

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A
TOWN OR VILLAGE GREEN KNOWN AS 'GREENSQUARE FIELD'
LOCATED AT THE REAR OF BRIARFIELD AVENUE, FINCHLEY,
LONDON N3 – APPLICATION NUMBER LLC/MM/004/2008**

**INSPECTOR'S REPORT AND RECOMMENDATION TO THE
REGISTRATION AUTHORITY – LONDON BOROUGH OF BARNET**

The application site

1. The application site is shown edged in red on the Ordnance Survey plan in the applicant's bundle at AB1/18. As is evident from this plan, the application site is, for the purposes of the application to register, divided in two parts, namely Land 1 and Land 2. The significance of this division will be explained later. It will be seen that the application site is surrounded by housing although it abuts the West Finchley Bowling Club (herein referred to as 'WFBC') on its north west boundary. The applicant and his supporters live in close proximity to the application site and a number of houses abutting the land have direct access onto it through gates at the end of their gardens.
2. At Tangle Tree Close (herein referred to as 'TTC') there is a passageway wide enough to allow vehicular access between Nos.20/21. It is roughly 10' wide and is grassed in the central portion. Access onto the road is impeded by an unlocked metal pillar on the roadside frontage which is likely to have been placed there in around 2005, evidently to prevent unauthorized access by third parties on the green – see OB1/228 for minutes of the 2005 AGM of the Greensquare Residents Association (herein referred to as 'the Association').

The passageway passes between the back gardens of Nos. 20/21 at the end of which there is another passageway running parallel with the road which serves as the rear access for a number of houses in TTC, most of which have garages which are, I suspect, used mainly for storage as there is ample parking on the road frontage where, on the opposite side of the road, there is a tall wall beyond which lies the North Circular Road which is said to be around 50m due west of the application site. The area is predominantly residential.

3. A number of photos have been produced on both sides. In the case of those produced by the applicant, they will be found in AB1/tab 9. In the case of those produced by the objector the photos will be found in OB1/tab 8. Part of the passageway running parallel to the road (running south west) will be seen in OB1/119. This photo was taken in April 2007 and, for the most part, the fence shown in the photo is no longer there. Running in the opposite direction at OB1/120, one can see old cars and other items left under the trees. Another photo taken at the same location on 3/04/2007 (at OB1/114) shows 2 cars (one under a canopy) and a boat, all of which had gone by the time I made my inspection of the application site although there is still a quantity of rubbish and various materials stored in this location by those living close by who have no paper title to such land, nor any apparent right or license to be storing materials on land which plainly falls within the curtilage of the application site and thus within the objector's paper title.
4. On the right of the photo at OB1/119 we see a gateway (now removed) which is the starting point of a path (herein referred to as 'the main path') running through an area of largely self-sown woodland, brambles, nettles and undergrowth (herein referred to, where the context permits, as 'the scrubland') leading into open ground (herein referred to as 'the field'). I should perhaps add that there was also a scattering of fruit trees within the scrubland which would have been planted in the days when it was allotment land (see tree schedule on OB1/9). The start of the main path is shown in the photograph at OB1/118 and the field into which it leads is shown in the photo at OB1/116 which was taken on 5/04/2007. There are other useful photos of the main path

at AB1/110 (see 17) and at AB1/111 (see 19/22). If one returns to the plan in the applicant's bundle at AB1/18 one can see a dotted black line running across the application site (this is the dotted line printed on the plan and not the thicker line drawn thereon in hand by the applicant dividing Land 1 from Land 2) denoting what is plainly intended to be the edge of the field where it abuts the scrubland shown in the photo at OB1/116. The applicant's bundle also contains a number of photos (with a very helpful schedule at AB1/98) which show the field, in the centre of which (AB1/102, see photo 3) there is a prominent goat willow tree. There are also hedges and trees around most, if not all, of the perimeter of the field which, in recent years, has been well managed. The applicant also produces photos showing men working on the field (AB1/110 – taken in 2000), children playing at Guy Fawkes' parties (taken in 2002-04), summer fetes (2000-06), private parties (2000-05), dog-walkers and children playing football where we have metal nets shown in a number of photos which have been on the field for, I believe, some years. The field is obviously well used by local residents for informal recreation, particularly in the drier summer months.

5. I carried out inspections of the application site on 3 occasions, two of which were unaccompanied. The accompanied visit took place during the public inquiry where the advocates and a number of supporters on both sides attended. However, as a result of evidence given afterwards by two of the objector's witnesses I felt it necessary to return to the application site. I have also driven around a number of the local streets and am confident that I have seen all that was necessary for the purposes of my report.
6. In my assessment of the application site I was greatly assisted by a document which will be found in OB1/122 (herein referred to as 'the Land Survey'). This survey drawing takes in the whole of the application site and WFBC parcels. It was so helpful that it was pinned up on a board and was constantly referred to by the witnesses on both sides. The Land Survey shows the results of a survey carried out for the objector in April 2002 which was updated in 2005 (there is a reference to this in the correspondence at OB1/127). It also contains a detailed tree schedule and the main areas of dense vegetation are

clearly marked thereon within the scrubland identified on the applicant's plan at AB1/18, through which we can see the main path running between the rear of the houses in TTC through into the field. The Land Survey is also noteworthy for the fact that it highlights the divisions between Land 1 and Land 2 and the parcel of land occupied by WFBC. Colouring was added to the version of this plan which was pinned up during the inquiry. The area coloured red was the curtilage of Land 1 (herein referred to as the 'Red Land'), the area coloured green was the curtilage of Land 2 (herein referred to as the 'Green Land') and the land in the occupation of the WFBC was coloured yellow. I have kept this plan which, as it came in two parts, had to be set taped together.

