to Gerald Kaufman MP (which stated, *inter alia*, that no harm was seen in dog walking, etc. on the Field while it was in fallow condition). The contents of that letter had never been conveyed to her either. Likewise, Councillor Reid said that she had not seen a letter dated 25th February 2004 (OB/42) from Mr Kelly to Mrs B Newing of the Residents' Association (which stated, *inter alia*, that it was necessary for the Federation to withdraw any consent which it had ever given to any resident to use any part of the Field and that neither Mrs Newing or any other resident in the area, whether a member of the Residents' Association or not, was entitled to go on to the Field for any reason at all). She was not otherwise aware of the contents of the letter. The Field had continued to be used after the letter. Whether she, Councillor Reid, would, as chairperson of the Residents' Association, have passed on a letter written to her on behalf of the Residents' Association, would depend on what the letter said. She did not give a direct reply to the question whether, in that capacity, she would have passed on a letter withdrawing consent to use the Field. Councillor Reed had also not seen, and was not aware of the contents of, a letter of 10th March 2004 (OB/43) from Mr Kaufman to Mr Kelly (in which Mr Kaufman referred to his concern that the latter was denying access to the Field to his constituents). The reply of the same date by Mr Kelly to Mr Kaufman (in which the former stated, *inter alia*, that he had revoked permission for access) (OB/44) was equally not a document which she had seen before nor had its contents ever been conveyed to her.

38. Moreover, a letter of 20th September 2000 (OB/45) written on Residents' Association headed paper by Mrs Newing as chairperson of the Residents' Association to Mr Kelly of the Federation, and which requested a meeting to discuss the Field, was again not something that Councillor Reid had seen before. Councillor Reid also said that she did

not recall any such meeting or, indeed, the meeting of some 400 Abbey Hey residents referred to in the letter which had led to the formation of the Residents' Association. Councillor Reid suggested, in answer to the question that it might be thought surprising that she had not been told, or become aware, of letters written by Mrs Newing, or to her, in connection with the Field, that she could only think that Mrs Newing had been acting in a personal capacity. She could not explain, when cross examined, how that could be the case in respect of the letter of 20th September 2000 given the letter heading and the fact that Mrs Newing (having signed it as chairperson) had said in the letter that she was introducing the Residents' Association to Mr Kelly. When cross-examined about the reference in the letter to the Field having been left to decline and get into a dangerous condition such that it should be brought back to be a safe environment for children to play, Councillor Reid said that it was full of rubbish and had to be cleaned up on a regular basis (which was something residents did). Councillor Reid suggested that the reason the Residents' Association had not been in correspondence with the landowner was because it was not aware of who the owner was. She did not know when that knowledge was obtained. So far as concerned Mr Kaufman's letter of 10th March 2004, Councillor Reid said it was not surprising that she was not aware of that because Mr Kaufman did not have an office or staff in the constituency. Mr Kaufman's view was that the Field was for the use of the public, that it belonged to the people, who had every right to use it, and that it was protected by Policy GO15 (of the Council's Unitary Development Plan). Councillor Reid accepted that Mrs Newing would have been the chairperson of the Residents' Association at the time of the letter of 10th March 2004 and said she must have mixed up her dates when she had said earlier that she had become the chairperson in 2002. She had no knowledge of the fact that it was Mrs Newing who had informed Mr Kaufman of the Federation's letter of 25th February 2004 which, in turn, had prompted Mr Kaufman's letter to the Federation of 10th March 2004. There had never been any discussion at the Residents' Association of the issue of permission having been given to use the Field for dog walking.

39. **Sue Bennett** of 44 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that she and her family had moved to that address in 2014. The Field was particularly valuable as a safe place where her elder son, who was 17 and suffered from a number of serious problems, could run out of the house to be alone for a couple of hours when things became too much for him. He would hide in a bush on the Field. Mrs Bennett's younger

son, who was eight, also played on the field two or three times a week with friends from Ancoats where he went to school. He liked to throw himself around, practising to be a goalkeeper. She had taken the children on walks there to see the changes brought by the passing seasons, to learn about nature and listen to the bird song. They had also played football, flown kites and built snowmen on the Field as well as picking blackberries, apples and plums. On those occasions when Mrs Bennett herself just needed to get out of the house she would just tend to use the Field by going around the perimeter. She had seen others taking that route also. Access to the Field was obtained from their back gate but Mrs Bennet had also used the Underwood Close entrance and the one from the Fallowfield Loop Line. It had always been possible to use these entrances. Mrs Bennett also used the Fallowfield Loop Line to go to Debdale Park, which was a well-used facility. Mrs Bennett had seen others on the Field, walking, talking, on bikes and children playing. They had never been asked not to use the Field or told that they could not go on it. Mrs Bennett had never seen any signs nor had she ever asked permission. She had never damaged or climbed over a gate.

40. **Anne Hern** of 27 Underwood Close, Abbey Hey, Manchester, M18 8UY said that she had lived in Abbey Hey most of her life, having moved into 29 Underwood Close in 1971 with her parents just after she was born. She lived there until 2005 when she moved to number 27 where she now lived with her husband and two young sons aged ten and seven. She now also owned number 29 which she had inherited following the death of her parents. Mrs Hern described the history of the Field and how she had played on it as a child. She had first noticed paths on the Field after football stopped being played on it. In the late 1990s her brother was terminally ill and she and her parents used to look after him and his two young children who they would take on to the Field every other weekend to play games. Mrs Hern's parents had loved walking on the Field, which they did once a day. The Field had, she said, been regularly used by walkers going back before 1990. Her house had a gate on to the Field which had been previously used to access the Field but could not be so used now because of the growth of brambles. Nobody from the Trust had ever said that the gate should not be there. A few people on Underwood Close had also had gates, but, as the Field grew wilder on this side, gates disappeared in favour of fences. Mrs Hern now used the entrance at the end of Underwood Close to access the Field and, occasionally, the one at the end of the Field closest to Audenshaw. A lot of people from Audenshaw used the Field. The

Underwood Close entrance had always been there for as long as Mrs Hern could remember, going back to the 1970s, although it had been narrowed in recent years by dumping of earth and tarmac. A former resident of The Orchards on Ackroyd Avenue had for many years from the mid-1990s taken a quad bike on to the Field by this entrance. Mrs Hern had never seen a gate there. The infilling works on the former railway cutting, which had started in 1994 and were completed in 1996, had not affected this access at all. The infilled area was itself accessible, and accessed, during the period of the infilling and the Field could also be entered from the works at this time via the former railway embankment and the (already) broken fence line along it.

41. Mrs Hern said that she was an artist and, personally, went on to the Field all the time not just to stay on the paths but to experience nature more widely, to take in and absorb her surroundings and to relax. She had ridden a bike there and drew there. Mrs Hern's children played on the Field on a weekly basis all year round, riding bikes (her younger son going off the paths and all over), going on nature rambles, flying kites, climbing trees, playing hide and seek and picking berries. The family would criss-cross the Field using the many well-worn paths on it. She called the eastern edge of the Field, where it was now overgrown, "the Devil's Corner". It was an ideal adventure playground for children. Her husband had taken their sons on to the Field in a buggy when they were younger. Former close neighbours at number 23 had used the Field regularly when they lived in Underwood Close and their son still went on to the Field with Mrs Hern's son on his visits to his grandparents, who had now taken up residence at number 23. She often (once or twice a week) arranged play dates on the Field with a few of her son's friends. Mrs Hern said that she often saw a few other people on the Field at the same time she was there. She would also see people on the Field from her son's bedroom window. Over the years she had seen many people use the Field for various activities, kite and drone flying, off road biking, horse riding, jogging, walking, walking dogs, exercising, den building and camping. There were also a lot of scramblers. Bonfire parties had been held regularly on the Field. These were organised by neighbours rather than being community events. Neighbours had bonfires on the Field every year for 13 years. Mrs Hern herself had not been to one; she did not like bonfires but did not mind watching from a distance. There was always one behind 14-16 Ackroyd Avenue. There were amazing firework displays.

42. Mrs Hern felt that the Field had been deliberately neglected by the Trust. In recent years she had rarely seen anyone maintaining the Field. A few years ago she had encountered a man, who she thought was John Rigby (the Trust's groundsman), dealing with knotweed but he had not told her to leave the Field. She had also met the same man more recently in 2017 but, again, he had not asked her to leave the Field. Similarly, in 2017 she had also met on the Field a Mr Hamill from the Boys and Girls Clubs of Greater Manchester (an operating name of the Trust) but he too had not told her (or three other members of the public who were then on the Field also) to leave the Field or that it was private property and not for the use of the public.
43. Mrs Hern said that there was a great and caring community spirit in Abbey Hey and the Field brought people together. She used a few of the local shops on Abbey Hey Lane, Raja's, the local garage and the Hare and Hounds pub. The family went to Abbey Hey Allotments fun days, Vine Street Park (including fun days there) and the Donkey Sanctuary. Although she was one of the Applicants, Mrs Hern said that she had not been involved in the identification of the claimed neighbourhood and could not assist with the question of how its boundaries had been selected. She considered that the area to the west of Vine Street was part of Abbey Hey but she had always thought of Abbey Hey as consisting of two sections divided by the railway. She had distributed some evidence questionnaires along Harrop Street and the streets off it and Boothdale Drive. The latter was not part of Abbey Hey. She said that only a handful of people from there used the Field.
44. **Antonio Morreale** of 24 Ackroyd Avenue, Abbey Hey, Manchester, 18 8TL said that he was 22 years old and had lived at that address since he was born. He had regularly used the Field throughout his childhood and still used it today. His main access was through a gate in the back garden to number 24. Most houses in Ackroyd Avenue on the north side of the Field similarly had gates on to it. He had first started to play outdoor games such as tag and hide and seek on the Field from about 2003 with other children who were then of similar age and who all lived on Ackroyd Avenue. This had taken place in the top north west corner of the Field as they did not venture too far at that age. As he and his friends grew older, they would go towards the middle of the Field and spend entire days in the summer building dens there, making use of the Japanese Knotweed on the Field to construct the same. Sometimes they would camp out in the

dens. On other occasions they would use the dens and trenches they had dug to create fun environments for airsoft skirmishes. He and his friends also built goal posts out of pieces of timber they had found on the Field and used a lawnmower to cut the grass to make a small pitch to play football and rugby on. They also cut the grass nearby to create a cycle course. Mr Morreale referred to a Google Earth aerial photograph of the Field from about 2009 which showed the football pitch, the dens next to it and part of the cycle course. It was about 2008 to 2009 that the lawnmower was brought on. They kept cutting the football pitch for three to four years. From 2000 to 2005 Mr Morreale's family had owned a dog which he would often take for walks around the Field. More recently, since about 2012, he had used the Field directly behind the garden of number 24 for plinking and target practice with his air rifle and later, from about 2015 to 2016, for archery practice with a bow and cross bow utilising a foam target. He had used his air rifles about once or twice a week originally but now a couple of times a month. He presently used the Field as a way of keeping fit by jogging around the perimeter tracks.

45. No one had ever attempted to stop Mr Morreale doing what he had done on the Field or had told him he could not use it. He had never seen any signs. He had never asked for permission to use the Field. He had never damaged or climbed over a fence to get on to the Field. Although he had mainly used the back gate entrance, Mr Morreale had also got on to the Field via the Underwood Close entrance which he had always been able to use when going that way. He had also used the entrance near Boothdale Drive. He had seen walkers on the worn paths on the Field and people running on the perimeter tracks and had also observed a lot of motor bikes and quad bikes on the Field. Mr Morreale said that the neighbourhood he lived in was called Abbey Hey and that he believed that the majority of the people who used the Field came from there and other local areas such as Gorton, Higher Openshaw and Audenshaw. Residents of Abbey Hey had a number of facilities and amenities available to them. Some of those he had referred to (such as the primary and secondary school, the nearest park, the swimming pool and gyms) were outside the red line of the claimed neighbourhood. As far as he was concerned, Abbey Hey's boundaries extended to Raja's shop, Gorton Railway Station and Abbey Hey Primary School.

46. **Edward Lilley** of 29 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that he was 17 years old and had lived at that address all his life. He had started to use the Field

when he was about seven. He had used it for making dens with his friends. This was the same activity that Antonio Morreale had described. He had cut the grass to make a pitch to play football and rugby, with goals being made out of items found on the Field such as sticks and old fence posts. This again was the same episode that Antonio had mentioned and the pitch had lasted for the three to four years that Antonio had referred to. He had been involved with Antonio in making a cycle track on the Field and he and his friends had also dug trenches on the top part of the Field as part of their play. Mr Morreale also referred to flying remote controlled planes on the Field and playing there with airsoft guns. There had been water fights on hot days in the summer and snowball fights in the winter. Mr Lilley had also regularly used the Field for walking dogs (both those of neighbours in the past and, recently, his own) and running. He mainly used the worn outside paths and those across the Field for running. If it was cold and wet he would use the Fallowfield Loop Line for running because of its better surface. If he was walking dogs, he would go off the paths. Mr Lilley said that he very rarely went to Debdale Park because it was too far. When he was younger Mr Lilley had got on to the Field from Antonio's house or from number 44. He had also been on to the Field via Mr Mooney's house with Mr Mooney's son, Jay, who he had played with although not as regularly as with his other friends. Mr Lilley now entered the Field at the end of Underwood Close.

47. Mr Lilley would often see other people using the Field for such things as dog walking, running and cycling. The perimeter path was used quite a lot for these activities. Horses from a stable at the end of Ackroyd Avenue had also been exercised and grazed on the Field. He had never been confronted in his use of the Field by anyone telling him it was private land or that he should not use it. There was public access on to the Field at the bottom of Underwood Close and he had always been able to use this access. There had not been any signs to suggest that the Field was private and he had never had to climb or damage a gate or fence to get on to it. He had never asked for permission to go on to the Field.

48. **David Lilley** of 29 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL, the father of the previous witness, said that he had lived at that address since 1987. He said the Field was accessed by his family at any time as they wished without question. That had started soon after moving to number 29. This was either from a gate in a neighbour's

garden or, more often, from Underwood Close. There never had been, nor were there presently, any obstacles to access at the latter entrance. Mr Lilley had never seen any signs to say that the Field was private land. He said that he himself used the Field fairly regularly for jogging a circuit or circuits, trying to do that two to three times a week. He would also stroll there and would cycle round it on a mountain bike probably once or twice a week. He had picked berries on the Field. He had been on evening/night bat walks there. The family had flown model aircraft there. On one occasion he had tried to play golf on the Field, hitting a ball and seeing where it landed. He had recently acquired a dog and now walked it on the Field. His wife walked on the Field also. There were quite a few paths on the Field. When he strolled there, he used all the Field, the worn paths and other areas. He and his wife had in the past planted three saplings along the Underwood Close side of the Field, one for each of their children. Bonfire parties had had taken place regularly on the Field, virtually every year. Lots of neighbours and friends, 20 or more people, all of whom lived in local streets would come together and enjoy Bonfire Night and the fireworks. The parties were organised on a “word of mouth” basis. One local resident had been able to obtain demonstration fireworks over a three year period. The allotments did not have bonfire celebrations. Mr Lilley said that his children and other local children had spent many hours playing on the Field. They would make dens, ride bikes and play ball games. Mr Lilley had provided the lawnmower to make the pitch on the Field as referred to by the previous two witnesses.

49. Whenever Mr Lilley went on to the Field, he saw others there. He had seen dog walkers, people riding and exercising horses on the Field and, one summer, a group of teenage boys used the Field for riding scrambling motorbikes. Mr Lilley said that when he moved to the area he was impressed by the feeling that there was a tight knit community in the local area. There was then a strong congregation at the local church of St George. He became closely involved with the community, having been the secretary for the Ackroyd Avenue Allotments for ten years from 1996 to 2006. He recalled a well-attended public meeting (40 to 50 people) held in a church hall in about 1995 at which there was expressed a unanimous desire for the council to cut the grass on the Field to try to bring it back to more formal use as a recreation facility. At the time there was not an awareness that anyone else had control of the Field. He had not seen anyone maintain the Field. He thought the councillor who had chaired the meeting had taken the matter of maintenance back to the Council. Mr Lilley had not attended a meeting at which the

Residents' Association was formed but was aware that there had been residents' associations.

50. **Timothy Glaister** of 22 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that he lived at that address with his wife and daughter who was now aged 21. He had moved there in July 2005 and had been a regular user of the Field since then. There were a number of paths on the Field. There was a main path (which had been present since 2005) which formed a circuit around the perimeter of the Field and there were further less defined paths criss-crossing the Field. Some of the paths could change and some were more established than others and could come and go somewhat (only a few days of walking being needed to make a path). He had used the Field, and still did, every day for walking for health, relaxation, general wellbeing, socialising with other walkers and walking his dog as well as observing and enjoying wildlife, particularly birds and birdsong. The social function served by use of the Field was a very important consideration as far as he was concerned, not least because he had moved to Manchester from the south west of the country and use of the Field had enabled him to get to know people. Mr Glaister picked blackberries on the Field every autumn. These were found all around, particularly the north west and south west corners of the Field as well as at its eastern end. Mr Glaister said that if he saw litter during his walks he would pick it up and take it home for disposal. During the summer he sometimes took secateurs with him so that he could prune branches that were growing across paths. He used all the paths. He used the perimeter path and completed figure of eight circuits using the other paths and would venture off the paths now and again (such as to retrieve an ill-aimed dog toy). If he was going on a longer walk, he would go as far as Debdale Park and Gorton Reservoirs. On his daily walks he regularly met up with other people and then continued to walk circuits of the Field in their company. In drier weather, Mr Glaister often saw local children using the Field for adventure and play, roaming around and climbing trees but he could not say where they came from. On Bonfire Night the Field was used for bonfires and fireworks by local residents. More often than not there was such a bonfire but its location moved around from year to year.

51. In the past, before about 2012 when his children were young, Mr Glaister had also regularly used the Field for a number of activities with them: playing with them (kite flying, frisbee, ball games and, occasionally, helping them with their den building,

which had been in the middle of the Field and also directly behind number 22); building snowmen and playing in the snow in the winter; camping overnight and cooking on a camping stove in summer (although this had not been regular and had taken place only on a couple of occasions, not far from the back of the house). As for access to the Field, Mr Glaister said that this was obtained via a gate in his back garden (as was the case with most properties on the south side of Ackroyd Avenue). He also used the Underwood Close entrance and the eastern entrance to the Field. He had never been unable to use the former. He knew that the owner of the Field was the Trust. To his knowledge, no representative of the Trust had seen him on the Field. He had never sought permission to undertake any activities on the Field. He had never been prevented from using the Field. As far as he was aware, there had never been any attempt by notice or fencing or by any other means to prevent or discourage use of the Field by the local community.

52. Mr Glaister said that the neighbourhood in which he lived was known as Abbey Hey. It had a number of facilities. The people who used the Field came mainly from Abbey Hey although some came from further afield (for example, from western Audenshaw, Higher Openshaw and North Gorton). Those he got to know through social interaction on the Field came from various places: Abbey Hey Lane; off Jetson Street and Harrop Street; and from the Audenshaw side. Although his partner, Caroline Martin, was one of the Applicants, Mr Glaister said that he himself had not been involved in the preparation of the Application. He said that he was unable to recall Caroline Martin's having been involved in email correspondence with the Trust in 2007 (OB/48-50) and was not aware of the email from Sandra Dewhurst on behalf of the latter to Caroline Martin of 21st June 2007 which had stated that the Field was privately owned and not open space for the use of the general public. Mr Glaister had never been involved with the Residents' Association.