7. On my visits to the application site I was able to walk around the field. I also walked along both sides of the bowling green and around the front of the pavilion. The application site is easily accessed from Dudley Road and TTC and from a number of the houses which back onto it. It seemed to me that most of the scrubland identified on the Land Survey was impenetrable. I would estimate that only about 25% of the total area of the scrubland is reasonably accessible and I doubt very much whether informal user of such land is widespread.
8. There is a single narrow subsidiary track running through the scrubland on the western side (ie on the Briarfield Avenue side) of the main path as one walks towards the field. The access point off the path is by no means evident and it had to be pointed out to me. The subsidiary track runs through quite dense undergrowth and ends at the fence of 59 Briarfield Avenue. The main path itself is narrow and reasonably well worn.
9. Elsewhere on the western side of the main path the undergrowth is quite dense and mostly impenetrable. There is also a fairly large quantity of garden spoil and other rubbish which has been dumped around the perimeter of the scrubland at and towards the western end of the passageway running along the rear of the properties in TTC. There was also a quantity of rubbish dumped next to the fences of 65/67 Briarfield Avenue. Some of the fencing

erected by the objector in 2007 was still in place at this end of the track and garden waste had simply been thrown over it.

10. On the eastern side (ie on the Rosemary Avenue side) of the main path the position is somewhat different. The undergrowth is still fairly heavy but not nearly as impenetrable as it is on the other side of the main path. I observed less growth in the middle of this area and it is certainly possible to walk, with or without dogs, and for children to play or explore within this central area. Indeed, there are the remnants of a den at the back of the fence of 43 Rosemary Avenue which I gather had been made by youngsters in 2006. It is just about possible to see someone standing on the main path from this den where the undergrowth is relatively dense and difficult to negotiate on foot, although I dare say that it would be a good deal easier to see across to the fences of the properties in Rosemary Avenue in the winter months. Again, on this side of the main path, there are also remnants of the objector's 2007 fencing behind the features marked on the Land Survey as 'Delap Shed', 'Fishing Boat' and 'Dumping Ground'.
11. A little to the west of the area described in paragraph 10 above there is an open area around the Ash tree marked 40 (or T40) on the survey drawing. The ground in the vicinity of this tree is well worn and when I inspected the application site on 26/09/2010 (unaccompanied) a swing hung from a branch of this tree. When I made my second (accompanied) visit on 29/09/2010 a second swing also hung from the same branch, having been placed there in the meantime by (as I was later informed by Mr Phillips on Day 4 of the inquiry) two residents who had moved it from the Goat Willow at T118. The area around T40 is obviously well used and as one moves away from this tree in the direction of the bold line crossing the scrubland on both sides of the main path the grass was trampled down where there was another den made by children straddling the land on either side of the bold black line on the plan (ie being the boundary between the Red Land and the Green Land as per the applicant's plan at AB1/18). This den would not have been visible from the main path.

12. As previously indicated, as a result of evidence given for the objector by Steve Hancocks (their Development Director) and Anthony Wolton (their solicitor and partner in the firm of Edwards Duthie of Ilford), I returned to the application site for a third time (unaccompanied) on 30/09/2010. Put shortly, Mr Hancocks contrasted what he had observed on his earlier visits to the application site to what he saw on my accompanied visit on 29/09/2010. He said that on his earlier visits there had been less evidence of tracks leading off into the undergrowth on the eastern (or Rosemary Avenue) side of the main path and that this area had been less easy to walk through than was the case on my accompanied site visit when he said that the whole way across to the fencing at the rear of the properties in Rosemary Avenue was more open than it had been before. He also said that the subsidiary track leading into the undergrowth on the western (or Briarfield Avenue) side of the main path was more visible on the accompanied visit than it had been before when he had not even gone down the path as its point of entry had not been obvious. For his part, Mr Wolton also contrasted what he saw on the accompanied site visit with what he had observed on his earlier visits to the application site which he said was more open than it had been before and that grass had been freshly trampled down.
13. In the light of the evidence of Mr Hancocks and Mr Wolton I returned to the site for a third time and I observed new and old cuttings on the ground on both sides of the main path and my distinct impression was that some of the subsidiary tracks on either side of the main path were relatively recent.
14. To close on my description of the application site, I also observed (a) bench seating in 4 locations on the field (b) the remnants of a gateway which had been installed by the objector at the north east corner of the application land where it abuts the path running up the side of the bowling green, and (c) the fact that notices have been put up on the green and elsewhere encouraging individuals not to dump rubbish or garden waste on the paths running alongside the bowling green or in the field or around the WFBC.

History

15. By an Indenture dated 15/12/1910 (herein referred to as 'the 1910 Lease') (see OB1/tab 4(a)) a parcel of land falling between the border of the two dotted black lines on the applicant's plan at AB1/18 (ie running between the middle of the back fence of 41 Rosemary Avenue and the south east corner of 59 Briarfield Avenue) and the rear of 6-10 Dudley Road was leased by James Watts to Messrs Sisson, Garner, Bristow and Hughes to hold as trustees as (see first recital) *'a private recreation ground for the use of owners and occupiers of the properties comprising the Lessor's Manor Park Estate ...'*. The term of the lease was 99 years expiring on 29/09/2006 and the rental was fixed throughout the term at a nominal £6 per annum. A covenant to repair and maintain *'in good and substantial repair order and condition'* will be found in clause 4 and a limited building covenant permitting the erection of a *'dressing room or pavilion'* will be found in clause 6. At clause 7 there is a covenant which requires the trustees to keep the entrance gate locked from one hour after sunset until one hour before sunrise on the following day. By clause 8 the trustees covenanted to lay out two tennis courts on the land (with a provision for further courts if requested by the lessor – *'until the whole of the said land shall be required for the purposes of lawn tennis or other sports or games'*). Ultimately one asphalt and two grass tennis courts were laid on the application site. The applicant said that the asphalt court straddled the Red Land and the Green Land whereas the grass courts were put down on the Red Land. At one time there was a club house (or rather a shed) for the tennis club which would have been located on the Green Land.
16. Clause 9 is important in that it states that the trustees *'will permit the owners and occupiers hereinbefore mentioned to have the use and enjoyment of the said land for the purposes of recreation at all reasonable times during the said term subject to such bye-laws regulations and conditions as the trustees shall from time to time make with the approval of the Lessor'*.
17. By clause 10 the trustees are permitted to grant the use of the whole or any part of the demised premises to a club *'carrying on lawn tennis or other sports*

or games' and by clause 11 the trustees covenanted to keep the grass mowed and in good condition and also to deliver up the ground at the end of the term *'free from thistles nettles and rushes ant and mole hills and well rolled and in good condition'*. We also have covenants for forfeiture and quiet enjoyment in clause 13 along with extensive provisions dealing with the appointment of replacement trustees who qualify as owners or occupiers of dwellings on the Manor Park Estate or (as a final default provision) *'or other responsible person who is willing so to be appointed'*.

18. The WFBC was founded in 1922 (OB2/92).
19. By the early 1930s the southern end of the application site appears to be under cultivation. See, for instance, at AB1/11A and B (photos showing boys clambering around on a greenhouse) and 11C (another photo showing the allotment gardens taken from an upper window at 45 Rosemary Avenue). Graham Jardine said in his evidence that he had been told that these photos had been taken just before the last war. At AB1/11 we have a photo dated 1948 which is taken further back within the scrubland as it is today showing rows of potatoes with the large greenhouse behind. There are further photos of a Mr Jacobs digging on the land in the late 1950s and early 1960s (AB1/109 at 13/14). We then have an office copy of the filed plan for 63 Briarfield Avenue (OB1/236) which is, of course, an abbreviated version of the Ordnance Survey plan for the area although the survey date for this plan is unknown, yet someone has marked on it what could be the date October 1957 which would certainly be consistent with the foregoing photos. At any rate, this plan shows (starting at the Dudley Road end) a bowling green, two tennis courts, a pavilion building (which was the clubhouse for the West Finchley Tennis Club) and allotment gardens with the pre-war greenhouse still in situ on the ground behind what was then Nos.21/22 (now of course TTC) which fronted directly onto what was then the North Circular Road.
20. In his evidence Mr Mehemed said that the allotments had finished and the greenhouse and outbuildings had gone by around the mid-1970s. For his part, Mr Chambers said that although the allotments had fallen into disuse by the

mid-1970s (by which time the greenhouse and old tennis club pavilion had fallen apart – Mr Chambers says that all 3 tennis courts had fallen into disuse by around 1970-72 – in the minutes of the AGM of WFBC held on 27/02/1971 there is also a reference to the tennis club having *'Finished'*), 2/3 allotments were still being used but were overgrown by 1980. The position is slightly different in the case of the evidence given by Stanley Dell who says that in the late 1960s the tennis pavilion was destroyed by fire and that it was during the same period that the allotments ceased to be run as allotments. To complete the picture, the large wall which now separates TTC from the North Circular Road would have been built in around 1987 judging by what the applicant says about this in his statement (AB2/402).

21. The applicant says in a document headed *'Detailed Justification for Application to Register the Land as a Town or Village Green'* (AB1/10) that by the mid to late 1960s interest in the tennis club was waning. The land was flooded and the 1910 Lease trustees became concerned that they would not be able to meet their repairing obligations. He goes on to say that there was a meeting of local residents to decide whether or not the 1910 Lease would have to be surrendered, but this did not happen. He goes on to say that at this point the tennis club ceased to function and the clubhouse burned down and *'in about 1967 the Trustees disbanded. As a result the lease was effectively surrendered. The last group of trustees died many years ago'*.
22. Before the end of the public inquiry documentation was helpfully provided by the WFBC which is contained in OB2. It included extracts from minutes of meetings of that club's executive committee and AGMs between 1964 and 1985, bank statements from 2000, notices to members of the tennis club (1971/2), correspondence involving the bowling and tennis clubs, the bowling club's accountants and the landlord's agents between 1970 and 1985. Finally, there is a note dated 1998 which the applicant drafted and handed to WFBC. I shall return to this note shortly.
23. It is unnecessary to go into the documents in OB2 in excessive detail. What seems to emerge from this material is this:

- (a) During the 1960s WFBC was making payments to the 1910 Lease trustees in respect of their use of part of the demised premises.
- (b) By the end of 1970/early 1971 there were discussions between WFBC and the trustees with a view to the former taking over the administration of the whole of the demised premises from the trustees who were then Messrs Weston, Cartwright and Chambers. At that time WFBC were still paying a portion of the outgoings on the land.
- (c) In November 1971 the landlord's agents floated the possibility of a surrender of the non-WFBC land (ie the Red land) – the possibility of a forfeiture was hinted at because of the neglect of the tennis club land which by then had, to all intents, been disbanded and the trustees were without funds to remedy dilapidations. WFBC appeared loath to assume responsibility for the former tennis club land and after 1972 they and the trustees tried in vain to persuade the landlord to accept a surrender of such land and agree to a re-grant in the case of the land occupied by WFBC.
- (d) By 1980 WFBC was paying all the outgoings on the demised premises, including the annual ground rent. By 1985 the non-WFBC land was not being maintained in any meaningful way.
- (e) By letter dated 23/02/1985, Mr Weston, one of the 1910 Lease trustees, wrote to WFBC stating: (i) that he and a Mr R.Richards (a third trustee, a Mr E.Tuffey, having by then moved out of the area some years previously) wished to resign as trustees and were looking to be replaced by two nominees from within WFBC, and (ii) that the whole of the land, ie the premises demised under the 1910 Lease, (as he put it) *'is to all intents and purposes, the West Finchley Bowling Club'*. WFBC's response was to the effect (iii) that they were only interested in the land which they used (iv) that no one at WFBC was willing to put themselves forward as a replacement trustee of the 1910 Lease, and (v) that they had assured the landlord that they would not oppose development on land outside their own curtilage.

24. In 1985 the Association was formed by local inhabitants who were using the field but who wanted to do more to maintain it as an amenity.
25. In 1993 the Association brought earth moving equipment onto the land in order to clear up parts of it. Evidently they banked up soil on the scrubland to prevent vehicles from entering and fly-tipping. They also seeded the land (presumably within the field) with grass.
26. Between 1993 and 1998 the grass on the field was being cut by a local resident (a Mr Pearcey). He charged for this at what I think was a fairly nominal rate (possibly as much as £300 per annum) and he was paid for this work by the Association.
27. Following Mr Pearcey's death in 1998 the applicant wrote a note to WFBC (presumably on behalf of the Association) in which he sought a letter of support from the club to an application which was going to be made by a group of local residents for a grant (£1,800) from the Millennium Awards Commission to enable residents to purchase a sit-on mower and thus continue to cut the grass on the field on a regular basis, as well as make provision for the clearance of what is described as *'the top embankment and the planting of that area and the fringes around the embankment with wild flowers to enhance its appearance'*. At that time, the applicant noted that the embankment was covered in thistles and needed to be cleared. He went on to say that an application would be made for a grant *'as soon as the Bowling Club have given permission for the continued use and upkeep of the field by the residents ... The residents would wish to have close liaison with the Bowling Club to ensure that they were fully informed as to what works are undertaken, and to preserve the area clear of any rubbish or undesirable use ... To support the application a letter of the landowner is required which would confirm that the West Finchley Bowling Club as leaseholder authorizes the residents to maintain the field and implement the planting of wild flowers on the top embankment ... If the matter is to proceed for this year the residents need, as soon as possible, a letter from the Bowling Club authorizing the*

residents to use and maintain the field at the residents own cost over the next 18 months leading up to the year 2000'.