53. **Ashley Hern** of 27 Underwood Close, Abbey Hey, Manchester, M18 8UY said that he had lived at that address since 2005 and had married his wife, Anne (one of the previous witnesses) in 2006. He had started to use the Field in 2005 as soon as he had moved to Underwood Close. The entrance he used (which was always able to be used) was the one at the bottom of Underwood Close. He had used the Field for walking, running and cycling, once or twice a week. His primary use of the Field was for walking. The route

he took was mood dependent; sometimes he would take the path round the Field but sometimes he would go into the middle for a better view. He often went into the middle part where there was a tree. He did not normally wear wellingtons to go on to the Field. He had walked there on his own and had pushed his sons in their prams on the Field (the latter activity having taken place on the worn paths). He had also taken them there to observe nature and to cycle. On the rare occasions that there had been snow, he had been able to build snowmen with them on the Field. The Field was also a perfect location for fireworks on 5th November (and New Year's Eve if a few were left over). He had not himself had a bonfire on the Field but there had been four or five occasions when a bonfire had taken place there. He would say that 50% of his use of the Field was with his sons. Use took place all year round but more in summer.

54. Mr Hern said that the Field had been a focal point of the community for as long as he had lived in the area and was a popular location for activities such as dog walking, walking and cycling which he had observed from their house. Dog walking took place very regularly on the Field, every day. Bike riding took place once or twice a week. Sometimes he would see frisbee being played on the Field. Mr Hern occasionally said "hello" to people he met on the Field. For a time (2009 to 2012/13) there had been a problem with mini-motorbikes but this use of the Field happened only occasionally now and was not persistent. There were some people from Underwood Close and Ackroyd Avenue that he came into contact with more regularly. Mr Hern said that he had never been told that he could not use the Field, that he had never seen signs saying that the Field was private property or had been told as much, and that there was no indication that it was private property. He had never asked for permission to use the Field. Facilities at Wright Robinson College were not available for informal recreation. He used Debdale Park and Gorton Reservoirs but not as much as the Field because they were not as accessible; Debdale Park was quite a way.

55. **Paul Billington** of 30 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that he had lived at that address since 1982. Before then he had lived at 16 Ackroyd Avenue from 1970 to 1982. He had lived away from the area from 1990 to 1996 but did return on visits during that time. His coming back to the area was on the day of the IRA bombing of Manchester (15th June 1996). The Field had been a big part of his life growing up in the area. As a child he would spend many hours on the Field, playing

football, cricket, golf, climbing trees and camping. The Field was used for formal sports at this time (well before 1996) and Abbey Hey Football Club had played there. Mr Billington had remained a regular user of the Field, going on it several times a week. There was access to the Field from a gate in his back garden, like most of the properties on his side of Ackroyd Avenue. The gates and fences were maintained by the owners of the properties on Ackroyd Avenue. However, Mr Billington's normal access to the Field at present was that from the bottom of Underwood Close. Access had always been possible there for all the time he had known the Field although it had got narrower and less flat because of the growth of vegetation and dumping. There had never been a gate there. Access to the Field by this entrance was left unchanged by the infilling works on the former railway cutting, which were completed in 1996. By the end of the infilling it was also possible simply to walk on to the Field from the infill. The Underwood Close entrance had previously been used (since 1996) by the son of the former owner of The Orchards on Ackroyd Avenue who would get on to the Field there with a quad bike which he would then ride around the Field. As for his own gate, Mr Billington had let vegetation grow over it for the purpose of security but he had used this gate a lot before 2004.

56. There was a main path on the Field forming a circuit around its perimeter and a number of other paths which criss-crossed it. The paths had changed slightly over the years. Mr Billington now used the Field for walking his dog, which he had had since 2014. He had walked on the Field without a dog previously. He did not use the Field in a regimented way. He would walk around the perimeter of the Field and zig-zag across it, taking in the peace, calm and beauty. Exit from the Field was also normally via the same point leading on to the end of Underwood Close. Mr Billington also used the Field as part of a run, perhaps two or three times a month, going round the perimeter and then zig-zagging across it. In late summer and autumn he had used the Field for picking fruit in most years. There were many areas where blackberries could be found just off the path a bit. His use of the Field was all year round but naturally more in summer. Certain areas were subject to waterlogging problems but this did not stop him. Mr Billington used the Fallowfield Loop Line for biking. He had a road bike. Most of the cyclists on the Field used mountain bikes. From 1993 to 1998 his niece used to come to stay and Mr Billington's father would take her on to the Field. Mr Billington said that no representative of the Trust had, to his knowledge, ever seen him on the Field. He had

never been prevented from using the Field and had never sought permission to do anything on it. There had never been any attempt by the owners to prevent or discourage use of the Field by the local community by notices or signs or fencing or by any other means. The Field had not been maintained for some 30 years.

57. When using the Field, Mr Billington regularly met other local people whose faces he recognised and with whom he would chat. He knew people from Ackroyd Avenue, Anne Hern from Underwood Close and recognised people from Abbey Hey Lane. During the last 20 years he had seen the Field used for many different activities, dog walking, walking, running, fruit picking, football, drone flying, kite flying, bicycle riding, bird watching, much children's play, children climbing trees, horse riding and bonfires. Mr Billington confirmed the mowing of a small section of the Field (which he guessed to be some 40m by 20m) to enable the playing of football which had been spoken of by previous witnesses. He had only seen the grass cutting take place once but the pitch had been there for three years or so. He also remembered Antonio Morreale and Edward Lilley playing in dens. He had seen other children kicking balls on the paths. He had not attended any bonfires on the Field but had seen them there for all but two years. They had taken place in two locations. There was always a huge bonfire behind number 38 Ackroyd Avenue which 20 to 25 people might attend and there was also one further up the Avenue, behind number 16 he would say, which was attended by a smaller group of about 15 people. They were not general community bonfires. He was not aware of any bonfires on the allotments but would not have been able to see them from his house.

58. Mr Billington said that the neighbourhood in which he lived was known as Abbey Hey. Most of the people who used the Field lived in Abbey Hey although some came from surrounding areas such as North Gorton, Higher Openshaw and Audenshaw. Abbey Hey had a great sense of community and many facilities. Mr Billington did not tend to get involved in community activities but an exception was that he did take part in the community litter pick which was carried out on the first Sunday of each month by about six or seven people who met at the top of Ackroyd Avenue and then concentrated their efforts on Abbey Hey Lane and the surrounding streets as far down as Vine Street. Beyond that street there was no interest in helping. Most of the litter pickers were from Ackroyd Avenue but there was a lady from Midgley Avenue and another from "the

Ladder”⁴. They generally did not go on the Field but left Mr Glaister to pick up litter there. To the question of whether Abbey Hey Primary School and Wright Robinson College were within Abbey Hey, Mr Billington said that the answer was “yes and no”. Abbey Hey Primary School was on Abbey Hey Lane but his idea of Abbey Hey as a community was defined by the area that had been picked for the village green neighbourhood (which did not go as far as Abbey Hey Primary School). There were no schools in this neighbourhood. Matters were open to interpretation. The former Abbey Hey Hotel was within the neighbourhood. His interpretation of the boundary was that it was to be found at Vine Street. He had not been involved in the preparation of the Application and had only come into the process quite late. He was not part of the group which had determined what the neighbourhood should be. He had heard of the Residents’ Association but that was where his knowledge of it stopped.

59. **Ian Crook** of The Orchards, Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that he and his wife, Emily Hulley (one of the Applicants), had lived at that address since 28th October 2011. Before then they had no knowledge of the Field. They had used the Field on a regular basis for various activities. Access had been via their back gate. Mr Crook had used the Field for running, typically using it to make up the distance of a longer run by adding laps of the Field or shorter loops as required. His wife had also on occasion used the Field for running. Mr Crook’s running on the Field had taken place regularly, twice a week, until 2015 but he did it rarely now. He and his wife had each walked the Field, either together or alone, as a way to unwind after a day’s work. On a number of occasions, but sporadically (once a year), they had spent time on the Field in the evening simply watching the bats fly around. Mr Crook had got a drone in 2016 and had practised flying that on the Field because it was a safe place to go with not many people around but he was now able to fly it from his garden. His wife used to do a lot of mountain biking and had ridden on the Field both on and off the paths using it to test her mountain bike. She stopped mountain biking when she became pregnant in 2014. His wife had also picked blackberries there every year since they had moved to The Orchards. On one occasion she had gone geocaching on the Field with a friend. In 2015 they had their first child and Mr Crook had taken him on to the Field from an

⁴ The group of streets made up of Jetson Street and Vine Street – the side rails of “the Ladder” – and the parallel series of shorter streets running between Jetson Street and Vine Street – the rungs of “the Ladder”.

early age, initially every day, carrying him a sling, and then once or twice a week. Later their son would walk on the Field too or be carried. Different routes were followed: the main perimeter path, looping around trees and, sometimes, cutting across the middle. Eventually their son could travel the length of the Field on his balance bike.

60. On most occasions when he was on the Field Mr Crook would see at least one other person on there and, at times, a handful or a group of kids. There was a lot of dog walking, walking and people on the Field with children. He had seen frisbee and ball games on the eastern part of the Field quite a bit. The frequency of seeing children playing on the Field was variable. The play tended to be on the far end of the Field. As for the eastern part of the Field, this was a flat area although it could also get quite muddy. There were isolated spots where this could happen but other large stretches were relatively dry. Mr Crook had not seen fireworks at their end of the Field but had seen bonfires there although these were not necessarily associated with Bonfire Night, one (in 2013) being an end of term burning of books by school pupils and the other (in 2015) having been local youths burning wood. During the time they had used the Field they had never been challenged by the landowner or any of his representatives over their use of it. They had never been asked to leave or told that they should not be there. They had never observed any maintenance of the Field or any other sign that it was being managed. When Mr Crook had sprayed Japanese Knotweed on his property he had also done the same some 20m into the Field. On the few occasions they had tried to contact the landowner they had received no response.

61. In about 2012 a large branch fell from one of the trees in the Field, landing in their property and causing damage to the boundary fence. His wife attempted to contact the landowner but received no response and eventually they cleared the branch themselves and repaired the damage. However, they did become aware of who the landowner was at this point. In 2015, while United Utilities were at their property undertaking some work there, they succeeded in getting the manhole cover in the north east corner of the Field replaced. It was previously uncovered and had presented a significant hazard. The work was done by a contractor and not undertaken by the landowner. Following this Mr Crook spent about half a day unblocking drainage pipes entering the manhole. In 2016 a large branch fell from a tree over the access to the eastern end of the Field from

the Fallowfield Loop Line. The branch blocked this access for several days before Mr Crook cleared it.

62. Since moving to The Orchards Mr Crook and his wife had been struck by the sense of community in the area. They had become friends with many of the locals and had regularly attended events held at the allotments such as Christmas fairs and summer shows. Since at least 2012 there had been a bonfire at the allotments but it was a low key affair, not advertised like other community events there, and treated as an opportunity to burn a bit of rubbish. Mr Crook and his wife regularly used local shops and services, including Raja's, Yummy's Café and Lodge Garage. Mr Crook had also used the barber's shop which had been present on Jetson Street up to 2016 until the barber retired. His wife was one of the Applicants and had been involved in the distribution of evidence questionnaires but he did not know where she had done this. The distribution exercise had started at the Field end of Abbey Hey and had worked its way out in the three days available. There were a lot less users beyond the railway cutting. In terms of the identification of the neighbourhood, Abbey Hey was regarded as the area extending up to the railway cutting, not many users coming from across it. He did not know why "the Ladder" area had not been included in the neighbourhood originally but the area now put forward had emerged after the Application was submitted as the product of a consensus among the group involved. This consensus was not something that had happened in the three days when the Application was originally prepared.

(5) THE EVIDENCE ON BEHALF OF THE TRUST

63. The Trust called two "live" witnesses, Karen Wilson and Trevor Mooney. It also relied on a witness statement by John Rigby.

64. **Karen Wilson** of 317 Stockport Business and Innovation Centre, 3rd Floor, Broadstone Mill, Stockport, SK5 7DL, said that she had been a Trustee of the Trust since March 2015 (but no involvement with it before then) and its Chair from November 2016. Her knowledge of the Field had commenced within a few months of her becoming a Trustee. She had not been involved in the decision to grant an option to Parkleigh in relation to development of the Field. She was aware from deeds in the possession of

the Trust that the Field was transferred to the trustees of the Manchester and Salford Playing Fields Society by a conveyance dated 24th May 1928 (OB/61). Pursuant to a scheme approved by the Charities Commission in 1997 the Manchester and Salford Playing Fields Society merged with another charity to become the Trust, which was registered under charity number 521234. At all times the Field had been in the ownership of the Manchester and Salford Playing Fields Society and then the Trust. The Field was registered at HM Land Registry under title number GM957377 in the name of the Official Custodian for Charities on behalf of the Trust. She believed that the Field was used for sporting purposes from the time of its acquisition but was last so used when there was an arrangement with GEC for football to be played there. Once the use of the Field by GEC came to an end on surrender of its lease in 1985/86 the Field was, she understood, not in a fit condition to be used for sporting purposes. She had been advised of this by John Rigby, the Trust's groundsman.

65. The Trust's principal objectives were (a) the provision of recreation grounds and (b) the provision of facilities for the recreation and leisure time occupation of young people and adults to help and educate them so to develop their physical, mental and spiritual capacities so that they might grow to full maturity as individuals and members of society. Over recent years the Trustees had been reviewing the ways in which funds could be raised to meet the Trust's charitable objectives, in particular to provide services for children and young people. A decision was thus taken to seek to sell the Field. Ideally, the Trust would like to be able to do more charitable work but its current income was such that it could not support the necessary staff. The Trust currently had two office staff, one groundsman and one caretaker. The Trust's clubs were run by volunteers. None of the Trustees was remunerated. As Chair of the Trust, Mrs Wilson said that she tended to work, again on an unpaid basis, one or two days a week on Trust business. The Application had come as a shock to all of the Trustees. There had never been discussion of such an eventuality nor had it been raised by the developers.

66. Of particular relevance to the present case is the correspondence that Mrs Wilson exhibited to her witness statement. The correspondence had been obtained by asking the Trust's employees to go through its archived files (both paper and on computer). The full extent of the correspondence that had been found was exhibited (OB/38-50).

Mrs Wilson did not have first hand knowledge of the correspondence; her role had been to have it located. The gist of her overall view of it (as put forward in chief) was that it showed that the Trust had been communicating with those (Mrs Newing of the Residents' Association and Mr Kaufman, the local MP) who were purporting to act for the residents in the area and that, through them, the Trust's position (which had included disapproval of bonfires and explicit consent for dog walking use followed by explicit withdrawal of consent for any activities) would therefore have been widely known to people. It is convenient next that I set the correspondence out. I do so in chronological order and record Mrs Wilson's answers when questioned (primarily in cross examination) about it.

67. The correspondence starts with a letter written by JD Kelly, the Chief Executive of the Trust, to Gerald Kaufman MP dated 15th August 2000 (OB/41). This letter refers to a letter (which is not before the inquiry) from Mr Kaufman of 14th August 2000. Having done that, it states that Mr Kelly can assure Mr Kaufman that any request he has received to deal with dangerous trees on the Field has been dealt with. It continues by saying that Mr Kelly had further discussed the question of the fencing (while not accepting responsibility for it) with residents, who claimed that they wished the access left open for the purpose of dog walking, etc. and while the Field was in fallow condition, Mr Kelly could see no harm in that. When cross examined on this letter, Mrs Wilson said that she would say that its predominant concern was in relation to trees on the Field. She agreed that the letter did not expressly say that permission was given for dog walking but it was implied that that was the case.

68. The next letter in time is one dated 20th September 2000 (OB/45) written, on paper headed with the name of the Abbey Hey Residents' Association, by Mrs B Newing, Chairperson. The letter is addressed to the Greater Manchester Federation of Clubs for Young People (another name for the Trust, as I have already explained) and is written to Mr Kelly. It is headed "Godfrey Ermen Playing Fields". In the letter Mrs Newing introduces the Residents' Association which, she says, is the only association for Abbey Hey that has a formal constitution lodged with Manchester City Council and recognised by them. The letter states that the Residents' Association was formed in April of the year in question (2000) after the holding of a public meeting attended by over 400 people of the area who were upset at the way in which Abbey Hey was declining. A

steering group was set up from the meeting. The letter continues by stating that several meetings had been held, questionnaires issued and discussions had and that residents were very upset at the way in which the playing fields had been left to decline and get into a dangerous condition. Some of the concerns were in respect of dangerous trees and inadequate/dangerous fencing. People in general felt that the Field should be brought back to its former glory as a well kept playing field and a safe environment for children to play. The letter concludes by asking if a meeting could be arranged at the Field to discuss how to improve the situation.

69. The exhibited correspondence then jumps to 17th November 2003 (OB/39). This piece of correspondence consists of a letter written to Mrs B Newing by Cobbetts (a firm of solicitors) acting for the Trust (which is said otherwise to be known as the Greater Manchester Federation of Clubs for Young People (“the Federation”)) as the owner of the Field. The heading of the letter is “Godfrey Ermen Playing Fields”. The letter begins by referring to Cobbetts’ having received a copy of a letter dated 7th November 2003 which James Kelly, the Chief Executive Officer of the Trust, wrote and hand delivered to Mrs Newing. This letter is not before the inquiry. Cobbetts’ letter continues by stating that Mr Kelly had told them that Mrs Newing’s response was a voicemail message indicating that she had every intention of proceeding with the bonfire referred to in Mr Kelly’s letter and had every right to do so as the land belonged to them. Cobbetts state that Mrs Newing had been warned of the public liability problems relating to a bonfire but that the Trust were not aware that she had taken any notice. The Federation was most concerned that the bonfire went ahead without authorisation. Cobbetts were of the opinion that Mrs Newing and her colleagues had committed a trespass against their clients and that they might also be guilty of criminal damage to their clients’ property. Their clients were also concerned that the Residents’ Association had purported to claim title to the Field and that that claim had, in the opinion of Cobbetts’ clients, no basis whatsoever. It was clear, however, that the Residents’ Association appeared to be prepared to exercise rights over Cobbetts’ clients’ property despite the latter’s refusal of permission for any rights to be exercised. In those circumstances, Cobbetts’ clients could not allow the Residents’ Association’s activities to go unchecked. Accordingly, Cobbetts required Mrs Newing within seven days of receipt of the letter to write to them acknowledging that neither she nor any member of the Residents’ Association had any right to the Field and, in particular, had no right to use any part of it. If Mrs Newing

failed to respond in this way then Cobbetts would consult with their clients for instructions to commence court proceedings for a declaration that she and the Residents' Association had no such rights. At that stage their clients would also consider pursuing Mrs Newing personally for the damage which the bonfire had caused to the Field. Cobbetts' letter also stated that it was believed that one of the members of the Residents' Association committee was a councillor and that the Residents' Association received funding from the Council for its activities. It was understood that Cobbetts' clients would be writing to the council seeking an explanation of what, if any, support the Council had given to the recent unlawful activities on the Field and seeking assurance that no assistance for any further unlawful activity would be given in the future. The letter concluded by stating that the recent activities on the Field were entirely unjustified and liable to cause considerable damage to Cobbetts' clients' property and, potentially, also to members of the public and that the situation could not be allowed to remain unclear. A response was awaited.

70. When cross examined on this letter, Mrs Wilson said that no letter from Mrs Newing by way of reply had been found, that there was no evidence of any letter written to the Council and that there was no evidence that any court proceedings had ever been taken. She also said accepted that, although Cobbetts' letter had said that access could not be allowed to go unchecked, there was no evidence that any signage had been put up, that any fencing had been erected, that access from either the Underwood Close entrance to the Field or that from the Fallowfield Loop Line had been stopped or that any action had been taken in respect of the gates on to the Field from residential properties.