28. In 2000 the Association was formally registered with the London Borough of Barnet. See Constitution adopted on 11/05/2000 at AB1/217 which is evidently in the standard form approved by the London Borough of Barnet. The registration meant that the Association became a member of the Barnet Voluntary Service Council (see OB1/235D/E).
29. On 6/03/2001 the objector was registered as proprietor with title absolute of the WFBC land AND the Red Land for which it had paid £130,000 on 2/05/2000. The office copies, which will be found at OB1/tab 2, show that the land was taken subject to the 1910 Lease. The filed plan at p.23 shows the land which was purchased under title number AGL88313.
30. At OB1/tab 1 there is a clip of correspondence involving the Land Registry, the applicant's firm, McBride Wilson & Co (the applicant is an Assistant Solicitor at this firm), the objector's previous solicitors, Peters & Co, and the vendor's solicitors, A.L.Hughes & Co who acted for Teachers & General Investment Co Ltd.
31. The correspondence at OB1/tab 1 discloses that the applicant was at pains to point out to the Land Registry (this was a first registration) and the objector's solicitors that the objector's holding was in fact subject to the 1910 Lease which should be noted on the title along with (as the applicant put it in his letter of 9/03/2001 at OB1/1) *'all the recreational leases, which were granted out of this title ... which affect four other houses ... (and) granted rights of way and usage over the property to be registered ... The recreational leases we know about affected numbers 29, 31, 41 (the home of the applicant – whose recreational lease over land, which included the Red Land, is evidently dated 31/01/1913), and 57 Briarfield Avenue'*. To these addresses should be added 39 Briarfield Avenue (see Indenture at OB1/58).
32. At OB1/58/64 we have Indentures dated 31/12/1910 and 9/11/1910 for 29 and 39 Briarfield Avenue respectively. By these deeds, parcels of land at the end

of the gardens of these properties were leased to the owners of these properties by the same landlord in the case of the 1910 Lease (namely James Watts) to which reference has already been made in paragraph 15 above.

33. Evidently the leases affecting the garden land of numbers 29, 31, 39, 41 and 57 Briarfield Avenue were all in the same form. Put shortly, the rents were nominal and the terms expired on 29/09/2006 which mirrored the position under the 1910 Lease. Of relevance, in this instance, is the fact that these (garden) leases contained a covenant on the part of the landlord in the case of the parcel behind these properties, and thus included the Red Land, the effect of which was that such land would, during the currency of the lease, only be used *'for the purpose of games or other recreation under the restrictions and subject to the provisions of a Lease or Grant intended to be made of the same for such purpose for the benefit of the owners and occupiers of the properties lying immediately around the same and in the area bounded by .. etc'*, which, as we know, came to be dated 15/12/1910 and governed the rights of those living within the landlord's Manor Park Estate for a term ending in 2006. What we have then is a covenant restrictive of the user of the landlord's adjoining land in anticipation of a later lease which expired in 2006.
34. One also sees that on 25/04/2001 Dennis O'Connor, the club secretary of WFBC, wrote to the Land Registry saying that they (ie WFBC) were *'the long leaseholders of the lease dated 15th December 1910'* and they asked for an entry in the case of their lease to be made against the objector's title in relation to the Red Land. The applicant was obviously content with this situation in light of the contents of the McBride Wilson & Co letter dated 1/05/2001 (OB1/10). The vendor's solicitors had no objection to this either and accepted that their client's title to AGL88313 was subject to the 1910 Lease which would have to be noted on the register (see OB1/18). In the event, the objector's title was registered on 6/03/2001 subject only to the 1910 Lease (OB1/29). This was followed by cautions entered against the objector's title by the owners of numbers 29, 31, 41 (ie the applicant's home) and 57 Briarfield Avenue in support of their own leases containing covenants restrictive as to

the user of the land purchased by the objector. This caution was later cancelled (quite possibly because the objector was not on notice of the existence of the garden leases held by these properties at the time of its own purchase). It seems clear enough to me, however, that the local residents' user of the Red Land must have been governed by the 1910 Lease until 2006.

35. Before I close on the objector's acquisition of the Red Land and the WFBC land (in a transaction completed on 2/05/2000), I should also mention that the agents' particulars mention that the land (which was described therein as *'Bowling Club and Green and Wasteland (Previously tennis courts), Approximately 1 acre'*) was leased to WFBC for a term expiring in 2006 (OB1/245). Indeed, I was shown a letter dated 12/10/2010 (AB3/117) which was obtained by the applicant from the vendor who indicated that until the sale of the land at auction in April 2000 the ground rental of £6 per annum under the 1910 lease had been paid by WFBC. I was also told that the Association were actually outbid by the objector at the auction on 11/04/2000.
36. On 8/03/2004 the objector completed the purchase of the Green Land for which it is said to have paid £200,000. The land is registered under title number AGL90336 and a copy of the filed plan will be found at OB1/47 and is mirrored on the application plan at AB1/18. Both plans include the passageway running between 20/21 TTC (which the register notes is subject to rights of way – which fact is obviously not without significance on the *as of right* issue) and the passageway running parallel to the road at the rear of the dwellings running between numbers 14-22 TTC.
37. By a Deed of Surrender dated 14/02/2006 (see OB1/55) Dennis Nicholls and Dennis O'Connor (who, as members of WFBC, had been appointed as trustees for the purposes of entering into the Deed of Surrender and being the grantees of a new lease of the bowling club premises from the objector) surrendered the 1910 Lease. In light of the foregoing, I doubt very much whether any tenable objection could be taken to these individuals holding themselves out as (tenant) trustees of the 1910 Lease and that the surrender

was almost certain to have been effective in bringing about an end to a term which was going to end by effluxion of time anyway on 29/09/2006.