71. Next there is correspondence in 2004. On 25th February 2004 Mr Kelly, in his role as Chief Executive of the Trust, wrote to Mrs B Newing in relation to the Field (OB/42). The letter in question was headed "Godrey Ermen Playing Fields" and was copied to Mr Kaufman and to Cobbetts. In the letter Mr Kelly said that information had come to him suggesting that Mrs Newing and the other members of the Residents' Association considered that they may have rights over the Field as a result of a letter which he wrote to Mr Kaufman on 15th August 2000. This is the letter referred to in paragraph 67 above. Mr Kelly stated that, in that letter, he had made it clear on behalf of the Federation that he had no objection to residents walking their dogs on the Field whilst it was in fallow condition. However, his wish to assist the residents appeared to have been abused and

the Federation's solicitors had written to Mrs Newing regarding the bonfire which was held on the Field and which he believed Mrs Newing had arranged. It was now necessary for Mr Kelly to withdraw any consent which the Federation had ever given to any resident to use any part of the Field. Accordingly, Mrs Newing should note that neither she nor any other resident in the area, whether a member of the Residents' Association or not, was entitled to go on to the Field for any reason at all. Mr Kelly concluded the letter by indicating that he would copy the letter to Mr Kaufman so that he was aware of the situation.

72. When cross examined, Mrs Wilson said that her interpretation of the letter was that Mr Kelly's reference to the withdrawal of any consent related back to his earlier letter of 15th August 2000 as well as any other discussions he might have had with Mrs Newing. In re-examination she confirmed that it was her view that the fact that Mr Kelly had referred to the withdrawal of consent was wholly suggestive of the fact that he believed that consent had previously been given. She accepted in cross examination that users of the Field might not be members of the Residents' Association and that she was not aware of any steps taken to communicate the contents of the letter to such non-member residents although she considered that Mr Kelly would have assumed that Mrs Newing would have informed members of the Residents' Association.

73. It is evident that Mr Kaufman then became aware of Mr Kelly's letter. On 10th March 2004 Mr Kaufman wrote (on House of Commons headed paper) a letter to Mr Kelly (OB/43). In that letter Mr Kaufman referred to a letter to him from Mr Kelly dated 10th February 2004 (which is not before the inquiry) following which he said that he had been contacted by Mrs Bernadette Newing of the Residents' Association and shown a letter from Mr Kelly to Mrs Newing dated 25th February 2004 (the letter referred to in paragraph 71 above). Mr Kaufman stated that, while Mr Kelly had said that his letter would be copied to him, he had received no such copy. He went on to say that it was not his business to get involved in the issue of whether a bonfire was held at the Field although Mrs Newing assured him that no such bonfire was held and that the police could confirm this. However, Mr Kaufman was very concerned indeed that Mr Kelly was now denying access to the Field to his constituents. Mr Kaufman did not believe that, under the terms of the bequest, Mr Kelly had the right to do this and he was therefore writing to ask him to revoke any such decision immediately. He said that Mr

Kelly might recall that in 1990 Mr Kaufman had held a debate in the House of Commons on the issue of the Field and had had on that occasion to refer to the attitude of those involved in the Manchester and Salford Playing Field Society. Mr Kaufman very much hoped that it would not be necessary for him to repeat that.

74. Mr Kelly replied to Mr Kaufman on the same day (10th March 2004) (OB/44). In that letter he said that his record showed that Mr Kaufman had been copied Mr Kelly's earlier letter of 25th February 2004 so he apologised that it was not received. Concerning the bonfire, he had evidence from several neighbours and had viewed its remains for himself and, as far as he was aware, the police had not yet completed their inquiries. Mr Kaufman's historic relationship with the Playing Field Society was with Mr Kelly's predecessor but he (Mr Kelly) had a full record of what Mr Kaufman had said in the House and what reply had been given by the Sports Minister. Mr Kelly's denial of access was based on the absurd assumption that granting access for "dog walking", etc. was used as an excuse for doing "anything we wish to do" to quote what was used as an excuse for having a bonfire on the Field. Further, he had received a threatening message left by Mrs Newing on the office Ansaphone. Consequently, following lengthy discussions with the Trust's legal team, he had revoked such permission for access. The Field belonged to the Trust, the debate on that topic now surely being over, had a cost to the Trust as a charity and produced no income whatever. Therefore, it was not Mr Kelly's intention to enter into prolonged correspondence with anyone over the Field but he felt that he must protect the interests of the Trust. Mr Kelly concluded by stating that Mr Kaufman, as a Member of Parliament, must take whatever action he deemed appropriate but that he would not wish his (Mr Kelly's) actions to be regarded as disruptive rather than those of someone just doing his job. In re-examination, Mrs Wilson said that Mr Kelly's revocation of permission made it clear that he believed that he had previously given permission.

75. There are then two other sequences of correspondence which received less attention at the inquiry. The first relates to an exchange in early 2017 between a Ms Joanne King of an unidentified address in Gorton and Mr Kelly (OB/46-47). In a letter of 23rd January 2017 Ms King expressed a wish to establish a manège and put stables on the Field, which she thought was for the use of the community. On 24th January 2007 Mr Kelly replied that the Field was private property owned by the Federation and was not

for the general use of the community and particularly not for exercising animals. Therefore, Ms King's request for permission to use the land for horses would not be possible.

76. The second sequence of correspondence is in email form and took place in June 2007 (OB/47-50). It was initiated by an email of 19th June 2007 from a Caroline Martin (being, I have no doubt, the same Caroline Martin who is one of the Applicants) to the Federation. In the email Ms Martin stated that she was interested in finding out more about the Field and that the Council had advised her that they believed that the Field belonged to the Federation. Ms Martin's email elicited an email response the next day (20th June 2007) from a Sandra Dewhurst on behalf of the Federation in which the latter stated that the Field was owned by the Trust which was the name registered with the Charity Commission and the working title of which was the Federation. The email asked Ms Martin exactly what information she was looking for. In turn, Ms Martin emailed back the same day saying that she was hoping to apply to Manchester City Council for a grant to improve the Field (perhaps by putting up signs asking people to pick up their dog poo, or some fixed play equipment for the children). Ms Martin stated that she would obviously need the permission of the owner of the Field before anything could be done. Ms Dewhurst emailed Ms Martin the following day (21st June 2007) and said that the Field was privately owned and not open space for the use of the general public. There were currently no plans to allow anything to be built on the Field.

77. Having set out the correspondence exhibited by Mrs Wilson, I return to summarising other aspects of her evidence, particularly again at this point that given under cross examination. Mrs Wilson said she was not aware of any attempts on the part of the Trust to erect signs at the Field or to obstruct the Underwood Close access to it. She was aware from Mr Rigby that steps had been taken to remove extensions of gardens on Ackroyd Avenue on to the Field and that there had been certain purchases of land from the Trust as well as licence agreements. There were, however, no documents produced by the Trust to the inquiry in this respect. There had been no correspondence from the Trust to residents in respect of the use of gates on to the Field from their properties. While Mrs Wilson had spoken to Mr Rigby, she had not spoken to Mr Kelly. She accepted that Mr Kaufman's concern in 1990 when raising the matter of the Field in Parliament had been in relation to the prospect of residential development on it. She

also accepted that the wider context in this respect was the planning policy of the local planning authority in relation to the preservation of open spaces. Mrs Wilson further accepted that, in the financial statements of the Trust for each of the years 2012 to 2014 (AB/55-57), the reference to an “unused field” was to the Field and that, equally in the financial statement for 2015 (AB/58), the Field was one of two such fields referred to as “unused” but that in all of these statements it was recorded that *“This space is regarded by local residents as a valuable green space”*. This italicised sentence is not found in the Trust’s financial statement for 2016 (AB/59). When it was suggested to Mrs Wilson that it had been removed because a planning application had now been made in respect of the Field, she said that she did not know the reason and that the Trust’s financial committee would have drafted the statements. She could not say whether or not the Field had come to be regarded as a valuable green space by local residents only since 2012, or whether the Trust had appreciated its value to local residents only since that date, rather than before then. She did, however, think that the reference to the Field being a valuable green space could refer to its pleasant visual outlook, a point she re-emphasised in re-examination.

78. As for the site plan (6478/01) (AB/18) which had been submitted as part of the 2016 planning application, Mrs Wilson agreed that there was no record on it of any gate at the Underwood Close access to the Field, the plan referring to a “gap”. The plan had recorded former buildings on the Field but she herself had not seen the former sports pavilion on the Field (referred to in the Trust’s original objection letter of 4th November 2016 (AB/61) as having been demolished with its remains buried) and thought that it had been in an equidistant position on the Field. She did not know where the partially buried goalposts were (as also referred to in the objection letter). The location of fly tipping on the Field (which had, again, been referred to in the objection letter) was shown on the site plan (on the edges of the Field only).

79. Turning to Mr Rigby, Mrs Wilson said that he was still employed by the Trust. He had been asked to make a statement but the Trust had not sought to have him attend the inquiry because he was elderly (70), struggled to get around and did not do much for the Trust any more. She stated that Mr Rigby had not recorded his activities in a work log nor was there any maintenance schedule for the Field. Mr Rigby did whatever was necessary. She was neither able to confirm or disagree with Mr Rigby’s statement that

over the last 20 years (before the date of his statement in November 2017) he had visited the Field about 20 times year. However, she did think that it was probably not realistic for Mr Rigby to have made 20 visits to the Field in 2016 and 2017. Given that Mr Rigby had stated that the fence running along the old railway line on the south eastern boundary of the Field originally belonged to the railway and that he believed that it was the latter's responsibility to repair it, Mrs Wilson accepted that it was fair that Mr Rigby would not have assumed responsibility for repair of the fence. Mr Rigby had not made any reports back to the Trust in respect of the occurrences he described in his statement of having told people on the Field (when he saw them there) that they should not be on the land.

80. **Trevor Mooney** of 12 Ackroyd Avenue, Abbey Hey, Manchester, M18 8TL said that he had lived on Ackroyd Avenue for 57 years. He had lived at his present address for 33 years and, before then, had lived at 25 Ackroyd Avenue. Number 12 backed on to the Field at its north westerly end. Mr Mooney had known the Field throughout his time on Ackroyd Avenue. There used to be organised football matches on the Field on Saturdays and Sundays but that had ceased after GEC left in 1985 and there had been no formal uses since. In 1993 the Manchester and Salford Playing Fields Association⁵ had applied for planning permission to develop the Field but this proposal was refused following a public inquiry. Mr Mooney said that, at this time, he was chairman of the Abbey Hey Residents' Committee, with which he had been involved from about 1988 to 2003 to 2004. The Committee had folded in about 2004 and no longer existed. Its only dealings with the Field had been in 1993 when it had objected to the planning application. Little evidence had been given then about use of the Field. He considered that Abbey Hey's boundaries were defined by bridges.

81. Mr Mooney said that he could see about 85% of the Field, all except the north eastern corner, from his son's bedroom window, which overlooked the Field. He frequently looked out of that window because his son had continual care needs which Mr Mooney had to attend to (along with his wife and other son). Mr Mooney had been retired for some ten years and was registered as his son's main carer. Mr Mooney said that he had only occasionally (a dozen times a year) seen children, all from Ackroyd Avenue,

⁵ Mr Mooney referred to "Association" rather than "Society" (the latter being the correct title).

playing on the land for an hour or two. Over the course of the last 33 years he had seen the Field being used by some local residents for dog walking, perhaps on average three to five times a day. They tended to be the same people (some of whom he knew as local) and used the perimeter track round the Field which, he said, had been made by young lads riding motor cycles. This latter activity took place about once every two months during the winter increasing to about once every two weeks during the summer. The dog walkers stayed on the perimeter track although their dogs might go into the middle of the Field. Mr Mooney had not seen walkers without dogs on the Field. There was no chance of playing any organised or informal football matches on the Field, and he was not aware that any had taken place, because of the length of the grass and its overgrown nature. He had only seen two or so bonfires, organised by residents, on the Field. There was certainly not an annual bonfire there. His general summary of the use of the Field was it had not changed over the years and that it was on the border between never being used and used very, very little.

82. Mr Mooney said that people who accessed the Field for dog walking normally came on to it from a rough path through what was once a mesh fence at the bottom of Underwood Close although one came on via a back gate. The fence he referred to had extended along the full length of the old railway line but had rotted away. The concrete posts remained. He had not seen people accessing the Field from the Fallowfield Loop Line. There was a locked gate at the Violet Street entrance to the Field. The gate had always been there and always locked so far as Mr Mooney was aware. Way back in time there had been a sign there also (*“Manchester and Salford Playing Fields Association No Trespassing”*) but none had existed for the last 20 years. There was a sign on lamp post near the start of Underwood Close which stated *“Warning, illegal use of motor vehicles will lead to prosecution. Vehicles will be seized without further warning pursuant to Police Reform Act S.59.”* Mr Mooney said that this had been erected about six years ago by the Council and Greater Manchester Police and was, he believed, designed to prevent motor cyclists coming on to the Field. He also said that in 2011 he himself had put a *“no parking”* sign up at the Violet Street entrance to the Field in order to help Mr Rigby, the groundsman, to obtain access. As for Mr Rigby, Mr Mooney said that he came on to the Field about 10 to 15 times a year and was always given a cup of tea on these occasions by Mr Mooney. His visits were at no set time and could be at any hour of the day. Mr Mooney remembered Mr Rigby’s having demolished the old changing

rooms on the Field (which had been about 50 metres into it from the last house on Underwood Close) with a JCB. Mr Rigby buried the rubble in a big hole and nothing was apparent now. The goalposts rotted away. Mr Mooney considered that there were other recreational facilities in the area which were much better than the Field and which were very popular. He instanced, amongst others, the Fallowfield Loop Line, Gorton Reservoirs, Debdale Park and the state-of-the-art facilities at Wright Robinson College.

83. When cross examined, Mr Mooney accepted that he was one of the named applicants in the 2016 planning application (AB/8) and that his house would be sold were the development to proceed. It was put to him that, while he had said that he was not aware of informal football being played on the Field, evidence had already been given that children had cut a pitch to allow this and that football had been played. Mr Mooney said that his own son had been involved when the grass was cut but it had been about ten years ago and that his son had said that he had only played there for a couple of hours. That was why he had not mentioned football in his statement. After the grass had been cut he never went back on to that area again. It was coincidence that the pitch was shown on the Google image (AB/122) produced by Mr Morreale. His son did not play football. Samantha Warner's evidence that access had been gained to the Field via the back gate of Mr Mooney's house at number 12 was not true. The gate was locked and boarded up as well as being vegetated over. The cycle course which had been mentioned as having been made on the Field (near the cut pitch) was not there a couple of days later. Children had built dens but this occupied no more than a blink⁶ in time. In re-examination Mr Mooney explained that his knowledge of these matters came from having been told about them by his son after he had written his statement. In answer to the overall point put to him in cross examination that he had omitted activities which he had witnessed on the Field, Mr Mooney said that he was giving an overall view on use of the Field and could not remember all those things which had occurred only for a blink in time. He had not omitted from his statement other transient activities witnessed on the Field. He had not seen horses on the Field, children playing with balls other than on the pitch already mentioned or blackberries being picked there (although there were lots of brambles on the Field). There was only one person who rode a bike on the Field.

⁶ Mr Mooney may have used the word "blimp" but "blink" (as in "blink of an eye") seems better to capture the sense of what he meant.

He had only seen fireworks on the Field on the two bonfire occasions he had referred to. He had never seen children climbing trees; all the trees were rotten. The Field was used for toileting dogs. He had not seen anyone pick dog waste up but the reason the Field was not full of dog waste was because there were only a small number of dogs which were taken on the Field. He would be guessing if he was to say when he last saw Mr Rigby on the Field; it was possibly three years ago. Mr Rigby came to the Field when he had something to do there. Mr Mooney did not want to guess how often this was.

84. As to his own use, Mr Mooney said that he had last been on the Field when he had a previous dog but this was over 25 years ago, before the last public inquiry. His evidence of use of the Field was based on what he could see through his son's bedroom window. Mr Mooney accepted that his assessment that he could see 85% of the Field from there was a guesstimate and not something he had measured. He could not see that part of the Field along the whole length of the back of Ackroyd Avenue but could see people on the track and could see across to the Underwood Close entrance.

85. The Trust also submitted a witness statement from its groundsman, **John Rigby**. Mr Rigby was not called as a witness. I have already touched on aspects of Mr Rigby's evidence in reporting the evidence given by Mrs Wilson. I need only add at this point that Mr Rigby's statement indicated that he was aware that local residents had used the Field to walk their dogs along the rough paths that had been made on it and that, when he saw people on the Field, he had told them that they should not be on the land and that it did not belong to them but the Trust.

(6) THE SUBMISSIONS ON BEHALF OF THE TRUST

86. I next to turn to set out the submissions on behalf of the Trust as objector to the Application. I deal with this before turning to the submissions on behalf of the Applicants to reflect the order in which submissions were made at the inquiry. The sub-headings used in this section of my report are those used in the submissions themselves (as are the sub-headings in the next section of my report on the Applicants' submissions).

Burden of proof

87. The burden of proving that the Field has become a town or village green lies on the Applicants. The standard of proof is the balance of probabilities. When considering whether or not the Applicants have discharged the evidential burden of proving that the Field has become a town or village green, the oft-stated observations of Lord Bingham in *R v Sunderland City Council ex parte Beresford*⁷ are of particular note when he stated, at paragraph 2, that “As Pill LJ rightly pointed out in *R v Suffolk County Council ex parte Steed* (1996) 75 P & CR 102, 111 ‘it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...’ It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met.” If the Application fails on any one of the statutory criteria, the Field should not be registered.

Motive for the Application

88. The motive for the Applicants making the Application is not in itself relevant to whether or not the Field should be registered as a village green. Nonetheless, it is relevant to assess the Applicants’ evidence in the context of the planning application made by the Trust in May 2016 for the residential development of the Field. That planning application was undoubtedly the catalyst for the Application, the motive being to preclude the development of the Field. Since at least 1990, local residents have been making significant efforts to prevent the development of the Field to the extent that, in May 1990, the matter was formally raised by the late Sir Gerald Kaufman, the local MP, in the House of Commons. He stated: “*The House can therefore imagine the alarm when reports recently began to circulate that the Godfrey Ermen field was to be sold - or even had been sold - for building purposes. Although it was established that the field*

⁷ [2003] UKHL 60. Although *Beresford* was overruled by *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31, it was not done so on this point which remains good law.

had not been sold, within a short period 2,000 local residents had signed a petition requesting that the Godfrey Ermen field be saved.”⁸

89. Correspondence between the Trust, Sir Gerald Kaufman and Mrs B Newing as the Chairperson of the Abbey Hey Residents’ Association took place in the early 2000s over the Field. Subsequently, only after the recent planning application was submitted and validated on 18th May 2016, but somewhat belatedly was not advertised until 1st June 2016, the Applicants made for the first time a “rushed” application for registration, despite the residents’ longstanding concerns over the Field. As stated in box 11 of the Application Form: *“Given the requirement to submit this application in advance of the ‘publication’ of any planning submission, the evidence questionnaires enclosed have been distributed, completed and collected over a three day period from 28th to 30th May 2016 (Bank Holiday weekend).”* The Application was received by the Registration Authority on 31st May 2016, and the planning application was formally advertised the following day. It is that motive to preclude the development of the Field which has driven the Application and underlies the evidence provided.