38. By a lease dated 14/02/2006 (AB1/33) the objector leased the WFBC land to the above-mentioned trustees for a term of 15 years expiring on 28/09/2021, although there is a break clause which would entitle the objector to determine the lease after 5 years on 28/09/2016. There is also a reservation entitling the objector to develop its adjoining land without exposing itself to any liability to WFBC.
39. The next development was the objector's application for planning permission dated 27/01/2007 (Registration Authority bundle – second tab) in which permission was sought to demolish 63 Briarfield Avenue and erect nine 4 bedroom houses within the curtilage of the application site, together with means of access and car parking. This application was refused under a notice dated 20/03/2007. One of the reasons given was that the proposed development would result in an unacceptable loss of valuable open space in an area of open space deficiency.
40. On 23/04/2007 the objector attempted to fence off the development site. The fencing erected was vandalized. A second attempt was made to fence off the land between 20-22/06/2007 when the objector successfully managed to fence (and gate) the boundaries on either side, namely (a) at the entry points to the alleyways running on both sides side of the bowling green (and it was evidently not long before the newly installed gates were vandalized – the remnants of which can still be seen today), and (b) on the southern perimeter of the scrubland (see OB1/119) although (and as I saw for myself on site from the remnants of such fencing as was still in situ) the objector actually fenced around the back of the car port or canopy that we can see in the photo at OB1/114. Attempts to obstruct access from the rear gardens of those properties which had direct access from their back gardens were evidently abandoned owing to vandalism.
41. The refusal of the local planning authority was appealed by the objector and I observe that the inquiry sat for 4 days on 14-16 May and on 3/07/2008. The

outcome was that the appeal was dismissed, the Appeal Decision being dated 20/08/2008. The inspector concluded in paragraph 41 of his decision that in his *'view the case turns on the loss of open space involved ... I believe this would amount to significant harm which would not be outweighed by the combined benefit of the new houses proposed and the mitigation measures of the Unilateral Undertaking'*.

42. Other parts of the decision letter were also very helpful, not least the description given of the site and the surrounding housing which the Inspector said was typical of north London nineteenth century terraced housing. He also noted (in paragraph 9) that *'approximately 60 houses back onto the land'*. I also agree with the Inspector's observation in paragraph 15 that *'the appeal site is essentially defined by the dwellings which surround it. The means of access into the land is narrow and confined and unlikely to be apparent other than to those who live in the immediate area. It is not without significance that the scheme necessitates the demolition of a dwelling in order to gain access to part of the townscape which is essentially enclosed. Taking account of both its past use and its present existence, I can understand and sympathize with the evident attachment which the neighbours feel for the land ...'*, a sentiment with which I too would agree. Incidentally, I was also interested to read in paragraph 31 that the *'goat willow'* in the centre of the Red Land was said to be *'in poor condition with less than 10 years left'*. My recollection is that this tree was in good health and had a substantial canopy of branches beneath which there was a picnic table and is doubtless a very nice spot indeed to sit with the children in the summer.
43. The correspondence shows that relations between local inhabitants and the objector deteriorated after 2004 and culminated in the fencing erected in April and June 2007. One sees that the objector corresponded with the owners of numbers 19, 20 and 22 TTC in 2005 to get them to remove items stored at the rear of their properties. The boat shown in the photo at OB1/114 belonged to a Mrs Jacobs at No.22 and a Mr and Mrs Kaminski at No.21 owned the garage at the end of the track – again shown on the right hand side of the photo at OB1/114 – who wrote to the objector on 3/11/2005 claiming to have

used the *'wooden garage & storage area'* at the back of their property since 1993. A firm of solicitors also wrote to the objector on behalf of the owner of 65 Briarfield Avenue (located at the end of the passageway running along the rear of the TTC properties) complaining about any attempt at fencing off at the rear of their property (OB1/135). In the early part of 2007 the objector again corresponded with (amongst others) the owners of 21 (Kaminski) and 22 TTC (Jacobs) and Nos.43 and 65 Briarfield Avenue asking them to clear the land so that it could be secured by fencing. In the event, and as already explained, fencing work took place in April and June 2007. By 14/09/2007 the objector's solicitor was writing to Mr Jardine at 45 Rosemary Avenue complaining that fencing around the site and *'signs confirming that this property is private land'* had been damaged or removed *'by persons unknown'*.

44. To complete the picture, on 9/02/2010 the objector again applied for planning permission to erect 2 x two-storey dwellings and 1 x single-storey dwelling with associated landscaping and car parking within (in effect) the Green Land which was said in an accompanying plan to be 0.18 ha (and included the passageways at the rear of the dwellings in TTC). The application was also refused by way of a Decision Notice dated 26/03/2010, essentially because *'the proposed development would result in an unacceptable loss of valuable open space'*. The documents relevant to this application will be found in the fourth tab in the Registration Authority's bundle.

The application to register

45. On 13/02/2008 Mr Chetin Malyali (acting on behalf of the Greensquare Residents Association) applied under section 15(4) of the Commons Act 2006 to register the green as a TVG. The application number allotted to the application by the registration authority was LLC/MM/004/08.
46. The application was in the prescribed form 44. The application form contained the following entries:
- Question 1: the form was addressed to the London Borough of Barnet.
 - Question 2: Mr Malyali gave his name and address as applicant.