Main issues

90. The main issues for determination are, of course, each of the relevant statutory criteria. However, the elements of the criteria which are specifically contested by the Trust are as follows:

- (a) whether the claimed neighbourhood amounts to a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act;
- (b) whether the claimed use was with force (“*vi*”) and/or with permission (“*precario*”) and thus not as of right during the relevant 20 year period; and
- (c) whether the Applicants have established the requisite degree and extent of qualifying use by a significant number of the inhabitants of a qualifying neighbourhood throughout the relevant 20 year period.

⁸ Column 1116 of Hansard Debates for 17th May 1990 (found in the Applicants’ Inquiry Bundle after the statement of Anne Unwin).

Neighbourhood

91. In their Application Form, the Applicants identified the claimed neighbourhood as an area which only extended to Jetson Street to the west. No justification for the identification of that particular area has been given by the Applicants. Indeed, Mr Crook acknowledged in response to a question from the Inspector that it was difficult in the three day period available to the Applicants to give thought to its identification. Notably, the evidence questionnaires submitted in support of the Application were completed on the understanding that that smaller area was the neighbourhood relied upon.
92. The claimed neighbourhood was subsequently amended to extend westwards to the infilled railway to the west of Vine Street. It is advanced by the Applicants specifically on the basis that it comprises the neighbourhood of Abbey Hey. The written witness statements and the oral evidence to the Inquiry have related to the cohesivity of the community of Abbey Hey.
93. A neighbourhood need not be a recognised administrative unit with precise geographical boundaries. The concept was specifically introduced to relax the precision and restrictions of a locality. Lord Hoffmann pointed out in *Oxfordshire County Council v Oxford City Council*⁹ that the statutory criteria of “*any neighbourhood within a locality*” is “*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries.*” Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness, as was originally pointed out in *R (on the application of Cheltenham Builders Limited) v South Gloucestershire District Council*.¹⁰
94. Further clarity was provided on that element of the statutory criteria by HHJ Waksman QC in *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council*¹¹ when he stated: “*While Lord Hoffmann said that the*

⁹ [2006] UKHL 25 at paragraph 27.

¹⁰ [2003] EWHC 2803 (Admin) at paragraphs 72 to 85.

¹¹ [2010] EWHC 530 (Admin) at paragraph 79.

*expression was drafted with ‘deliberate imprecision’, that was to be contrasted with the locality whose boundaries had to be ‘legally significant’. See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality... but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, **a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way.** This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.” (Emphasis in the submissions). He thereby emphasised the importance of the identification of a meaningful neighbourhood given that it is the inhabitants of such area, and only such area, who have the benefit of the recreational rights that flow from a registered village green.*

95. The Applicants’ evidence is that “Abbey Hey” is a qualifying neighbourhood. The skeleton argument in support of the Application refers to the “clear geographical boundaries and the wealth of evidence which demonstrates the cohesive and long-standing nature of Abbey Hey.”¹² That may well be, and Abbey Hey may well be a qualifying neighbourhood as referred to in the skeleton argument and in the evidence in support. However, the claimed neighbourhood relied upon is only a part of Abbey Hey.

96. That is demonstrated by the Applicants’ own evidence in support.

(a) A number of the witness statements identify both primary and secondary schools as being in Abbey Hey – e.g., Antonio Morreale and Paul Billington. Yet, both Abbey Hey Primary School and Wright Robinson College are outside the claimed neighbourhood.

(b) Catherine Warner pointed out in cross examination that Abbey Hey extends to the west beyond Vine Street, as did Anne Hern and Antonio Morreale.

¹² At paragraph 20(c).

(c) Councillor Reid similarly identified Abbey Hey as extending further to the west and regarded herself as living within Abbey Hey at her first home at 5 Compstall Grove which is outwith the claimed neighbourhood.

(d) The sign indicating the start of Abbey Hey from the west is outwith the claimed neighbourhood.

97. It is also of note that no meaningful justification for the identification of the boundaries of the claimed neighbourhood has been forthcoming from the Applicants. According to Mr Crook, it was the consensus of “the group” that such comprised Abbey Hey. However, as indicated above, the evidence in support of the community cohesion of Abbey Hey has related to the wider area. Instead, it appears from the telling comment of Mr Crook in cross examination that, the further away from the Field the group went to obtain support for the Application, the less the Field was used, in reality the neighbourhood boundary has been identified by reference to those who use the Field rather than by reference to the boundary of the community of Abbey Hey. That is tantamount to drawing a line on a map with no meaningful boundaries in terms of the community.

98. In effect, and on the basis of the Applicants’ own evidence, the claimed neighbourhood is only part of the neighbourhood of Abbey Hey. Although it was held in *Leeds Group plc v Leeds City Council*¹³ that reliance could be placed on two neighbourhoods to satisfy the statutory criteria, only part of a neighbourhood is not a qualifying neighbourhood. Indeed, if that were so, the requirement for a neighbourhood to have a requisite degree of cohesivity would be meaningless if only a part of that neighbourhood could then be relied upon.

99. Consequently, the Trust contends that the area relied upon by the Applicants is not itself a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act, and that the Applicants’ evidence has supported a wider area as being a neighbourhood rather than justifying any alleged cohesivity of the claimed area. On that ground alone, the Trust respectfully invites a finding that the Application should fail.

¹³ [2010] EWCA Civ 1438 at paragraph 27.

Use as of right

100. Use of land “as of right” is use without force, without secrecy and without permission, namely *nec vi, nec clam, nec precario*. The Trust contends that the use has been largely *vi*, namely with force, and thus not as of right during the relevant 20 year period of May 1996 to May 2016.

101. For such purposes, “force” is not limited to physical force. User is *vi* if it involves climbing or breaking down fences or gates, but also if it is under protest from the landowner. Lord Rodger in *R (on the application of Lewis) v Redcar and Cleveland Borough Council* stated that “*it would be wrong to suppose that user is ‘vi’ only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi... If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being vi...user is only peaceable (nec vi) if it is neither violent nor contentious.*”¹⁴ (Emphasis in the submissions).

102. It is apparent from the only available correspondence which has been located that, during the relevant 20 year period, the Trust had informed local residents of Abbey Hey that they were not entitled to use the Field.¹⁵ The first letter in time is from Mr Kelly, the Chief Executive of the Trust and thus acting on behalf of the landowner, to Gerald Kaufman MP dated 15th August 2000. The latter was the MP for the area including Abbey Hey. It is of note from that letter that Mr Kelly had been in discussions with local residents over the Field and that they wished access to be left open for dog walking. Mr Kelly expressly stated that “*while the field is in Fallow condition*”, he saw no harm in such use of the Field for dog walking taking place. That was being communicated to Mr Kaufman who was acting on behalf of his constituents. At a similar time, Mrs Newing sent a letter to the Trust dated 20 September 2000 on behalf of the Abbey Hey Residents’ Association. It was written on the Association’s letter

¹⁴ [2010] UKSC 11 at paragraphs 88-90.

¹⁵ Correspondence at page 38 onwards of the Trust’s Inquiry Bundle.

head, was signed by her as “Chairperson”, and commenced with “*As you can see from our letter head, we are Abbey Hey Residents Association.*” Despite Councillor Reid’s somewhat incredulous attempts to suggest otherwise, that letter was clearly written by Mrs Newing on behalf of the Residents’ Association. In that capacity, she too was corresponding with the Trust at the same time. Moreover, she pointed out that the Residents’ Association had recently formed after holding a public meeting attended by over 400 people from the area. The Residents’ Association was thus actively engaging with significant numbers of the local community.

103. Subsequently, on 25th February 2004, Mr Kelly wrote to Mrs Newing in a letter addressed to the Residents’ Association expressing concerns over the Association’s stance. He referred to a suggestion that the members of the Residents’ Association appeared to consider that they had rights over the Field as a result of the letter he had previously sent to Mr Kaufman on 15th August 2000. Due to the abuse of his previous statement that he had no objection to residents using the Field for dog walking at certain times by the holding of an unauthorised bonfire on the Field, he proceeded to state: “*It is now necessary for me to withdraw any consent which this Federation has ever given to any resident to use any part of the field. Accordingly please note that neither you nor any other resident in the area whether a member of your association or not is entitled to go onto Godfrey Ermen Playing Field for any reason at all. I will copy this letter to Mr Gerald Kaufman so that he is aware of the situation.*”

104. By that letter, the landowner was expressly withdrawing his consent to any resident to use the Field for any purpose. That is very clear from the wording which is wholly unambiguous. It was addressed to all residents of the area, whether a member of the Residents’ Association or not. According to Mr Kaufman’s letter of 10th March 2004, he was duly contacted by Mrs Newing who showed him a copy of that letter. He responded expressing concern that the Landowner was “*denying access to the Godfrey Ermen Playing Fields to my constituents.*” It is thus apparent that Mrs Newing and Mr Kaufman were closely communicating in relation to the issue, the former on behalf of the Residents’ Association and the latter on behalf of his constituents. Moreover, it was clearly understood from Mr Kaufman’s response of 10th March 2004 that access to the Field was being denied by the landowner to all his constituents. Notably, everyone living in the claimed neighbourhood at that time would have been one of his

constituents. Mr Kelly repeated his “*denial of access*” in a response to Mr Kaufman of the same date.

105. Such correspondence is clear that, as from February 2004, the landowner was denying access to the Field by local residents. Any use of the Field thereafter would have been contrary to the landowner’s clear statement and would therefore have been contentious. It is correct that no signs were ever placed on the Field nor was the Underwood Close entrance blocked off. Nonetheless, it is not a pre-requisite of a contentious use that signage is erected or that the land is closed off. Instead, as stated by HHJ Waksman QC in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council*¹⁶ in the context of signage: “*The aim is to let the reasonable user know that the owner objects to and contests his user.*”

106. The correspondence sent was such as to let the reasonable user know that the Trust objected to and contested the use of the Field by local residents from February 2004 onwards. It was sent to the Residents’ Association on behalf of local residents with whom the Residents’ Association was evidently actively engaged and to Mr Kaufman on behalf of his constituents. It would be reasonable to expect that both conveyed the contents to those whom they represented and on whose behalf their correspondence was sent. It is also of note that the initial grant of access to the Field for dog walking was conveyed by similar correspondence. It was therefore apt for its withdrawal to be done in the same manner. A reasonable user would have become aware through such means that the use of the Field was being contested. Consequently, the use of the Field for any purpose thereafter was *vi* and so not as of right.

107. Alternatively, if it is found that the denial of access was not brought to the attention of all reasonable users of the Field, it was undoubtedly brought to the attention of:

- (a) the members of the Residents’ Association, the majority of whom resided in Abbey Hey according to Mrs Kirby and Councillor Reid in cross examination;
- (b) the residents of Abbey Hey to whom they conveyed it and on whose behalf they were acting; and

¹⁶ [2010] EWHC 530 (Admin) at paragraph 22.

(c) those constituents of Abbey Hey to whom Mr Kaufman conveyed it and on whose behalf he was acting.

On any view, that would be a material number of the inhabitants of Abbey Hey. Thus, their use of the Field would have to be discounted from the qualifying use from 2004 onwards as not having been as of right.

108. Finally in relation to that issue, the correspondence of one of the Applicants, Caroline Martin, in 2007 in which she was seeking to ascertain the ownership of the Field is worthy of note. According to her e-mail of 20th June 2007, she was seeking to obtain a grant to improve the Field and stated: “*Obviously I would need the permission of the owner of the field before anything could be done.*” This Applicant, and indeed the Applicant who signed the Statutory Declaration in support of the Application, was of the view in 2007 that she required the permission of the landowner to do anything on the Field. Similarly, Ms King sought permission to use the Field for her horses in 2007, which request was refused by the landowner. Such is wholly inconsistent with the Applicants’ contention that the Field was being used by local residents as of right.

109. Some use of the Field was *precario* and so also not as of right. As stated above, permission was given to local residents to walk their dogs on the Field whilst it was in fallow condition in the correspondence in 2000 until such permission was withdrawn in 2004. For the same reasons as above, such permission would have been brought to the attention of local inhabitants, or at least to a material number of them. Any such use of the Field for dog walking during that period would accordingly not have been as of right.

Sufficiency of use by a significant number of local inhabitants throughout the relevant 20 year period

110. Turning to the issue upon which the evidence at the inquiry focused, the Trust contends that the nature and extent of the recreational use of the Field over the 20 year period has been wholly insufficient to establish recreational rights in the inhabitants of the claimed neighbourhood.

111. The fundamental legal test is set out in *R (on the application of Lewis) v Redcar and Cleveland Borough Council*¹⁷. The use must be of such a nature and frequency as to show the landowner that rights are being asserted by local inhabitants and it must be more than sporadic intrusion on to the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. It is necessary to assess how the matters would have appeared to the landowner. Ultimately, whether sufficient use has been carried out is a matter of evidence upon which a judgment must be made. However, in the assessment of such evidence, the Trust highlights a number of relevant matters.
112. The use must be continuous throughout the relevant 20 year period: *Hollins v. Verney*¹⁸. Hence, the qualifying use must have continued throughout that period to a sufficient extent to establish recreational rights. That is of particular note in relation to the period between 2000 and 2004 when the landowner had granted permission for the use of the Field for dog walking.
113. Only qualifying use can be taken into account in such assessment. It is of note that the following must be discounted.
114. Any use outside the relevant 20 year period cannot be regarded as part of the qualifying use. A material amount of evidence was given of use which occurred prior to 1996, including when the Field was still actively in use for formal sports, and of use post May 2016.
115. Any use by those outside the claimed neighbourhood must be discounted. Moreover, for those users whose addresses are unknown, they cannot be assumed to reside in the neighbourhood given the burden of proof on the Applicants. That would include, for example, the use by:
- (a) children from Wright Robinson College many of whom live outside the claimed neighbourhood boundary: Samantha Warner in cross examination;

¹⁷ [2010] UKSC 11 at paragraph 36.

¹⁸ (1884) 13 QBD 304.

- (b) other children who were seen playing on the Field whose addresses were unknown;
- (c) visitors who lived outside the area, such as Mr Billington's niece;
- (d) users from Boothdale Drive; and
- (e) other users from Openshaw, Gorton and Audenshaw to which a number of witnesses referred.

116. That issue is of particular importance given the lack of oral evidence of use of the Field by identified persons living at identified addresses within the claimed neighbourhood other than people who lived in the immediately adjoining streets of Ackroyd Avenue and Underwood Close. The vast majority of other users claimed to have been seen using the Field were not identified as residing in the claimed neighbourhood.

117. The use of the Field that was not as of right must be discounted as referred to above.

118. In addition, the use of the Field that was more akin to the exercise of a public right of way along a linear route rather than the exercise of a recreational right over the Field generally must be discounted. In *R (Laing Homes Limited) v Buckinghamshire County Council*¹⁹, Sullivan J (as he then was) noted at paragraph 102 that: "*it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.*" He further pointed out that: "*If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*"²⁰

¹⁹ [2003] EWHC 1578 (Admin).

²⁰ The submissions ascribe this further quoted passage to Sullivan J in *Laing Homes* but it is actually what Lightman J said in the first instance decision in *Oxfordshire County Council v Oxford City Council* [2004] EWHC 12 (Ch) at paragraph 102.

119. Moreover, a user is entitled to carry out any reasonable activity on a right of way which is lawful and does not obstruct the right of passage: see *DPP v Jones*²¹. That would include activities such as stopping for a chat, stopping to pick blackberries, kicking a ball as walking along and cycling along it.
120. It is acknowledged that it is a question of fact on the basis of the evidence as to the nature of the use. However, a right of way use is not limited to a use to gain access. Recreational walking is also capable of amounting to a right of way use if along a linear path.
121. Applying the legal position to the evidence, it is notable that the primary use of the Field acknowledged by each of the witnesses was for dog walking. Hence, the issue of whether the use would appear to the reasonable landowner to be more akin to the exercise of a right of way than of recreational rights over the entire Field is particularly significant. Virtually every witness who gave evidence in support of the Application acknowledged that they had used the perimeter track around the Field, albeit a number stated that they also used other routes. They had also seen others using that track. It has been used not merely for dog walking, but for general walking, running, cycling, to access brambles and to kick a ball along. All such use, which the evidence indicated was the primary way in which the Field has been used, amounts to a use more akin to the exercise of a right of way which should be discounted.
122. Having carried out the requisite discounts, it is contended that the qualifying use is extremely limited. That is unsurprising given two further points. Firstly, the condition of the Field. It becomes muddy in areas and some witnesses, such as Mrs Kirby and Mrs Gray, described always wearing wellingtons when they used the land; Mr Morreale resorted to mowing part of the Field in order to create a football pitch; and Councillor Reid described it in cross examination as “*not a suitable area to play because it is full of rubbish*”. Secondly, there are a number of other recreational areas in the nearby vicinity, such as the Fallowfield Loop Line, Debdale Park and Gorton Reservoirs. The witnesses consistently agreed that such areas were well used.

²¹ [1999] 2 AC 240.

123. The reality is that the Field has been used sporadically over the years by a similar group of individuals, primarily for dog walking, and with occasional children's play, namely, as described by Mr Mooney. His home overlooks the Field and he is at home the majority of time as his son's carer. Indeed, the condition of the Field with the existing tracks and the overgrown untrampled grass elsewhere supports that view.
124. Moreover, that is consistent with the Applicants' evidence. Apart from Councillor Reid, each and every witness called to give oral evidence lives on a street immediately adjacent to the Field, namely Ackroyd Avenue, Underwood Close, or at the end of Violet Street. There is not a requirement to establish a spread of users over the neighbourhood. Nonetheless, the use must be by a significant number of the inhabitants of that area. Instead, the use has primarily been by the residents of Ackroyd Avenue and Underwood Close, with the former largely accessing the Field via their own back gates. That is a world apart from a regular use by the general community. Notably, the primary entrance from Underwood Close has even become narrower over time according to Mr Billington's evidence which is inconsistent with its significant use. The use by children whose addresses were known was again limited to those on Ackroyd Avenue and Underwood Close. The witness statements consistently referred to such use by children being primarily during the summer. Other activities, such as playing in the snow and bonfires, are seasonal by their nature and not regular. There have been no community events held on the Field.
125. The evidence questionnaires must of course also be taken into account. However, the weight attributed to them must be limited as the compilers have not been subject to cross examination. Moreover, material matters are unknown from those questionnaires, such as whether the compilers primarily used the perimeter paths and whether they used the Field as of right during the early 2000s. More weight must be given to the oral evidence, including that of Mr Mooney.
126. Indeed, the reality is reflected in other surrounding evidence. There is nothing in the Hansard extract, albeit from 1990, that the Field was then in use by the local community for general recreational purposes. It is instead referred to as a "*green oasis*". Similarly, in the Trust's accounts, reference is made to the area being regarded by local residents as "*a valuable green space*", but not as a recreational area. There

was no regular use taking place by the general community such as to demonstrate the assertion of recreational rights. That is no doubt why the Application came as a surprise to the Trust as stated by Mrs Wilson. Indeed, it is also of note that no application was made until May 2016, received 24 hours before the planning application was publicised, which is itself surprising if the recreational use has been as significant over the years as the Applicants suggest.

127. In conclusion, the Trust contends that the evidence demonstrates that the use of the Field has been sporadic over the relevant 20 year period, primarily by a few individual dog walkers living in close proximity to it, and has been wholly insufficient to indicate to the Trust that the local community of the identified neighbourhood were asserting recreational rights over it.

Conclusion

128. Consequently, the Trust contends that the statutory criteria have not been met and invites a recommendation that the Field should not be registered as a village green.

(7) THE SUBMISSIONS ON BEHALF OF THE APPLICANTS

Introduction

129. The following issues have emerged from the parties' evidence during the course of the inquiry:

- (a) whether Abbey Hey is a qualifying neighbourhood;
- (b) whether the Field has been used for the relevant 20 year period;
- (c) whether the use of the Field has been for lawful sports and pastimes and by a significant number of inhabitants of Abbey Hey throughout the relevant 20 year period; and
- (d) whether the use of the Field has been as of right.

130. For the avoidance of doubt, the Applicants rely on the City of Manchester (being a metropolitan district/borough) as the locality for the purposes of section 15(2) of the 2006 Act. This element does not appear to be in dispute.

Analysis of issues

(a) Whether Abbey Hey is a qualifying neighbourhood

131. The Applicants submit that Abbey Hey, as defined by the revised boundary, is a qualifying neighbourhood (AB/7).
132. The Applicants highlight the following principles in this regard:
- (a) in section 15 of the 2006 Act “*any neighbourhood within a locality*” is drafted with “*deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*” (*Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 *per* Lord Hoffmann at [27]) and is a “*fluid concept*” (*R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) at [69]);
 - (b) a neighbourhood must have a sufficient degree of cohesiveness so as to be capable of meaningful description (*Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust* at [79]);
 - (c) in *Northampton BC v Lovatt* (1998) 30 HLR 875, a housing case but cited in *Gadsden*, Chadwick LJ relied at 891 on the following dictionary definition of neighbourhood: “*the people living near to a certain place or within a certain range ... a community, a certain number of people who live close together. A district or portion of a town ... especially considered in reference to the character or circumstances of its inhabitants; a small but relatively self contained sector of a larger urban area*”; and
 - (d) the fact that a green is used by inhabitants of multiple neighbourhoods is not a bar to registration, given the removal of the predominance test: see *Leeds Group plc v Leeds City Council* [2010] EWCA Civ 1438 *per* Sullivan LJ at [27].
133. Further, it is important to have regard to the nature of the wider locality: Abbey Hey is a neighbourhood in a high density urban district. It follows that traditional concepts of neat village boundaries are inappropriate when considering metropolitan neighbourhoods and to insist on such clinical neatness would be to undermine the “*deliberate imprecision*” and “*fluid*” nature which the concept of a neighbourhood has.

134. In the light of this, the Applicants submit that Abbey Hey is a qualifying neighbourhood for the following reasons:

- (a) the neighbourhood chosen has strong geographical cohesiveness, being bounded on the main three sides by former railway lines (north, west and south) and the well-known Tameside boundary on the small remaining eastern side;
- (b) these railway lines form a natural distinction between Abbey Hey and the surrounding areas, but it is unsurprising and not fatal that there is movement in and out of the neighbourhood, for example to work and school;
- (c) the neighbourhood of Abbey Hey is longstanding: see the historical mapping (in particular figures 28 to 30) at (AB/65) which shows Abbey Hey dating back until at least 1892 in a form very close to the Application neighbourhood and where the area between the three railway lines is consistently labelled Abbey Hey;
- (d) there has been considerable evidence of the cohesive community nature of the neighbourhood, in particular fundraising events at the allotments, the youth group at St Paul's and St John's, communal use of, and fund raising events, at the local Hare and Hounds pub, support for local businesses such as Raja's and Lodge Service Station and also of former businesses, such as the Abbey Hey Hotel, and litter picks;
- (e) this cohesiveness is exemplified by Mrs Warner's testimony as to the occasions when her daughter Gillian got lost and was found through community searches; and
- (f) there was clear evidence from Mr Billington in respect of the litter picks and Councillor Reid in respect of the Residents' Association that, for the purposes of attracting members, the Vine Street/Gorton Curve acted as natural barrier, with membership being exclusively or almost exclusively derived from the area to the east of the Vine Street/Gorton Curve. This further highlights the cohesive nature of the community within Abbey Hey, distinct from neighbouring areas.

135. The Trust's argument on this issue appeared in cross examination to focus on the integrity of the western boundary. In this regard, it is very noticeable that, in examination in chief, the Trust's own witness, Mr Mooney, who had been part of the Abbey Hey Residents' Committee, described the western boundary of Abbey Hey as

running down Vine Street from the T-junction and following the infill, i.e., exactly as shown by the Application neighbourhood boundary.

136. Further, the presence of Abbey Hey Primary School outside of the Application neighbourhood boundary is unsurprising given the high density land usage within the boundary, i.e., there would simply not be space for a school, and in any event, the naming of the primary school is explicable by the road name, Abbey Hey Lane, and cannot be viewed as in anyway fatal. The presence of services is an indicator not a pre-requisite for a neighbourhood and the siting of schools is at the whim of the local authority. Accordingly, the location of the primary school outside of the neighbourhood is arguably *de minimis* and in any event does not prevent Abbey Hey from being a qualifying neighbourhood.

137. The definition relied on by Chadwick LJ in *Lovatt* is also instructive in this regard: Abbey Hey is clearly a place where “*a certain number of people ... live close together*” and is a “*relatively self contained sector of a larger urban area*”.

138. Finally, questions were put to Mr Crook about the process by which the neighbourhood boundary was settled on. Mr Crook gave credible evidence that this was achieved by a process of consensus across a larger group of inhabitants with local knowledge; it was not the sole decision of one inhabitant and it was not an arbitrary line – as demonstrated by the historical maps and decision to amend the boundary so as to reflect the product of those consensus discussions. This approach is wholly appropriate, particularly because it is grounded in local knowledge.

(b) Whether the Field has been used for the relevant 20 year period

139. It is common ground that the relevant 20 year period is from 31st May 1996 to 31st May 2016.

140. The Applicants consider that they have demonstrated use throughout the relevant period and rely in particular on the oral evidence of Vicky Kirby (40 year period including from 1984 at current address); Terence Hulston (since 1985 at Walter Street and subsequently Violet Street); Catherine Warner (since 1994); Julie Reed

(since 1986 at current address); Anne Hern (lifetime, but unbroken since 1995/6); David Lilley (since 1987); and Paul Billington (lifetime but unbroken since 15th June 1996).

141. This evidence is supplemented by the written evidence of long use, see: Peter and John Wroe (1976 to 2016) (AB/127); Jeff Gorman (1993 to 2016) (AB/130); Hilary Evans (1976 to 2016) (AB/136); Maureen Knott (1976 to 2016) (AB/138); Chris Oldham (1979 to 2000) (AB/146); Keith Ashworth (1970 to 2016) (AB/151).

142. In addition from (AB/2), the Applicants highlight the following responses (number corresponding to the manuscript number) all of which encompass the full period: (1) Jeffery Kershaw; (2) Sandra Paterson; (4) M Webb; (10) William Flanagan; (11) John Peatfield; (12) Sarah Lees; (17) Lisa Harrington; (20) Helen Faulkner; (23) Philip Holbrook; (26) Winifred Durbin; (27) Lynn Holbrook; (28) William and Sandra Morrissey; (34) Alison Lilley; (36) Margaret Worrall; (37) Jane Cooper; (40) Lesley Wood; (41) William Bennett; (42) B Wolliscroft; (43) Philip Moss; (48) David Foulkes; (49) Dawn Boulton; (50) Elaine Tully; (53) Brenda Dickson; (54) Rachael Morrissey; (55) Lynn McGovern; (56) Maureen Knott; (61) Virginia Hulston; (62) Simon Morrissey; (65) Barry Kirby; (68) Ivana Morreale; (69) Wendy Holbrook; (70) Gilbert Mansfield; (71) Jeff Faulkner; (73) Robert Reid; (76) Barbara Ashworth; (77) Alison Drury; (78) Fred Wagstaffe; (79) Alan Shaw; (80) Janet Best; (81) Paul Lees; (82) Amy Lees; (86) J Donlan; (87) David Sheldon; (88) James Dooley; (89) David Freeman; (90) Brenda Dooley; (91) Joanne Peatfield; (94) Jania Norcliffe; (95) Marion Shaw; (98) Paul Davis; (102) Julie Parker; (107) Elaine Borrell; (108) John Borrell; (109) Lydia Reid; (116) Mr & Mrs B Peachey; (117) Paul KIELTY; (119) Victoria Davies; (120) Linda Joyce Saxton; (123) Philip Reid; (124) Colin J Chapman; (125) Giuseppe Morreale; (127) Gillian Mason; (129) Joan Flanagan; (130) Kelly Kingston; (137) Carol Lees; (144) Stephen Cordon.

143. The Trust's only discernible argument on this – as opposed to merely putting the Applicants to proof – is the documentation relating to the works to the Fallowfield Loop Line. This was put to Mr Billington in cross examination who dealt with the matter decisively – and entirely consistently with the rebuttal note submitted prior to the start of the inquiry. Mrs Hern's evidence in this regard was also clear and

unchallenged: namely the Underwood Close entrance remained available throughout the works to the Fallowfield Loop Line.

(c) Whether the use of the Field has been for lawful sports and pastimes and by a significant number of inhabitants of Abbey Hey throughout the relevant 20 year period

(i) *Use for lawful sports and pastimes*

144. The Applicants have presented a considerable volume of evidence, both oral and written, as to the sports and pastimes which take place on the field on a very regular and sometimes daily basis. These include *inter alia*:

- (a) strolling/recreational walking;
- (b) dog walking;
- (c) playing with children (including ball games and treasure hunts);
- (d) building dens and digging trenches;
- (e) climbing trees;
- (f) picking blackberries, plums and apples;
- (g) nature/insect hunts/exploring including picking flowers;
- (h) informal football;
- (i) cycling;
- (j) kite/frisbee/drone flying;
- (k) exercising and riding horses;
- (l) camping;
- (m) bonfires and fireworks;
- (n) bird watching and bat watching; and
- (o) playing in the snow.

Dog walking

145. The Trust's main argument under this sub-issue is that the use for dog walking and/or strolling is walking in the nature of a right of way.

146. In assessing this issue, regard should be had to the following principles (see *Oxfordshire* [2004] Ch 253 at [102] – [103]; and the Applicants’ skeleton argument at [24]):

- (a) dog walking and strolling are both lawful sports and pastimes when done for the purposes of recreation;
- (b) the user should be assessed as a whole and with a common sense approach;
- (c) this assessment should consider the context in which the exercise takes place, including the character of the land and the season of the year;
- (d) the critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both;
- (e) user which veers off the tracks or meanders leisurely over and enjoys the land on either side is more particularly referable to use as a green.

147. Applying these principles to the evidence, the Applicants aver that the dog walking and/or strolling have been recreational and thus within the ambit of sports and pastimes.

148. First, the geographical and physical context of the Field is important:

- (a) The Field is bordered on the western, northern and southern edge by houses or impenetrable wood/fencing (in the case of the eastern edge) such that it is only accessible from residential properties and is not accessible from the public highway.
- (b) Along the southern edge of the Field where public access is available, the Fallowfield Loop Line is directly adjacent and provides a modern, high quality and well used public footpath. This is used by both pedestrians and cyclists. The quality of the surface on the Fallowfield Loop Line is superior to the quality of the paths on the Field. Accordingly, use of the Fallowfield Loop Line permits the pedestrian or cyclist to make faster progress than the paths on the Field and to connect to the wider footpath network.

149. Secondly, in this geographic context, the nature of the user on the Field is noticeably different to the use of the Fallowfield Loop Line.

- (a) The vast majority of users enter and exit the Field from the same entrance, namely, Underwood Close or, to a lesser extent, a back gate.
- (b) The Field is a destination for users, not a short cut or a place which they pass through *en route* to another destination. This is further supported by the way in which the Field is valued, namely to enjoy nature and for the pleasure of the green space. The lack of public access on three sides and the presence of a modern public footpath on the other means that use of the Field is a conscious recreational choice and destination, not use as a thoroughfare or for the purposes of passage or travel to a destination – for example to commute to work.
- (c) This is reflected in the patterns of use. Not all use is confined to the single defined perimeter path: there has been repeated evidence of “criss-crossing” user which traverses the Field as well as deviations in paths – for example around trees – as well as an iterative process of formation (and cessation) of new paths across the Field. See in particular: Mrs Hern, Mr Billington, Mr Crook and Mr David Lilley. Further there has been consistent evidence of user veering off the worn paths to explore (particularly with children) or to pick blackberries/fruit. As a result, it cannot be said that there is a single identifiable route.
- (d) User which is confined to the perimeter path is circular rather than linear in nature. This is indicative of recreational use rather than use in the nature of a right of way: the use is primarily for the purpose of recreation not for the purpose of passage or on a fixed route between two identifiable points.

150. Thirdly, the majority of oral users explained that their use of the Field was motivated by the well-being value which they attached to the Field. The Field for many users was a source of stimuli, relaxation and mindfulness: see *inter alia* Mr & Mrs Hern, Mrs Bennett, Mr Crook, Mrs Warner and Mrs Kirby. Accordingly, even where some user was predominantly confined to the worn perimeter path, it is clear that the purpose and value of that activity was recreational.

The condition of the Field

151. The Trust also argues that it is impossible to carry out lawful sports and pastimes on the Field because of overgrown or so-called “unsafe” areas. This argument is

impermissibly fixated on formal use, presupposes a total aversion to risk or mud and is erroneous for the following reasons.

(a) As demonstrated in cross examination of Mrs Wilson, the Trust has significantly overstated the extent to which the Field is overgrown and/or unsafe. As Mrs Wilson accepted, the plan at (AB/18) which was submitted with the planning application demonstrates that the vast majority of the site is accessible. In particular:

- i. the areas of fly-tipping are confined to the edges of the Field; and
- ii. the former buildings take up a very small portion of the Field and, as is apparent on site, they are partly buried.

(b) In respect of the demolished pavilion, the Applicants' case is that this is one of the buildings shown on the plan at (AB/18) close to the Violet Street entrance. Mrs Wilson's assertion that the pavilion was located close to the centre of the Field is a second-hand account from Mr Rigby, illogical given the normal positioning of pavilions around the edge of playing fields and unsupported by the plan which was professionally compiled for the purpose of the planning application. In any event, both Mrs Wilson and Mr Mooney accepted that the pavilion had been buried after being demolished (note Mr Mooney's comment about Mr Rigby using a JCB and digging a large hole). Accordingly, given that any debris was buried, it is difficult to see how this creates a real impediment to practising sports or pastimes. This is particularly the case in respect of informal sports and pastimes where the ground is not required to be perfectly flat and manicured for them to be possible.

(c) "Land" for the purposes of the 2006 Act simply means the area which is defined in the application for registration and does not require a qualitative judgment of the green's surface condition (see Applicants' skeleton argument at [28] and *Gadsden* at 14-11 and 14-12).

152. Further, as discussed above, the user of the Field has been varied in terms of location and has not merely been confined to the paths. In particular, it is clear that users have strayed from the paths *inter alia* to pick blackberries, to climb trees, to play informal games at either end, to camp away from the paths, to play football on an *ad hoc* pitch in the middle, to create a cycle track in the middle, to dig holes/trenches/dens in the middle, to explore inside groupings of trees/saplings, and to explore and build

dens in the wooded area at the north eastern end (including to access the pond and to pick apples/plums). It is also noteworthy that even where there are overgrown areas, they have nonetheless been utilised with a spirit of adventure: see in particular the evidence of children using the Japanese Knotweed for making dens and transporting other materials between areas for the same purpose. The evidence of Ms Warner, Mr Morreale and Mr Edward Lilley is commended to the Registration Authority in particular in this regard. Note also the approach of adults, notably Mrs Hern and Mrs Kirby, whose interest in wildlife (shared by many users) takes them off the paths, both individually and with their children.

153. In any event, the presence of some truly overgrown (such as to be inaccessible) or unsafe areas is not fatal, all the more so when such areas are at best very limited as in this case: see *Oxfordshire per Lord Hoffmann* at [66] – [68]. The Applicants commend, by analogy, Lord Hoffmann’s example of a surface where 75% was covered by flower beds, borders and shrubberies on which the public may not walk as being “*not in my view ... inconsistent with a finding that there was recreational use of the [land] as a whole*”. Following this the Applicants submit that the presence of only very limited areas which are inaccessible, as opposed to simply being longer grass, is not inconsistent with a finding that there has been recreational use of the Field as a whole.

Bonfires & seasonal activities

154. Evidence of bonfires and fireworks was given by several witnesses. The Applicants’ case is that this evidence should be viewed in the round, but particular weight should be given to the users who provided detailed first-hand knowledge, namely Mr David Lilley and Mrs Hern, both of whom described in detail the impressive firework displays they had seen and were detailed as to the location and nature of the bonfires.

155. Similarly, regard should be had to the consistent evidence that many users were not deterred by mud or rain during the winter months – indeed some, such as Mr Hulston and children users noticeably relished these periods. Again, taken together and appreciating the Trust’s overplaying of the underfoot conditions, it is clear that the use has been year round.

(ii) *Significant number of inhabitants of Abbey Hey*

156. The Applicants submit that the full suite of written and oral evidence demonstrates that a significant number of inhabitants of Abbey Hey have used the Field. It should be noted that there is no predominance test and the fact that the Field is used by inhabitants of other neighbourhoods is neither surprising nor fatal: see *Leeds Group*.

157. The Trust's cross examination has sought to portray the user as lacking spread throughout Abbey Hey. First, the fact that the inhabitants who have lived closest to the Field have used the Field regularly is unsurprising but it does not follow that those living further away have not. Secondly, "*significant number*" does not equate to geographical spread, it is purely quantitative. Accordingly, as a matter of principle the users of a green could be consolidated very close to a green but nonetheless amount to a significant number of inhabitants within the neighbourhood. Thirdly, and in any event, it is clear that there has been a spread of user from throughout the neighbourhood: see, for example, the cluster of users at the western end of Harrop Street, users on both sides of Jetson Street and at the north western corner of the neighbourhood. Fourthly, the fact that a small minority of users (whose evidence is not relied on) come from outside the neighbourhood is indicative of the fact that travel to the Field from any part of the neighbourhood is not prohibitively distant.

158. The Applicants also note that the graphical representation provided by the Trust (OBJ/1) is deficient in two respects. First, the plotted numbers are per property and not per user. Accordingly, it does not plot multiple users at the same property: this is only shown in the final column of (OBJ/2). Secondly, as set out in a separate note, eight users who lived in the neighbourhood during the relevant period but who have since moved out of the neighbourhood but nonetheless contributed evidence, have been shown as falling outside the neighbourhood. It is clear that these users should be included.

159. Mr Mooney's evidence as to user lacked any credibility and in any event is of little utility and should be afforded no weight. Mr Mooney had a clear financial incentive in seeing the planning application succeed. It was apparent that Mr Mooney's evidence was partial, as he omitted the use of the Field by his own son and his friends

for football, making dens and cycling. Moreover, his evidence had been based on an arbitrary criterion as to whether a use was a “blink” or not. Mr Mooney gave no coherent explanation of his approach in this regard²², but it was clear that he had knowledge of more user than his statement or examination in chief referred to. In particular, it is noticeable that, whilst he claimed to have spoken to his son after writing his statement, he made no attempt to correct this inaccuracy or to assist the inquiry in examination in chief or by way of a further statement. In the light of this, it was apparent following cross examination that his assessment as to user in examination in chief was inaccurate, yet illogically and incredibly he maintained that assessment in re-examination.

(d) Whether the use of the Field has been as of right

160. The Applicants submit that the use of the Field has been as of right throughout the relevant 20 year period. There are two sub-issues under this element:

- (a) whether the use was with permission (*precario*); and
- (b) whether the use was by force (*vi*).