- Question 3: was left blank as he was not acting through solicitors.
- Question 4: the application was based on the Commons Act 2006 s.15(4) on the basis that on 4/04/2007 notices were placed on the land by the objector 'prohibiting continuing recreational use'.
- Question 5: the green was stated to be usually known as '*Greensquare Field, formerly known as the Manor Park Estate Recreation Ground*', whose location was said to be '*open space bounded by Briarfield Avenue, Tangle Tree Close, Rosemary Avenue and Dudley Terrace, Finchley N3. Ordnance Survey Map Reference TQ259OSE*', and a map was attached (AB1/18), whereon the application land was shown edged red.
- Question 6: the relevant locality was stated to be Finchley Church End Electoral Ward and the applicant was relying upon a neighbourhood within that locality which was described as follows: '*Briarfield Avenue, Tangle Tree Close, Rosemary Ave and Dudley Terrace. The housing estate was built between 1904 and 1910. All the homes share recognizable architectural features. The neighbourhood has its own residents association and Neighbourhood Watch scheme*'. There was a neighbourhood map attached to the application which will be found at AB1/19.
- Question 7: the justification for the application was said to be qualifying recreational use by local inhabitants ever since the estate was built approximately 100 years ago. It is said that in the case of the Red Land, user had been *as of right* notwithstanding the existence of the 1910 Lease; alternatively, that the lease had been surrendered in about 1967. The application was accompanied by the document at AB1/10-17.
- Question 8: identified the objector as the landowner.
- Question 9: was not relevant (dealing with voluntary registration).
- Question 10: the application was accompanied by the documents in the attached index.

47. The application was publicized by the registration authority in accordance with the regulations (*The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007*). The publicity notice invited objections and the only objection received was from the objector.
48. The main points taken by the objector in its undated notice of objection received on 30/07/2008 (AB1/133) were as follows:
- Sufficient qualifying user was accepted in the case of the Red Land although because of the existence of the 1910 Lease until 2006 (which the objector denies was ever surrendered by operation of law) such user could not have been exercised by local inhabitants *as of right* within the meaning of section 15.
 - In the case of the Green Land the objector did not accept that there had been sufficient user by local inhabitants for the purposes of LSP during the relevant period of 20 years as a matter of fact to justify registration; and/or that such user as there had been would have brought the existence of the claimed right to the attention of the landowner.
 - The objector did not raise any issue on locality or neighbourhood.
49. After being instructed by the registration authority I gave directions on 26/05/2010 dealing with procedure at the inquiry which was held over 5 days at Hendon Town Hall between 27-30/09/2010 and on 22/10/2010.
50. Representation at the public inquiry was as follows:
- Jeremy Phillips, of counsel, appeared for the applicant.
 - Morag Ellis QC appeared for the objector.
51. I would like to thank the parties' representatives for their very careful and helpful presentations of their respective cases. I would also particularly like to thank Poonam Rajput of the Registration Authority who made all the administrative arrangements for the inquiry with great efficiency.

New greens: law and procedure

52. Section 15(1) of the Commons Act 2006 enables any person to apply to the commons registration authority to register land as a TVG in a case where subsection (2), (3) or (4) applies.
53. Section 15(4) applies where:
- '(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) they ceased to do so before the commencement of this section; and*
 - (c) the application is made within the period of 5 years beginning with the cessation referred to in paragraph (b).'*
54. In this instance, as (a) section 15 came into force on 6/04/2007 (b) the objector's notices went up on (as is claimed in the application) 4/04/2007 (at which point user would have been non-peaceable and thus not as of right), and (c) the application was made on 13/02/2008, the application under section 15(4) is made out and was not challenged at the inquiry.
55. ***a significant number***

This term has never been defined but in *R v Staffordshire County Council, ex parte Alfred McAlpine Homes Ltd [2002] EWHC 76 (Admin)* Sullivan J (as he then was) said (under the heading *'My Conclusions'*) that *'significant'* did not mean a considerable or a substantial number. He said that the correct answer *'is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers'*. It is, therefore, very much a matter of impression from the evidence whether the usage relied on is by a *significant number of the inhabitants of any locality or of any neighbourhood within a locality*.

56. In short, where the locals' user is insignificant, in the sense that it is trivial or sporadic, then it is unlikely to be qualifying use. The sufficiency of the claimed user is an issue of considerable importance in this case.
57. ***the inhabitants of any locality, or of any neighbourhood within a locality,***
- The law requires those using the application site to be a significant number of the inhabitants of either a locality *or* any neighbourhood within a locality. The term locality evidently has different meanings in limbs (1) and (2). A limb (1) locality must be a legally recognized administrative division of the county whereas a limb (2) locality does not have to be as narrow as this and can include a community with definite boundaries which is not known to the law (see *Leeds Group plc v Leeds City Council [2010] EWHC 810 (Ch)*, a decision that is currently under appeal).
58. A neighbourhood, on the other hand, need not be a legally recognized community but it must still be an area with a sufficient degree of cohesiveness and a housing estate would certainly come under this head if it had some degree of cohesiveness (see *Cheltenham Builders Ltd v South Gloucestershire District Council [2003] EWHC 2803 (Admin)*). The answer to this question is plainly one of fact.
59. In the *Leeds* case the court also held that an electoral ward was capable of being a locality. On any footing, an electoral ward is an administrative area known to the law. It is true that in *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578*, at para 138, Sullivan J was not inclined to accept that an electoral ward was a locality, although the outcome in that case did not turn on this issue. My own view is that I am *not* bound by what was said about this in the *Laing Homes'* case and I propose to follow the *Leeds* case. Accordingly, it follows that a locality, embracing as it does current local government boundaries, would include electoral wards.
60. In this case, no issue was taken by the objector with the applicant's choice of locality or neighbourhood within a locality (see paragraph 43 above, under

Question 6) and it seems to me that this was the correct approach in the circumstances.

61. ***as of right***

The term *as of right* involves statutory prescription which is the legal process by which long use of another's land is converted into a legal right to use the land. In the context in which it arises (ie in the case of private law easements, inferring dedication as a highway and TVGs) 20 years uninterrupted user *as of right* will usually suffice to lay claim to the right in question.

62. The applicant must show that he has used the right as if he were entitled to it. What it traditionally comprehends is user which is not by force, stealth or with the express or implied license of the landowner. The essence of the rule is that for at least 20 years the landowner has acquiesced in the claimed use as in an established right and the landowner cannot be regarded as acquiescing unless the user would appear to the reasonable landowner to be an assertion of the right claimed (see Lord Walker at [36] in *R (Lewis) v Redcar and Cleveland Borough Council & Persimmon Homes (Teesside) Ltd* [2010] UKSC 11).

63. User *as of right* will be precluded in any case where it is exercised pursuant to a legal right. In *Beresford v Sunderland City Council* [2004] 1 AC 889, Lord Bingham said at [3] that, in the context of TVG law, user *as of right* does not mean that the inhabitants should have a legal right since the question is whether a party who lacks a legal right has acquired one by user for a stipulated period.