Whether the use was with permission

161. The Trust’s case in this regard is limited to a single letter dated 15th August 2000 (“the August 2000 Letter”) (OB/41). The other letters in the Trust’s inquiry bundle are all concerned with the alleged revocation of permission and there is a total absence of any evidence that permission was given orally.

162. The following principles apply to this issue:

- (a) the nature of the alleged permission must be objectively assessed or construed: *Beresford per Lord Scott* at [51];
- (b) mere toleration or acquiescence on the part of the landowner of the local inhabitants’ user of the application land is not inconsistent with such user having been as of right and does not prevent registration as a green: *Sunningwell per Lord Hoffmann* at 358F, approved in *Beresford per Lord Bingham* at [6];

²² His claim that the Google image was pure coincidence is implausible.

- (c) the grant of a licence to those using the application land must comprise a “*positive act*” (*Beresford per Lord Rodger* at [59]) or amount to the communication of an “*overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass*” (*Beresford per Lord Walker* at [75]);
- (d) permission may be express or implied (subject to the above) but the extent of understanding between the parties is important – for example the understanding of each other’s habits; and
- (e) the “*normal rule*” in respect of a private landowner is that it is “*essential that any licence be communicated to the inhabitants of the locality [or neighbourhood, here] before it could be said that their usage was ‘by right’*”: *Newhaven per Lord Neuberger and Lord Hodge* at [68] (emphasis added).

163. Mrs Wilson accepted rightly in cross examination that the August 2000 Letter does not amount to an express permission. This is clear from the language: there are no words of grant or consent. Accordingly, the August 2000 Letter could not amount to a permission except implicitly – i.e., it could only be an implied permission. The Applicants aver this is not the case for the following reasons.

164. Mrs Wilson considered the primary focus of the August 2000 Letter to be the dangerous trees, not the question of fencing. It follows that if the August 2000 Letter amounts to implied permission then – on the Trust’s own case – this would be by way of a secondary comment in a very short letter. The Applicants submit that this is an unlikely and improbable occurrence.

165. Further or in any event, the Applicants submit that the August 2000 Letter – specifically the sentence “*I further discussed the question of the Fencing (while not accepting responsibility for it) with residents, who claim that they wish the access left open for the purpose of dog walking etc and while the field is in Fallow condition I see no harm in that*” - does not amount to an implied consent such as to render the user of the Field *precario*, but rather is evidence of acquiescence for the following reasons:

- (a) The subject of this sentence is the fencing. Mr Kelly’s parenthetical comment makes clear that the Trust did not accept responsibility for maintaining the fencing. This is consistent with Mr Rigby’s statement at paragraph 9 (“*the fence*

running along the old railway line along the south eastern boundary of the fields by Underwood Close”) and, as Mrs Wilson confirmed in cross examination, was the operating view of the Trust. The reference to “*wish the access left open*” in the second half of the sentence only makes sense if that refers to access where fencing is not present, i.e., the wish was to continue access via Underwood Close and/or the Fallowfield Loop Line where there was no fencing. Accordingly, it is illogical and implausible that Mr Kelly was permitting access by not replacing fencing at the same time as disclaiming responsibility for that fencing.

- (b) This sentence does not amount to a positive or overt act. Taken at its highest, it is acquiescence: the Trust knew that dog walking occurred and stood by. Mr Kelly is expressing his opinion, namely, that there was “*no harm*” in access for dog walking, but he was not granting permission or indicating any decision in relation to that access. This is confirmed by the later letter from Mr Kelly dated 25th February 2004 (OB/42): “*In that letter I made it clear that on behalf of the Federation I had no objection to residents walking their dogs on site whilst the field is in fallow condition.*” In Mr Kelly’s own words, which are noticeably lacking the positive words of grant/consent, the August 2000 Letter was an expression of “*no objection*”, it was not a grant of permission. Moreover, in the light of this it is impossible to say that Mr Kelly intended the August 2000 Letter to be understood as a permission.
- (c) The August 2000 Letter was sent to Gerald Kaufman. Accordingly, it cannot be said that the essential criterion that any permission be communicated to the inhabitants was met *per Newhaven*.

First, there is no evidence that Gerald Kaufman communicated the letter more widely.

Secondly, whilst it is acknowledged that Gerald Kaufman was concerned about the Field, the Hansard speech makes plain that this concern was primarily around the prospect of the Field being built on (see cross examination of Mrs Wilson and Councillor Reid’s evidence that Gerald Kaufman was concerned with policy GO15 which sought to prevent residential development).

Thirdly, the 10th March 2004 letter (OB/43) letter, where Gerald Kaufman does engage with the question of access, makes no reference to the August 2000 Letter: Gerald Kaufman’s anger at the denial of access is based on what he

perceived the terms of the original grant to the Trust in 1928 meant, not the grant of permission in the August 2000 Letter. Moreover, given Gerald Kaufman's position on 10th March 2004 that access for inhabitants was derived from the terms of the original grant²³, not the giving of permission by the Trust, it would have been inconsistent for him to regard the August 2000 Letter as a grant of permission (because on his view no such grant was necessary). It follows that, as he clearly did not consider the grant of permission was necessary, it is very unlikely that he would have communicated what could only be an implied permission (if an implicit permission of this nature could even be communicated, given the lack of context).

Fourthly, even if Gerald Kaufman did communicate the contents of the August 2000 Letter, it is impossible to discern who that would have been communicated to (note that the Abbey Hey Residents' Association was not set up at this date). The Trust implicitly asks the Registration Authority to assume that sending a single letter to Gerald Kaufman equates to communication to the inhabitants. This assumption is unsupported by any evidence and seems very unlikely given Councillor Reid's evidence that he did not have a manned constituency office in the constituency.

166. Finally, for the avoidance of doubt, it cannot plausibly be said that the Trust gave permission for any activities outwith the August 2000 Letter. Such a suggestion is unsupported by any evidence.

Whether the use was by force

167. Mrs Wilson confirmed in cross examination that, for the relevant period, the Trust has no evidence of:
- (a) taking any steps to erect fencing to preclude access to the Field;
 - (b) erecting any signs on the Field to deter use;
 - (c) adding a gate or otherwise obstructing the Underwood Close entrance to the Field; and

²³ See also Hansard.

(d) writing to the residential properties which border the Field – or taking other steps in relation to these properties – to prevent access from gates at the rear of these properties.

168. These answers were unanimously confirmed by the Applicants' witnesses, all of whom stated that they had neither been prevented from accessing the Field from Underwood Close or any other entrance, nor seen any sign on the Field to deter use, nor asked for permission to use the Field.

169. On this basis, the Applicants submit that none of the steps put to Mrs Wilson (see paragraph 167 above) were actually undertaken by the Trust during the relevant period.

170. It follows that the Trust's arguments in this regard are founded on only two bases:

- (a) the alleged oral challenges of Mr Rigby; and
- (b) two letters to Mrs Newing dated 17th November 2003 (OB/39) and 25th February 2004 (OB/42) as well as – possibly – a letter to Gerald Kaufman dated 10th March 2004 (OB/44).

171. First, the Applicants submit that Mr Rigby's alleged oral challenges did not occur and, in any event, no weight should be attached to Mr Rigby's evidence of these purported challenges.

- (a) Mr Rigby did not attend to give oral evidence. Mrs Wilson explained that this was because of his age, he "*struggles to get around*" and "*doesn't do much [work for the Trust] any more*".
- (b) In the light of Mr Rigby's age and health, his claim at paragraph 5 of his witness statement that he had visited the Field "*about 20 times a year*" over the 20 years preceding November 2017 is implausible and plainly wrong. Indeed Mr Mooney, who professed to have regular cups of tea with Mr Rigby, stated that he had not seen him for about three years – i.e., no later than early 2015. It is clear that the purported schedule in paragraph 5 was simply fabricated.
- (c) Mr Rigby's actions are uncorroborated by any work reports or reports of trespassers.

- (d) The alleged challenges in paragraph 11 are vague, unparticularised and amount to nothing more than a bare and uncorroborated assertion.
- (e) Mr Hulston gave unchallenged evidence that his interactions with Mr Rigby had been amicable, such that Mr Rigby even sprayed Mr Hulston's weeds.
- (f) Similarly, Mrs Hern gave unchallenged evidence that, on the occasions she had met Mr Rigby, he did not challenge her presence or use on the Field. Indeed, this acquiescent approach also appears to have been shared by another employee of the Trust, Mr Hamill, as Mrs Hern also explained, albeit outside of the relevant period.

172. Secondly, the Applicants submit that the correspondence did not render the user contentious.

173. In *Betterment Properties (Weymouth) Limited v Dorset County Council* [2010] EWHC 3045 (Ch), Morgan J said at [121]²⁴, following consideration of *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust*, that the test for contentious user, as formulated for a town or village green case was: "*Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstance, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.*"

174. The Applicants note the following factual matters in this regard:

- (a) The sum total of the correspondence is three letters in a period of five months. There is no evidence of objection at any other point in the relevant 20 year period.
- (b) The objection was made in writing to only two people. As Mrs Wilson confirmed in cross examination, there is no evidence of the Trust following up this correspondence by way of fencing, signage or gates. In particular the threats in the November 2013 Letter that the Trust "*cannot allow [the] activities*

²⁴ Upheld in the Court of Appeal – [2012] EWCA Civ 250.

to go unchecked” and that court proceedings would be commenced for a declaration in the absence of a written response (of which there is no evidence) were not followed up in any form.

- (c) In the February 2004 Letter, Mr Kelly states that “*neither you nor any other resident in the area whether a member of your association or not is entitled to go onto Godfrey Ermen Playing Field*” [emphasis added]. However, there is no evidence of the Trust taking any steps to alert non-members.
- (d) None of the oral witness had any knowledge of this correspondence and almost all had not been members of the Residents’ Association.
- (e) Councillor Reid explained, as a member of the Residents’ Association and later its chairperson, that she had never seen the contents of the correspondence or been made aware of its contents. Moreover, the Residents’ Association was run by a small steering group of approximately eight to ten people in a flexible manner and the publications were generally concerned with events such as “*the summer fair, Father Christmas, that sort of thing*”.
- (f) In addition, Mr Mooney gave evidence that there was another residents’ committee in operation until approximately 2004. However, he confirmed in examination in chief that the only involvement of that group with the Field was in respect of a planning public inquiry in 1993.
- (g) The Trust is, and was, an experienced and resourced landowner with four other playing field sites in the area and ready access to legal advice, as the 17th November 2003 letter demonstrates.

175. Applying the test stated by Morgan J in *Betterment* to this factual evidence, the Applicants submit that the circumstances of the case are, and were, not such as to indicate to the persons using the Field, or to a reasonable person knowing the relevant circumstances, that the Trust actually objected and continued to object and would back its objection either by physical obstruction or by legal action.

176. First, there is no evidence that users were aware of the objection.

177. Secondly, the Trust did not continue to object. Taken at its highest, the objection amounted to three letters in a five month period.

178. Thirdly, as Mrs Wilson confirmed in cross examination, there is no evidence that the Trust backed that objection by physical obstruction or legal action – despite threatening to do so. The Applicants submit that there is no evidence because none of these steps were taken. There were a range of simple and economical steps which the Trust could take – for example a gate at Underwood Close or the erection of signs – but which it did not take.

179. Fourthly, cumulatively, it is apparent that the Trust did not do everything consistent with its means as an experienced and resourced landowner of playing fields and proportionately to the user (which it was aware came from outside the Residents’ Association which in any event was one of two such organisations) to contest and endeavour to interrupt the user.

180. The Trust was acquiescent and stood by as the inhabitants used the Field.

181. As demonstrated by reference to the Trust’s Annual Report and Financial Statements (AB/55–59), the Trust consistently recognised that the Field was “*regarded by local residents as a valuable green space.*” Contrary to Mrs Wilson’s hypothetical examples, the only proper meaning of this phrase in the context of the Trust’s other interactions with local residents, is that the Trust appreciated that the Field was a valuable green space for residents to use. This comment is recorded in the Annual Report for the years ending March 2012 to March 2015²⁵ and was only removed, somewhat obviously, in the Annual Report following submission of the planning application. Given this consistent pattern, it is fair to infer that the Field was a valuable green space prior to 2011/2012 and that the Trust was aware of this.

182. Taking these references together with the Trust’s failure to erect signage, gates or fencing, a clear course of conduct emerges, namely acquiescence. The Trust simply stood by. It follows that when the Applicants’ evidence is viewed in this broad context, it is clear that the use by local inhabitants was as of right.

²⁵ Including where Mrs Wilson was listed as a trustee.

183. For the avoidance of doubt, the Applicants’ case on the other correspondence – which was pursued with little vigour in the Trust’s cross-examination and did not feature in Mrs Wilson’s evidence – is plainly insufficient to satisfy the test in *Betterment Properties*. The letter from Ms King (OB/46) lacks any context and appears to relate to a desire to construct “*an outdoor manège*” and was not about the regular use by the local inhabitants of Abbey Hey. In any event, the audience of this letter is not claimed to extend beyond Ms King (whose address is unknown). The same comments apply to the emails with Caroline Martin (OB/47-50). It was put to Mr Glaister that these were emails to his partner. There is no conclusive evidence of this but, in any event, he was not aware of the correspondence.

Conclusion

184. For the reasons above, as elaborated through the oral and written evidence²⁶, the Applicants submit that section 15(2) of the 2006 Act has been satisfied and they respectfully request that the Application is allowed and the Field registered accordingly.

(8) FACT FINDING AND ANALYSIS

185. I turn to fact finding and analysis. It is helpful to approach this by reference to the main issues as they were identified in the closing submissions on behalf of the Trust. I have already set this out in paragraph 90 above but I repeat it here for the sake of convenience:

- (a) whether the claimed neighbourhood is a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act;
- (b) whether the claimed use was with force (“*vi*”) and/or with permission (“*precario*”) and thus not as of right during the relevant 20 year period; and
- (c) whether the Applicants have established the requisite degree and extent of qualifying use by a significant number of the inhabitants of a qualifying neighbourhood throughout the relevant 20 year period.

²⁶ The written evidence is commended to the Registration Authority in its entirety, even where not referred to in oral evidence or closing submissions.

I have found it more logical to reverse the order of (b) and (c) when considering these issues.

(a) Whether the claimed neighbourhood is a qualifying neighbourhood within section 15(2) of the 2006 Act.

186. Before turning to the substance of this issue, I record for the sake of completeness that it was common ground between the parties that the City of Manchester was an appropriate locality to satisfy the requirement of section 15(2) of the 2006 Act that the claimed neighbourhood is one “*within a locality*”.

187. Relevant law in relation to the notion of “neighbourhood” is rehearsed in the closing submissions on behalf of the Trust and the Applicants and I do not need to repeat here what I have set out previously in recording those submissions. I take account of all the passages in the decided authorities which have been cited to me. As an overarching point, I particularly remind myself of the “*deliberate imprecision*” of the term neighbourhood. In this regard I also bear in mind that the intention of Parliament in introducing the notion of “*neighbourhood*” into the law was, as HHJ Behrens said in *Leeds Group plc v Leeds City Council*²⁷ at first instance, “*to make easier*”²⁸ the registration of new greens and, as Sullivan LJ put it when the same case reached the Court of Appeal, “*to remove unnecessary technical obstacles to the registration of land that was performing a valuable recreational function for local inhabitants*”²⁹.

188. While it is not a case on the law relating to town or village greens, *Northampton BC v Lovatt*³⁰, which (as above) is cited in the closing submissions on behalf of the Appellants, is, I think, useful in showing that dictionary definitions of “*neighbourhood*” have a part to play in assessing the issue of what constitutes a neighbourhood in circumstances where there is no definition to call upon in the legal instrument which gives rise to the issue. The dictionary definition cited in *Lovatt*

²⁷ [2010] EWHC 810 (Ch).

²⁸ At paragraph 103. See also the view of HHJ Waksman QC in the *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust* case that the fact that the relevant area from which users must come includes a “*neighbourhood*” “*makes qualification much easier*”: [2010] EWHC 530 (Admin) at paragraph 69.

²⁹ [2010] EWCA Civ 1438 at paragraph 27.

³⁰ (1998) 30 HLR 875.

appears to be the same dictionary definition that HHJ Behrens referred to in *Leeds Group plc* at first instance when upholding the inspector's approach to "neighbourhood" in that case, including the latter's reliance on such a definition³¹: "A district or portion of a town"; "a small but relatively self-contained sector of a larger urban area".

189. HHJ Behrens also agreed with a submission made to him that "*boundaries of districts are often not logical and that it is not necessary to look too hard for reasons for the boundaries.*"³²

190. I further find useful the remarks of the inspector in the *Leeds Group plc* case in relation to the issue of "cohesiveness", remarks again cited with approval by HHJ Behrens³³. The inspector in that case said that "*[i]t seems to me that the 'cohesiveness' point cannot in reality mean much more, in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of making a town or village green claim.*"³⁴

191. Applying the law to the facts in the present case I am in no doubt that the claimed neighbourhood is a qualifying neighbourhood for the purposes of section 15(2)(a) of the 2006 Act. First, it has a strong cohesiveness in geographic terms. The boundaries of the claimed neighbourhood are clear and rational. An existing railway line lies to the north. The route of former, now infilled, railway lines lie to the south and west with their erstwhile presence reflected in the modern features of, respectively, the Fallowfield Loop Line and the Vine Street Park. The eastern boundary corresponds with the boundary between Manchester and Tameside. The claimed neighbourhood is a small and well-contained sector of the larger urban area of east Manchester. Its boundaries distinctly separate it from other parts of the wider built-up area and it is served by a range of shops, services and facilities within those boundaries. That other

³¹ At paragraph 99.

³² At paragraph 105.

³³ Ibid.

³⁴ See paragraph 36 of [2010] EWHC 810 (Ch).

facilities (such as schools) lie outside the claimed neighbourhood is of little significance in the present context. It is not necessary for a qualifying neighbourhood to have any particular facilities. Secondly, the evidence, overall, shows there to be community cohesiveness in relation to the claimed neighbourhood manifested in widespread local use of, and support for, the shops, services and facilities which are within it as well as the holding of fund-raising events at the Hare and Hounds pub and functions at the Ackroyd Avenue Allotments. The same cohesiveness is also demonstrated in the concentration of membership of the Residents' Association in the claimed neighbourhood and the scope of involvement in community litter picking events, as I refer to in paragraph 194 below.

192. The thrust of the Trust's closing submissions is that, while Abbey Hey may well be a qualifying neighbourhood, the claimed neighbourhood is only part of Abbey Hey. In support of this argument it is said: that the schools referred to in the evidence and identified as being within Abbey Hey – Abbey Hey Primary School and Wright Robinson College - are outside the claimed neighbourhood; that a number of witnesses (Catherine Warner, Councillor Reid, Ann Hern and Antonio Morreale) described Abbey Hey as extending further to the west than Vine Street and the former railway chord in that location; and that the sign indicating the start of Abbey Hey from the west lies to the west of the claimed neighbourhood boundary. These points are correct factually in their own terms but I think that they are of limited merit. They run counter to the objective of avoiding an approach which puts technical obstacles in the way of registration and, to my mind, are directed more to an issue of nomenclature rather than substance.

193. Even if the name Abbey Hey is more appropriately applied to a wider area than the claimed neighbourhood (extending further west than its western boundary), that does not as such demonstrate that the claimed neighbourhood is not a qualifying neighbourhood and that it does not possess the requisite degree of cohesiveness. For the reasons which I have already given in paragraph 191 above I consider that the claimed neighbourhood does possess that quality. As for geographic cohesiveness, the claimed neighbourhood manifests this strongly, as I have already indicated. Its clear and rational boundaries are as distinct as one could reasonably expect in a large and dense urban area such as east Manchester. These matters are unaffected by the question

of where the boundaries of “Abbey Hey” may lie. The present case is far removed from the case of an arbitrary line drawn on a map.