64. Permission can be express or it can be implied but permission cannot be implied from inaction or acts of encouragement by the landowner. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence and will not preclude *as of right*.

65. In Megarry & Wade – '*The Law of Real Property*' – at 28-059, the following is stated: '*At common law any consent or agreement by the servient owner,*

*whether oral or written, rendered the user precario. It made no difference how long the user was in fact enjoyed under it and not under a claim to use as of right'. Elsewhere in the same text at 28-038 it is stated: 'User under license is of course permissive, whether or not there is a contract or annual payment'. An authority close to the present facts is that of *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 which involved user of a way for at least 70 years with 15 shillings being paid each year for use of the way, such payment being inconsistent with enjoyment *as of right*. Further, in *Healey v Hawkins* [1968] 3 All ER 836 Goff J stated at p.841D 'that once permission had been given the user must remain permissive and not capable of ripening into a right, save where the permission is oral and the permission has continued for forty or sixty years, unless and until, having been given for a limited period only, it expires, or, being general it is revoked or where there is a change in circumstances from which revocation may fairly be implied'.*

66. *in lawful sports and pastimes*

This term was considered in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2001] 1 AC 335 at 356/7, where Lord Hoffmann said that it was '*not two classes of activities but a single composite class ... As long as the activity can properly be called a sport or a pastime, it falls within the composite class*'. He also said at p.357 that he agreed with Carnwath J. in *R v Suffolk County Council, ex parte Steed* [1995] 70 P & CR, 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. In practice, therefore, use of the application site for dog walking, children's play and general informal recreation will normally suffice as qualifying user under section 15. It will not though include walking of such a character as would give rise to a presumption of dedication as a public right of way (*Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at paras 96-105) – the *Oxfordshire* case (on appeal in the House of Lords at [2006] 2 AC 674).

67. ***for a period of at least twenty years***

In the case of an application under section 15(4), the period of 20 years is the period immediately before the cessation of the qualifying use.

68. ***The effect of registration***

There are 3 main consequences: (a) land becomes a new green only when it is registered as such; (b) registration as a new green confers general recreational rights over the green on local people; and (c) registration as a new green subjects the land to the protective provisions of section 12 of the *Inclosure Act 1857* and section 29 of the *Commons Act 1876*, which in practice preclude development of greens.

Determination of the application

69. The regulations provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the registration authority can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, whereby the registration authority appoints an independent Inspector to conduct a non-statutory public inquiry into the application and to report whether it should be accepted or not. In some cases, procedural fairness will make an oral hearing not merely an option but a necessity. In *R (Whitney) v Commons Commissioners [2005] 1 QB 282*, it was held that the procedure by non-statutory public inquiry did not infringe art.6 of the ECHR because any decision of the registration authority is subject to review by the courts.

Procedural issues

70. The onus lies on the applicant for registration.
71. It is no trivial matter for a landowner to have land registered as a green and all the elements required to establish a new green must be '*properly and strictly proved*' (*R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111 per Pill LJ*, approved by Lord Bingham in *R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2*).

72. There is no obvious reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.
73. It was held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form. The issue for the commons registration authority is whether or not the application land has become a new green and is clearly a matter of fact and degree for the registration authority which has to weigh up all the evidence and decide whether it satisfies the criteria for registration.
74. It was also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is established that part but not all of the application land has become a new green. Mr Phillips has helpfully referred me to the decision of the Commons Commissioner A.A. Baden-Fuller *In the Matter of Gleaston Green (Ref No:20/D/3)* in which it was his view (in an application made under the Commons Registration Act 1965) that, notwithstanding that part of the land was a '*swamp and tip*' and hence unsuited to for sports and pastimes, the definition of TVG in section 22 did not require him to limit the land to which the application applies to the exact area on which sports and pastimes are actively indulged and that it could include '*all the surrounding area of land which can fairly be described as the same piece of land*'.
75. In the *Oxfordshire* case it was said by Lord Hoffmann at para 61 that '*the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is to deal with the application and the evidence as presented by the parties*'.

Evidence for the applicant

76. I deal firstly with the oral and written evidence of those who attended the inquiry. I shall then turn to the written evidence of those who did not attend the inquiry. However, because recreational user is accepted in the case of the Red Land and as no issue arises in this case on locality or neighbourhood , the oral evidence was confined largely to user in relation to the Green Land. It

therefore becomes unnecessary in my summary of the evidence to cover the evidence on the locality/neighbourhood issue or otherwise deal with the evidence of user advanced by the applicant and his supporters in relation to the Red Land, that is, to the extent to which it can be distinguished from the evidence which is specifically in relation to the Green Land. The same applies in relation to the issue of surrender on which the applicant was cross-examined in some detail but which was abandoned by Mr Phillips in his closing submissions.

77. **Chetin Malyali** (the applicant)

He has lived at 41 Briarfield Avenue since 1983 and his statement is at OB2/400. The applicant tells us that he is the Secretary of the Association which was formed in 1985 (Graham Jardine is the Chairman). In his written evidence the applicant says that the Green Land is less open and contains trees, including a number of fruit trees, but also some dense brambles cut through by a path. He says that for many years a swing *'was'* tied to one of the larger trees *'and the portable bench and table were under the large trees'*, which was not the case when I inspected the Green Land. He also says that properties backing onto the application site *'were built with integral rear access directly onto the field through gates at the end of their gardens'* which is something that I could see for myself in those places where the undergrowth was not impenetrable around the perimeter of the application site. The applicant also asserts that the 1910 Lease *'was effectively surrendered'* in around 1966 when the ground rent was paid by WFBC once the *'Trustees .. gave up their position and disbanded'*.

78. The applicant says that earthworks were carried out in 1993 to clear the land and make it *'more accessible'*. Benches and football posts were also placed on the field in 2000. The green is maintained by the Association and communal events are held there every year. Although he knew of the application site and had played there with a friend as a child before he went to live in Briarfield Avenue in 1983, he mentions a number of activities which have taken place there. In the case of the Green Land, he mentions (and

when cross-examined about this he said that he had observed the following activities taking place thereon) blackberry picking, fruit picking, bird watching, flower picking, picnicking, walking, tree climbing, bonfires, firework displays, dog walking, rope swinging, camping and den making by children. He also mentions a seating area under the trees and children's swings. He also says that the local cub and scout group have used the Green Land for camping, evening activities and badge work and that it would have been apparent to the landowner that these activities (which continued unhindered until April 2007) were taking place on the Green Land.