194. Turning to community cohesion, I do not accept the point made in the closing submissions on behalf of the Trust that the evidence demonstrates the same not by reference to the claimed neighbourhood but only by reference to a wider area. This conclusion is not justified on an overall assessment of the evidence. Areas of community cohesion may overlap and manifest themselves to differing extents. For instance, while Councillor Reid did say that the community spirit she had referred to related to a wider area than the claimed neighbourhood, she also pointed out (and I accept this aspect of her evidence) that the majority of the members of the Residents’ Association came from within the claimed neighbourhood. Mrs Kirby likewise said (which I accept) that two thirds of the members of the Residents’ Association lived within the claimed neighbourhood. This suggests to me a particular cohesion within the area of the claimed neighbourhood. Mr Billington said (which I also accept) that there was no interest in the community litter pick beyond Vine Street. His idea of Abbey Hey as a community was defined by the area of the claimed neighbourhood. Moreover, on the evidence before me, the use of, and support for, shops, services and facilities within the claimed neighbourhood as well as attendance at events and functions therein, has very much been by residents within the claimed neighbourhood. I consider that the Trust’s closing submissions insufficiently recognise that community cohesion is an elastic and imprecise concept. It is unrealistic to think that, in a heavily built up area, such cohesion will manifest itself at a single level with neat self-containment between hard and fast boundaries.

195. As to the naming of the claimed neighbourhood, older Ordnance Survey maps consistently locate the name Abbey Hey within the area (corresponding with the claimed neighbourhood) bounded by the three railway lines and, indeed, on the Field itself³⁵. In the light of that, my view is that the claimed neighbourhood is, in fact, meaningfully described as such even if the name Abbey Hey is now more meaningfully applied (as I think the balance of the oral evidence I heard suggests) to a wider area

³⁵ See Ordnance Survey maps from the 1890s to the 1960s in AB/65 (Applicants’ Response to the Trust’s objection) and in AB/10 (Desk Study Report for the 2016 planning application).

encompassing the claimed neighbourhood but extending also to its west. I stress again that I regard this as an issue of nomenclature, not substance. I think that Mrs Hern's evidence was particularly enlightening in this regard. She said that she had always thought of Abbey Hey to consist of two sections divided by the railway (at Vine Street). I think that that captures well the overall evidence I have heard. The section I am concerned with, the claimed neighbourhood, is a qualifying neighbourhood for the reasons I have already given. If a more meaningful description of it than that conveyed by the name Abbey Hey alone is required, then I do not see any reason why that should not be eastern Abbey Hey. Given that this goes only to the issue of naming, it matters not that no one suggested this name at the inquiry.

196. I mention two final points on the issue of neighbourhood. First, I do not consider this to be a case where the neighbourhood boundary has been identified by reference simply to use of the Field. That submission on behalf of the Trust places far too much weight on a comment of Mr Crook that not many users came from across the railway cutting (which, in this context refers to the former Gorton Curve at Vine Street) and does not take account of his further evidence that the revised boundary was arrived at as the product of consensus among the group of local residents promoting the Application. And, importantly, the neighbourhood is in any event justified by reference to geographic and community cohesion as I have already concluded. Secondly, and for the sake of completeness, I note that the Trust (correctly in my view) takes no point that the neighbourhood boundary is too widely drawn and that it should have stopped at Jetson Street as originally proposed. I think that a western boundary drawn at that point would have been arbitrary in geographical terms.

(b) Whether the Applicants have established the requisite degree and extent of qualifying use by a significant number of the inhabitants of the neighbourhood throughout the relevant 20 year period

(i) Introduction

197. The submission made on behalf of the Trust is that the nature and extent of the use made of the Field by local inhabitants has been insufficient to sustain its registration as a new green. In making that submission it is correctly pointed out that any use outside

the relevant 20 year period should not be taken into account. I have not done so in coming to my conclusions. It is also correctly pointed out that use by those who live outside the neighbourhood should be discounted and I have also observed that requirement. It is further right to note, as the closing submissions of the Trust again point out, that users said to have been seen on the Field but not identified as living within the neighbourhood cannot be assumed to be residents of it. I have proceeded on that basis and not made such an assumption.

(ii) *Use of paths on the Field*

198. The above points aside, the principal submission made on behalf of the Trust in relation to the nature and extent of the use of the Field is that its predominant use would have suggested to a reasonable landowner the exercise of a public right of way (or rights of way) rather than the exercise of a right to indulge in lawful sports and pastimes across the whole of the Field. The Trust's closing submissions remind me of the remarks of Sullivan J on this topic in the case of *Laing Homes Ltd v Buckinghamshire County Council*³⁶ and of Lightman J in the first instance decision in *Oxfordshire County Council v Oxford City Council*³⁷.

199. The overarching test is, of course, as Lightman J pointed out, how the matter would have appeared to the owner of the land³⁸. Within the context of that overarching test, the following guidance given by Lightman J is instructive³⁹. First, recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Secondly, use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green but walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as

³⁶ [2003] EWHC 1578 (Admin) in particular at paragraphs 98-110.

³⁷ [2004] EWHC 12 (Ch).

³⁸ At paragraph 102.

³⁹ *Ibid* and paragraph 103.

to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. Thirdly, a point upon which the Trust place some emphasis, if the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green). Fourthly, the critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e.g., an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e.g., fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. Fifthly, it is necessary to look at the user as a whole and decide the issue by adopting a common sense approach to what (if any claim) it is referable.

200. I also drew the parties' attention to the case of *Allaway v Oxfordshire County Council*⁴⁰ where Patterson J rejected a challenge to the decision of a village green inspector who had discounted the use of a circular path running broadly around the perimeter of a claimed green but only to the extent that that route was used by walkers as part of a route from one point outside the land to another. The inspector in that case otherwise treated use of the circular route as referable to the exercise of the right to a green.

201. Having set out the legal background to the issue of use of paths on the Field, I now turn to my findings of fact on that discrete topic before moving to use of the Field apart from the paths. The evidence I have heard in support of the Application persuades me, and I so find, that the perimeter path on the Field (which I accept is the main path) has been well used on a regular basis for activities such as dog walking, walking, running and cycling but predominantly for dog walking and walking. I refer not just to the activities of the witnesses themselves but also to their observation of use by others.

⁴⁰ [2016] EWHC 2677 (Admin).

The activities I have mentioned are not intended to represent an exhaustive list of what has occurred on the perimeter path but the chief qualifying uses which have taken place there. Some of the horse riding which a number of witnesses have referred to will undoubtedly have been on the perimeter path but this use, I find, has been very much of a lesser order of magnitude than other uses. Off road motorcycles or quad bikes have also been ridden on the perimeter path but these activities are not to be regarded as lawful sports or pastimes. Turning away from the perimeter path, I am also persuaded, and I so find, that the witnesses I have heard in support of the Application have made good deal of use on a regular basis of a number of other worn paths on the Field, including those which I have described in paragraph 21 above, again predominantly for dog walking and walking. Usage of the other paths has the obvious attractions of providing the variety that would be absent in always following a perimeter route and of allowing for differing route choices to suit the time available, the weather conditions or simply the particular inclination of the user at the time in question. Such usage gives the ability to take figure of eight routes on the Field (as referred to by Mrs Kirby and Mr Glaister), to take criss-crossing routes (as referred to by Mr Hulston and Mrs Hern) or to follow shorter loops (as referred to by Mr Crook). There is a considerable body of written evidence in support of the Application. This evidence has not been able to be clarified or tested by questioning, and I make due allowance for that. However, I have no reason to think that there is not encompassed in the evidence of use described in the written evidence a pattern of use of the paths similar to that described by the witnesses who have given live evidence, that is, plentiful use of both the perimeter path and other worn paths on the land for dog walking and walking but also, to a lesser extent, for running and cycling. I so find. The Field is an attractive feature for informal recreation and the paths on it are an obvious focus for the activities just mentioned. References to dog walking and walking are a recurrent feature of the written evidence.

202. It is not possible to be precise about which paths on the Field came into existence at which point in time. Different paths could well have been created at different points in time and, as a number of witnesses explained, the particular course of paths on the Field has been subject to some variation over time as changes in the vegetation have taken place. Some paths will have been long-standing and others more transient. I accept the evidence of Mrs Hern that paths first started to appear on the Field after football stopped being played on it (which was in 1985). That is as one would

expect in that, in the absence of regular maintenance of the Field and corresponding growth in the grass, users would create path on the Field. Overall, I find that several paths, and not just the perimeter path, have existed on the Field over the course of the relevant period at any given point in time and that, over that same period, those paths have been subject to substantial recreational use as I have already described.

203. Turning to use of the Field apart from the paths, I find that there has been an appreciable body of such use over the relevant 20 year period although significantly less than use of the paths. All witnesses called in support of the Application spoke, to a greater or lesser extent, of use apart from on the paths. This has taken various forms such as experiencing nature, blackberry picking, children's play (including climbing trees, den building and informal ball games as well as the use of the mown pitch created by Mr Morreale and his friends for playing football and the cycle course that they also created) and more adventurous cycling. I should also mention bonfires. I accept the evidence I have heard in support of the Application about bonfires and find that, over the course of the relevant 20 year period, bonfires have regularly taken place on the Field, in areas off any paths, on or around 5th November. There is to my mind an unresolved question mark over whether the holding of a bonfire would amount to a "lawful" sport and pastime in the light of Lord Walker's comment in *Lewis v Redcar and Cleveland Borough Council*⁴¹ that "*most bonfires are now illegal on environmental grounds*"⁴². I do not think that I need to come a conclusion on this point because, whether or not bonfires are included in my assessment of uses that took place on areas of the Field apart from the paths, my overall finding would nevertheless remain as I have set it out in the first sentence of this paragraph.

204. In addition to the activities I have already mentioned, the evidence in support of the Application also reveals that various other activities have taken place on the Field, including kite flying, bird or bat watching and playing in the snow. It is not possible on the evidence to come to a clear conclusion whether these activities took place on or off the paths but the fact that they took place needs to be taken into account in arriving at an overall assessment of use.

⁴¹ [2010] UKSC 11

⁴² At paragraph 47.

205. I reject Mr Mooney's overall assessment of use of the Field (somewhere between never used and used very, very little). I do not find Mr Mooney's evidence reliable. It was, in my view, marred by exaggeration and undermined by an arbitrary selection of which uses to refer to on the basis of a self-set criterion of transience, as well as being unsatisfactory in initially leaving out of account his own son's involvement in the creation of the football pitch. It is also notable that Mr Mooney had not been on to the Field at all during the relevant period and, however much of it he could see from his son's bedroom window, observation from that point cannot in my view carry the weight of observations made on the Field itself. Overall, I consider that Mr Mooney's evidence cannot stand consistently with the evidence in support of the Application. I prefer the latter evidence.

206. Having made the findings which I have, I return at this point to the question of whether use of the paths on the Field should be discounted. I do not consider that any such use should be discounted. I come to this conclusion for the following reasons. I have already found that several paths, and not just the perimeter path, have existed on the Field over the course of the relevant period at any given point in time and that, over that same period, those paths have been subject to substantial recreational use. Dog walkers, walkers and others have used these paths to take a variety of routes on the Field: the circuit of the perimeter; figure of eight configurations; criss-crossing; and shorter loops. I think that, in these circumstances, the appearance given to a reasonable landowner would have been one of an assertion of a right to use the whole of the Field for informal recreation. It would be unrealistic for a landowner to think that all that was being asserted was a collection of several, separate rights of way. Secondly, a reasonable landowner could not have thought that the paths were simply being used as a way of getting from one point outside the Field to another point outside it. He would have appreciated from usage of the paths alone that the Field was being used as a destination for users and not merely as a short cut or place passed through *en route* to elsewhere. This impression would have been confirmed by the appearance of obvious points of entry to the Field from the end of Underwood Close and off the Fallowfield Loop Line showing that users were coming on to the Field to use the paths on it for purposes different from travel along the Loop Line. Thirdly, it would have appeared to the reasonable landowner that, while most use of the Field was on the paths, there was nevertheless, as I have already found, an appreciable body of use of the Field which did

not take place on the paths. This would have reinforced the appearance of a right to indulge in informal recreation over the whole of the Field. Fourthly, a reasonable landowner could not have been unaware of the numerous gates on to the Field from the gardens of adjoining properties suggestive of access to the Field by those residents for the purposes of informal recreation in general. Fifthly, for all the preceding reasons, I do not think that the situation would have appeared to a reasonable landowner as being at all ambiguous.

207. The Trust's actual knowledge of what was taking place on the Field is manifest in the fact that it was aware in 2000 of "*dog walking, etc*"⁴³. I also think that it is of some significance in terms of the Trust's actual knowledge that its own financial statements for the years 2012 to 2015 (AB/55-58) all record that the Field "*is regarded by local residents as a valuable green space*". In my view, that statement must be considered not just in the context of ownership of the Field by a body which has as one of its objects the promotion of active recreation but also in the context of the correspondence in relation to use of the Field which is discussed in the following section of this report which considers whether use was as of right. In these circumstances, it is unrealistic to think that the reference to "*a valuable green space*" was simply to visual amenity. In truth, the Trust must have been recognising that the value placed on the Field by local residents was because of their use of it.

208. Before leaving the present topic, I mention three other points which all arise from case law. First, I consider that the case of *Laing Homes* is clearly distinguishable from the present case on its facts just as it was distinguished in *Allaway*. In that case, Patterson J distinguished *Laing Homes* on the basis that it involved three recently confirmed public footpaths around the perimeter of the three fields in question. The present case does not involve confirmed public footpaths nor is it one where there is only a perimeter path. Secondly, I do not think that the case of *Dyfed County Council v Secretary of State for Wales*⁴⁴, which was mentioned by Miss Stockley in oral submission, assists the Trust. This authority establishes that recreational walking on a circular route (which, in the case itself, was around a lake) can give rise to the

⁴³ The reference here is to Mr Kelly's letter to Mr Kaufman of 10th March 2004 (OB/41).

⁴⁴ (1990) 59 P & CR 275.

establishment of a right of way. However, in the present case recreational walking around the loop of the perimeter route is only part of the overall evidential picture which has led to my conclusion that no use of the paths on the Field falls to be discounted from the use which is to be taken into account in assessing qualifying use for the purpose of registration of a new green. Thirdly, that conclusion is also unaffected by the proposition for which *DPP v Jones*⁴⁵ is authority, namely, that a user is entitled to carry out any reasonable activity on a right of way which is lawful and does not obstruct the right of passage. In the circumstances of the present case, even when allowance is made for that proposition, it does not alter anything I have said in paragraph 206 above.

(iii) Overall assessment of use of the Field

209. Having decided that use of the paths on the Field does not fall to be discounted, I turn to my overall assessment of its use. Overall, I conclude that use of the Field for informal recreation has taken place for at least 20 years⁴⁶ and, in the words of Lord Hope in *Lewis*, has been “*of such amount and in such manner as would reasonably be regarded as being the assertion of a public right*”⁴⁷. That right has been asserted over the whole of the Field. There has been substantial recreational use. I do not accept the Trust’s submission that there has been only sporadic use of the Field by a few individuals from houses in the immediate vicinity of the Field walking dogs. It is true that the oral evidence I have heard in support of the Application has been limited (apart from Councillor Reid) to that from residents (and in one case a former resident) of Ackroyd Avenue, Underwood Close and Violet Street but, almost without exception, those users have spoken of seeing other people on the Field and there is a considerable body of written evidence which reveals significant use of the Field by others in the claimed neighbourhood. As I have already said, I make appropriate allowance for the fact that the written evidence has not been able to be clarified or tested by cross examination but it seems to me that the general picture it paints very much corroborates the oral evidence and I take into account accordingly. I have already explained why I do not find Mr Mooney’s evidence to be reliable.

⁴⁵ [1999] 2 AC 240.

⁴⁶ As to which I accept the analysis of the evidence with reference to years of use contained in the Applicants’ closing submissions at set out at paragraphs 140 to 143 above.

⁴⁷ At paragraph 67.

210. I do not consider that the condition of the Field has acted as a significant factor in limiting its use. The oral evidence I have heard has not come close to establishing any such point. Some areas of the Field do become muddy in wet conditions but not to the extent that donning a pair of wellingtons would not solve the issue (as explained by Mrs Kirby, Mr Hulston, who relished the prospect of taking his grandson on the Field in such conditions, and Mrs Gray). Mud did not bother Mrs Warner. Mr Crook described the areas which could get muddy (including the eastern end of the Field) as isolated spots whereas other large stretches would be relatively dry. Mr Billington was not deterred by the fact that certain areas were subject to waterlogging. Nothing I have heard makes me think that the ground conditions of the Field were subject to other than the normal variability of season and weather that might apply to almost any unmanaged piece of open land. And to the extent that that variability was reflected in a variability of use, that would be an entirely normal incident of any green.

211. The unmanaged condition of the Field over the relevant period (barring the spraying of knotweed on it by Mr Rigby) means that the vegetation on it has, by and large, been allowed to grow unchecked. The evidence shows that the fact that the Field has been left to nature is part of its attraction. Use of the Field on the paths have I have described has not been checked by vegetation growth, although it may have involved some adjustment to the course of the routes over time. In winter, the grass growing over the bulk of the Field will die down and present little hindrance to use, although use will inevitably be less when the days are short and the weather less favourable. In summer, the longer grass would not prevent any real impediment to users such as Mrs Gray who chose to go into it to look for insects with her son or Mrs Hern who went off the paths to take in the experience of nature. No-one would penetrate some of the dense scrub towards the boundaries of the Field but these scrub features take up a relatively limited portion of the overall area and the fact that they are truly inaccessible is no impediment to the registration of the Field. The Trust does not suggest otherwise but, for the sake of completeness, I should say that I consider that an observation of Lord Hoffman in *Oxfordshire County Council* (and referred to in the closing submissions on behalf of the Applicants) is applicable here by way of analogy. Lord Hofmann stated that the whole of a public garden could be treated as in use for recreational activities even though 75% of the surface consisted of flower beds, borders and shrubberies on which

the public may not walk⁴⁸. It is also the case that some of the perimeter vegetation of the Field has, in fact, been used. Children have climbed trees (as spoken of by several witnesses), Japanese Knotweed has been employed in the service of the den-making (as spoken of by Mr Morreale) and the eastern woodland has acted as an adventure playground for children (as spoken of by Mrs Hern).

212. The Trust has not made out any case that the Field is unsafe or dangerous. There is no evidence that the buried remains of the former sports pavilion or the occasional episode of fly-tipping have had any material impact on use.

213. There are other places, apart from the Field, for informal recreation in the wider area, in particular, Debdale Park and Gorton Reservoirs, which are well used amenities. However, the Field has something distinctly different to offer and, for many in the neighbourhood, is also closer and more convenient. The fact remains that, whatever choices may have been available to local residents for informal recreation, those choices have been exercised to give rise to a substantial use of the Field for such activity over the relevant 20 year period.

214. At this point in the analysis my conclusion is that there has been substantial use of the Field for lawful sports and pastimes for a period of at least 20 years. The next issue which requires consideration is whether that use has been by a significant number of the inhabitants of the neighbourhood (which I have already found to be a qualifying neighbourhood).

(iv) Use by a significant number of the inhabitants of the neighbourhood

215. In *Alfred McAlpine Homes Ltd v Staffordshire County Council*⁴⁹ Sullivan J said that whether evidence showed that use was by a significant number of the inhabitants of any locality or any neighbourhood within a locality was very much a matter of impression⁵⁰. What mattered was “*that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use*”

⁴⁸ [2006] UKHL 25 at paragraph 67.

⁴⁹ [2002] EWHC 76 (Admin).

⁵⁰ At paragraph 71.

by the local community for informal recreation, rather than occasional use by individuals as trespassers."⁵¹

216. In *Lancashire County Council v Secretary of State for Environment, Food and Rural Affairs*⁵² the Court of Appeal unequivocally rejected the notion that the "significant number" test embodied a requirement to show a geographical "spread" of users over the qualifying area⁵³. It also pointed out that, however large the qualifying area was, "*inhabitants who live near the green for which registration is sought are more likely to use it than those who live further away.*"⁵⁴ The same point had earlier been made by Vos J In *Adamson v Paddico (267) Ltd*⁵⁵ when he observed that the majority of users of the green in that case lived closest to it with a scattering from further away, that being precisely what one would expect⁵⁶.

217. In the present case, most users have come from close to the Field, from Ackroyd Avenue and Underwood Close in particular. That is, however, precisely what one would expect. I have already explained that I do not accept the Trust's submission that there has been only sporadic use of the Field by a few individuals from houses in the immediate vicinity of the Field walking dogs. The evidence overall, including the written evidence, shows that many users also come from elsewhere in the neighbourhood. The addresses from which users have come thin out further away in the neighbourhood in those parts of it towards Vine Street but, again, that is an entirely unsurprising pattern⁵⁷. I am quite satisfied that the use of the Field has been by a significant number of the inhabitants of the neighbourhood.

218. I have now reached that point in my analysis where I am able to conclude that a significant number of the inhabitants of the neighbourhood have indulged in lawful

⁵¹ Ibid.

⁵² [2018] EWCA Civ 721.

⁵³ See the judgment of Lindblom LJ at paragraph 78.

⁵⁴ Ibid.

⁵⁵ [2011] EWHC 1606 (Ch).

⁵⁶ At paragraph 106i).

⁵⁷ A helpful map representation of where users have been drawn from is provided by OBJ/1. I have also borne in mind the caveats in respect of this document raised in the Applicants' closing submissions (as set out in paragraph 158 above).

sports and pastimes on the Field for a period of at least 20 years. It remains to consider whether that has been “as of right”.

(c) Whether the claimed use was with force (“*vi*”) and/or with permission (“*precario*”) and thus not as of right during the relevant 20 year period

219. I deal with the question of whether use of the Field was as of right by considering, first, the question of force before, secondly, turning to the issue of permission. This reflects the order in which these topics are addressed in the Trust’s closing submissions.

(i) *Forcible use*

220. It is well established that use which is “*vi*” is not confined to use which employs physical force but extends also to use which is contentious: see, Lord Rodger in *Lewis v Redcar and Cleveland Borough Council*⁵⁸. However, Lord Rodger was not faced in that case with the question of what a landowner has to do in order to render use of his land contentious. That issue was more particularly considered in the case of *Betterment Properties (Weymouth) Limited v Dorset County Council*⁵⁹ where, after a comprehensive survey of the authorities⁶⁰, Morgan J formulated the following test:

“Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.”

221. When the last-mentioned case reached the Court of Appeal⁶¹, the court upheld Morgan J on the issue of contentious user. Patten LJ defined the issue to be whether the landowner “*had taken sufficient steps so as to effectively indicate that any use by local*

⁵⁸ [2010] UKSC 11 at paragraphs 88-90.

⁵⁹ [2010] EWHC 3045 (Ch).

⁶⁰ Including *Smith v Brudenell-Bruce* [2002] 2 P & CR 4 and *Oxfordshire and Buckinghamshire Mental NHS Foundation Trust* [2010] EWHC 530 (Admin).

⁶¹ *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250.

inhabitants of the registered land beyond the footpaths was not acquiesced in."⁶² Patten LJ also said, inter alia, that "*all the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land*"⁶³ and that, while the landowner was "*not required to do the impossible*" his response must "*be commensurate with the scale of the problem that he is faced with.*"⁶⁴ In short, the test is whether the landowner has done enough to make his opposition known to users of his land.

222. That test was endorsed by the Court of Appeal in *Winterburn v Bennett*⁶⁵. This case was not about a village green but concerned an easement to park vehicles and thus involved the law of prescription. The Court of Appeal proceeded on the basis that the same principles were applicable in each case⁶⁶. David Richards LJ said that the issue was, as Patten LJ had defined it in *Betterment*, namely, "*whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in.*"⁶⁷ He agreed that "*the circumstances must indicate to persons using the land that the owner objects and continues to object*" to the use in question and that the protest of the owner "*needs to be proportionate to the user.*"⁶⁸ On the facts of the case itself it was held that the continuous presence of signs asserting that the land in question was private property was a proportionate protest. David Richards LJ also said "*the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in Betterment [2012] 2 P & CR 3 is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner needed to do to bring to the attention of those using the land that they were not entitled to do so.*"⁶⁹

⁶² At paragraph 30.

⁶³ At paragraph 49.

⁶⁴ At paragraph 52.

⁶⁵ [2016] EWCA Civ 482.

⁶⁶ At paragraph 31.

⁶⁷ At paragraph 37.

⁶⁸ Ibid.

⁶⁹ At paragraph 36.

223. The Trust's case at the inquiry that use of the Field was contentious was based entirely on correspondence (exhibited to Mrs Wilson's witness statement) with Mrs Newing of the Residents' Association and Gerald Kaufman MP. The limited nature of the issue in this respect is readily explicable in the light of the evidence. First, Mrs Wilson confirmed that she was not aware of any attempts on the part of the Trust to erect signs at the Field or to obstruct the Underwood Close access to it and that there had been no correspondence from the Trust to residents in respect of the use of gates on to the Field from their properties. The unanimous evidence of the witnesses called in support of the Application is that, over the relevant period, access to the Field has always been available from the end of Underwood Close, this access has never been obstructed and there have never been any signs anywhere indicating that use of the Field was not allowed. I accept this evidence and find the facts accordingly⁷⁰. I also find that, since the creation of the Fallowfield Loop Line, there has been freely available pedestrian access on to the Field at its eastern end which has never been impeded by the Trust. I further find that the Trust has never taken any steps to prevent access to the Field by rear gates from those properties on the south side of Ackroyd Avenue which have such gates. Accordingly, there is no basis for any argument that contentious use arises from physical obstruction of access to the Field, signage or challenge to the existence of gates allowing entry on to the Field from adjoining properties.

224. Moreover, at the inquiry the Trust did not pursue, either by way of cross examination or in closing submissions, any point in relation to oral challenges to use as referred to by Mr Rigby in his witness statement. I do not accept that any such challenges occurred. Mr Rigby was not available to be questioned and his statement that oral challenges to use took place is vague, unparticularised and unsupported by any written reports of the same. On Mrs Wilson's own evidence, Mr Rigby's account of the frequency of his visits to the Field in the last two years was probably not realistic. More importantly, I accept the evidence of Mr Hulston and Mrs Hern that, when they encountered Mr Rigby, the latter had not challenged their use of the Field.

⁷⁰ For the avoidance of doubt, I make clear that, in the findings I have made, I specifically find that the infilling works to the former railway cutting were separated from the access to the Field at the end of Underwood Close and had no effect on that access.

225. Thus it is that the focus of the issue on whether use was contentious must be on the correspondence exhibited to Mrs Wilson's witness statement. In that context, my understanding of the closing submissions on behalf of the Trust is that particular emphasis is placed on Mr Kelly's letter to Mrs Newing of the Residents' Association of 25th February 2004 (OB/42). The Trust's case as made in the closing submissions is that any use of the Field after February 2004 would have been contentious. Nevertheless, it is convenient to start with the earlier letter of 17th November 2003 (OB/39) from the Trust's solicitors (Cobbetts) to Mrs Newing of the Residents' Association. I have set out the contents of this letter in paragraph 69 above.

226. The letter made clear that the Trust objected to the use of the Field. It spoke of a refusal of permission for any rights to be exercised over the Field and sought a written assurance from Mrs Newing that neither she nor any member of the Residents' Association had any right to use any part of the Field. While it may be clear that the letter amounted to an objection by the Trust to use of the Field, it is unclear to what extent the contents of the letter were disseminated more widely by Mrs Newing. The inquiry has not had the benefit of hearing, or having any statement, from Mrs Newing. I did not gain any real assistance on this issue from Councillor Reid. She professed never to have seen the letter despite her involvement with the Residents' Association. I found Councillor Reid's evidence generally in relation to the correspondence from (and to) the Trust to be argumentative and unhelpful. Whether or not Councillor Reid ever saw the letter or not (and it is not necessary for me to make any express finding on that) I find it very difficult to believe that its contents would not have been raised by Mrs Newing with at least some others in the Residents' Association, whether at a meeting or in some other way. However, I have no way of knowing whether the whole membership of the Residents' Association was made aware of the letter and its contents or whether any members passed the information on to non-members. The most effective gauge I have for the issue of whether the Trust's objection was communicated to the wider local community and non-members of the Residents' Association is that there has been no suggestion in the evidence of the witnesses called in support of the Application (most of whom had had no involvement with the Residents' Association) that they were aware of the Trust's objection or the correspondence in which it was contained. And I accept the evidence of these witnesses that they had never been told they could not use the Field.

227. As to what the Trust did after the letter of 17th November 2003 was sent, it is clear, and I so find, that no response having been forthcoming to the letter from Mrs Newing, court proceedings, despite being threatened in the letter in that eventuality, were not taken. I also find that, whereas Cobbetts' letter had said that the Trust could not allow activities on the Field to go unchecked, activities were (as Mrs Wilson confirmed) thereafter left unchecked in that no signage was put up, no fencing was erected, neither access from the Underwood Close entrance to the Field or that from the Fallowfield Loop Line was stopped and no action was taken in respect of the gates on to the Field from residential properties on Ackroyd Avenue.

228. The next letter which is relevant to the issue of contentious user is that written some three months later on 25th February 2004 (OB/42) by Mr Kelly on behalf of the Trust to Mrs Newing of the Residents' Association. I have already set out the contents of this letter in paragraph 71 above. Again, this letter clearly amounted to an objection by the Trust to use of the Field. The letter spoke of withdrawal of any consent which had ever been given to any resident to use any part of the Field and asked for it to be noted that neither Mrs Newing nor any other resident in the area, whether a member of the Residents' Association or not, was entitled to go on to the Field for any reason at all. When the letter was shown to Mr Kaufman he, unsurprisingly, regarded it a denial of access to the Field to his constituents, as his letter to Mr Kelly of 10th March 2004 (OB/43) makes clear. Again, while I find it difficult to think that Mrs Newing would not have shared Mr Kelly's letter of 25th February 2004 with anyone else at all in the Residents' Association, I have no way of knowing the extent to which this would have taken place and have no evidence to assist in this regard. And Mrs Wilson realistically accepted that she was not aware of any steps taken by the Trust to communicate the contents of the letter to residents in the area who were users of the Field but not members of the Residents' Association.

229. Mr Kelly re-asserted his denial of access to the Field in his reply to Mr Kaufman of 10th March 2004 (OB/44). I have set out the contents of this letter in paragraph 74 above. There is little reason to think that Mr Kaufman would have taken upon it himself to issue any direct communication to Abbey Hey residents about this given that his point of contact at this stage was Mrs Newing. It is fair to infer that he would have

shared the response of Mr Kelly with Mrs Newing but what exactly she would have done thereafter is conjectural⁷¹.

230. The correspondence that I have dealt with in the preceding paragraphs is that which is central to the Trust's case that use has been contentious. My conclusion is that this correspondence was not sufficient so as to effectively indicate that use of the Field by local inhabitants was not acquiesced in. First, the evidence does not show that the correspondence was sufficient to bring the Trust's opposition to use of the Field to the actual notice of those using it. I have already made the point that there has been no suggestion in the evidence of the witnesses called in support of the Application (most of whom had no involvement with the Residents' Association) that they were aware of the Trust's objection or the correspondence in which it was contained. I do not consider that the evidence allows any inference to be drawn that the Trust's opposition to use of the Field achieved a widespread dissemination to the local community via the Residents' Association and/or Mr Kaufman. Secondly, and even were I to be wrong on the first point, the objections of the Trust did not continue. The key correspondence consists of the three letters referred to above all written within a short spell of four months. Thereafter the correspondence stops until a couple of communications in 2007 which do not, as I explain below, materially advance the Trust's case. Moreover, there is nothing to suggest that there was any impact on actual use of the Field at the relevant time. Thirdly, and even were I to be wrong on the previous two points, the correspondence was not in any event sufficient on its own given the failure of the Trust to take the obvious and reasonable further step of erecting notices or signs at entrances to the Field (or on it) to make it clear that the use was prohibited. I do not consider that the Trust was required to resort to physical obstruction of entry to the Field or legal action but I do think that it did not do enough in this case by not erecting notices or signs. That was the level of response which would have been commensurate with, or proportionate to, the user in this case.

⁷¹ In the whole of the written evidence in support of the Application the only references to any of the correspondence relied on by the Trust are "*letter to the Residents' Association/Gerald Kaufman 10/3/04*" found in the evidence questionnaire of Elaine Borrell of 11 Lakeside Close (number (107) of (AB/2)) and "*letter to Gerald Kaufman*" found in the evidence questionnaire of John Borrell (number 108 of (AB/2)) of the same address. How these witnesses came by knowledge of this letter cannot be known.

231. Turning to the two communications in 2007 which I referred to in the preceding paragraph, the first is a letter of 24th January 2007 (OB/47) from Mr Kelly on behalf of the Trust to a Ms King of an unknown address in Gorton. That letter was a response to a letter from Ms King of 23rd January 2007 (OB/46) in which she had enquired about making provision for equine facilities on the Field in the form of an outdoor manège and stables. Mr Kelly's letter stated that the land was private property owned by the Trust and was not for the general use of the community and particularly not for exercising animals. This letter does not take the matter of contentious use any further forward for the Trust because there is simply no evidence that its contents ever went beyond Ms King. It was plainly not a sufficient step on its own to make use of the Field contentious nor, taken cumulatively, does it alter the conclusion that previous correspondence was insufficient to achieve this. I reach the same conclusions in respect of an email response of 21st June 2007 (OB/50) on behalf of the Trust to an email enquiry of 20th June 2007 (OB/48) from Caroline Martin who had stated that she was hoping to apply to Manchester City Council for a grant to improve the Field (perhaps by putting up a sign asking people to pick up their dog poo, or some fixed play equipment for the children). Ms Martin acknowledged in her email that she would obviously need the permission of the owner of the Field before anything could be done. The email is suggestive of the fact that dog walking and children's play was already occurring on the Field (and without permission). The permission that was sought was in relation to physical works on the Field. Be that matter as it may, the email sent in reply on behalf of the Trust (by Sandra Dewhurst) (OB/50) said that the Field was privately owned and was not open space for the use of the general public. There is no evidence that the contents of this email were communicated more widely by Ms Martin. Mr Glaister, Ms Martin's partner said, and I accept his evidence on this point, that he was not aware of the email sent on behalf of the Trust.

(ii) *Permissive use*

232. The Trust's case is that use that use of the Field by dog walkers was permissive in the period from 2000, when such permission was granted, until 2004, when permission was revoked. The case that permission was granted turns on the letter written by Mr Kelly on behalf of the Trust to Mr Kaufman on 15th August 2000 (OB/41). I have set out the contents of this letter in paragraph 67 above.

233. While this letter was not expressed in terms as a grant of permission for dog walking etc., I consider that, in substance, that is what it was. I think that the arguments made on behalf of the Applicants which seek to make the contrary case (as set out in paragraph 165(a) and (b) above) are overly legalistic. The distinction they make between, on the one hand, a lack of harm or objection and, on the other, a permission, is a false antithesis in the present context. The matter is to be looked at in a common sense way. To my mind, when, in response to an expressed wish of persons to indulge in activity on land, a landowner responds by saying that he sees no harm in that activity, it is an implicit premise of that response that the activity is thereby permitted by the landowner. That is how a reasonable reader of the letter would have understood it in this case. Such a reader would equally have appreciated that, had Mr Kelly thought that there would be harm, he would have said that use was not permitted⁷². Mr Kelly himself must have appreciated that his letter could be read as giving consent. In his letter of 25th February 2004 to Mrs Newing, whereas he described his earlier letter to Mr Kaufman as having made clear that he had no objection to residents walking their dogs on the Field while it was in fallow condition, he also felt it necessary to withdraw any consent for use of the Field which had ever been given. On the evidence available, the only candidate piece of correspondence for such consent is Mr Kelly's letter to Mr Kaufman of 15th August 2000.

234. However, I think that the closing submissions on behalf of the Applicants are on much firmer ground when they deal with the question of whether the permission was communicated to local inhabitants. The submissions correctly point out that in *Newhaven Port & Properties Ltd v East Sussex County Council*⁷³ Lord Neuberger and Lord Hodge emphasised that it was certainly the normal rule in the case of a private landowner (as is the Trust) that any licence be communicated to local inhabitants before it could be said that their usage of the land in question was "by right"⁷⁴. In this case there is no reason why the normal rule should not apply and there is simply no evidence that Mr Kaufman communicated the contents of Mr Kelly's letter of 15th August 2000 to anyone else. There is, for example, nothing which suggests that Mr Kaufman and

⁷² I think that the same reader would also have understood that if the land ceased, in Mr Kelly's estimation, to be in fallow condition a different answer could be forthcoming.

⁷³ [2015] UKSC 7.

⁷⁴ At paragraph 68.

Mrs Newing of the Residents' Association⁷⁵ were in contact with each other at this time and there is no evidence that Mr Kaufman contacted any residents on his own account. It is also unlikely that Mr Kaufman would have felt any particular need to communicate the contents of the letter. The letter contained no threat of building on the Field, which had been Mr Kaufman's particular concern when he had raised the issue of the Field in Parliament in 1990, and it confirmed, rather than denied, access. It also seems to me that, because Mr Kaufman's view, as apparent from his later letter of 10th March 20004 to Mr Kelly, was that residents had a right to use the Field under the terms of the original bequest, it is unlikely that he would have considered that there was any need to communicate what he would have considered an unnecessary justification on the part of Mr Kelly for access on the basis of lack of harm.

235. I thus find that the Trust's case that dog walking was by permission after August 2000 on account of Mr Kelly's letter of 15th of that month is not made out. The Trust has not sought to make any case on the basis of an oral permission outwith Mr Kelly's letter of 15th August 2000. It was right not to do so. There is no evidence of any such oral permission. It cannot be inferred from Mr Kelly's reference in his letter to discussions with local residents that any oral permission was granted in the course of the same.

236. In sum, I conclude that use of the Field has throughout the relevant 20 year period been "as of right". As the Trust has not made out the vitiating factor of either forcible or permissive user, it must be taken to have acquiesced in the use: see *Lewis v Redcar and Cleveland Borough Council*⁷⁶.

(9) OVERALL CONCLUSION AND RECOMMENDATION

237. My overall conclusion is that all elements of the statutory definition in section 15(2) of the 2006 Act have been met in this case.

⁷⁵ This had been set up in April 2000 as appears from Mrs Newing's letter to the Greater Manchester Federation of Clubs for Young People of 20th September 2000 (OB/45).

⁷⁶ [2010] UKSC 11 per Lord Hope at paragraph 67.

238. Accordingly, I recommend to the Registration Authority that the Application should be accepted and that the Field should be registered as a town or village green.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
18th July 2018