79. In chief he said that there was always a rope or a tyre tied to the tree '*at various times*'. He also mentions that a bench was on the Green Land (ie beneath the tree which held the swing) from time to time. He says that his children have played on both sides of the main path on the Green Land. He says they used to climb trees and also made dens at the back of 45 Rosemary Avenue. He says that the scouts also collected firewood from the Green land. In short, he says that children used the land, mainly the children of his neighbours whom he recognized. He said it was '*a draw for children to come there*', although it was not entirely clear whether he was referring to the Red Land or the Green Land or both. I suspect it was probably the latter.
80. When cross-examined he said that mowing, maintenance and tidying up took place within the open ground within the Red Land '*but everyone was using the whole of it*' (ie the Red Land and the Green Land). He also said that all the communal functions took place on the Red Land and that functions could not be held on the Green Land. He also conceded that none of the photos produced in support of the application to register showed anything happening on the Green Land and that the majority of the open space on such land has consistently been under T40. He recalled that the first time he swung his own child on that tree would have been in 1996/97. When asked what else he had done on the Green Land he said that he had (a) picked flowers by the main path (b) seen birds on the Green Land by the path (c) had been into the undergrowth to look for foxes (which he said he had done a couple of times)

and (d) had picked fruit (from pear, damson and apple trees) and blackberries in season.

81. Helen Jacobs

Mrs Jacobs has lived at 22 TTC since 1964. Her two statements will be found at AB2/483 and 486. She says her sons used to play on the application site when they were children (which was over 20 years ago). On the Green Land they would climb trees and pitch their tent to play Cowboys and Indians and have *'little picnics'*. She also says that she would exercise her dogs every morning *'across both Land 1 and 2'* (she does not have a dog at the moment). In her second statement she says the greenhouse shown on the photos at AB1/105-108 was in a state of dereliction in 1964: *'The glass was all broken and only some of the foundations remained. Over the years that got covered over as well'*.

82. In her oral evidence she said that she went into the *'wood'* with her dog. I believe that she meant that she went as far as T40 where the ground is admittedly more open than elsewhere on the Green Land. She also says that she picked blackberries and damsons on the Green Land. When cross-examined she said that her dogs would *'sniff about'* near T40. She would be with them as they did this. When asked about the swing (which she says was put up by Mr Kaminski at 21 TTC) she did not think it had been there the whole time in the period 1997-2009 when her last dog had been alive. She says that she cut back the brambles along the path going through the Green Land. Evidently the boat shown on OB1/114 was hers and had been there for over 20 years. She also spoke of a patch of bluebells near to the boundary with 42/44 Rosemary Avenue where she walked with her dog on *'a little pathway'*. She accepted that the Green Land had got a bit more overgrown with saplings on its north eastern side but on the south west side it was *'not that much different in terms of undergrowth'* where, as I have already indicated, it is largely impenetrable.

83. Roman Bogucki

Mr Bogucki has lived at 24 TTC since 1968. His statement is at AB1/417. He says he uses the Green Land *'quite a lot'* to pick apples, blackberries and plumbs which can be picked on the main path which used to be wider. He said that more than 20 years ago you could actually drive on the main path. He also said that you can go 2/3 yards into the scrub to pick plumbs (north east of T29). He says he walked his dog on the main path and his dog ran *'everywhere'*. He says he walks *'there practically every day now'*. In his oral evidence he did not say where he walked every day and as a matter of common sense Mr Bogucki (who is in his 70s) was very probably referring to his use of the main path. I judge this to be the case in view of what he says in his statement, namely that he walks *'across Land 2 and Land 1 and then back again'*. In his statement Mr Bogucki also speaks of making plumb jam and apple juice and how the Green Land is *'a real bird sanctuary'*.

84. David Kaminski

Mr Kaminski has lived with his family at 21 TTC since 1992. His statement is at AB2/494 in which he says he walks his dog daily on the Green Land. He also mentions fruit picking in this area (plumbs, pears, apples and blackberries). He also said that a neighbour's daughter used to tether her horse to the trees at weekends on the Green Land although in his oral evidence he said that the horse was actually tethered on the Red Land and that this only occurred for a *'year or two'* in the early 1990s. In his oral evidence he also said that *'you would be surprised how many fruit trees there are'*. He said his son built his first camp in the *'dense vegetation'*. He mentioned that the objectors' fencing came down within 3 or 4 weeks of being erected – he says it was pulled down *'by children'* although a lot of it is still there. In chief he said that the north east part of the Green Land had become much more overgrown in the last 5 years although in his cross-examination he said that *'inside it is very much more open'*.

85. **Joseph Croucher**

Mr Croucher lived with his family at 43 Briarfield Avenue between 1974-92. His statement is at AB2/443 and deals mainly with his family's user of the open area within the Red Land although he does say that his family picked blackberries, plums, pears and apples which is presumably (at least for the most part) a reference to activity on the Green Land. In his oral evidence he says that the Green Land was overgrown in 1975 although children used it for camps and picking fruit. His own children (now grown up) played on the Green Land.

86. **Michael Cunningham**

Mr Cunningham (now in his 50s) grew up at 13 Rosemary Avenue (which backs on to the bowling green) and since around the mid 1980s has lived with his family at No.44 which lies across the road. His statement is at AB2/445. His own use of the application site would have been between 1967 and 1983, mainly until 1974. In his case, it was, I think, mainly playing in the trees and sporting activity with other local boys. He particularly mentions a Mr Lloyd placing a set of goal posts which remained for many years. He says his own children (aged 17/19) used the application site when invited to communal activities although he says that they did not spend much time there. He said that he walked his dog on the application site in the period 1997-2000 although he mainly kept to the paths.

87. **Mrs Desiree Artesi**

Mrs Artesi has lived at 31 Rosemary Avenue since 2003. Her statement is at AB2/407. She also filled in the evidence questionnaire at B2/411. In her statement she says that she and her family has used the Green Land for recreational purposes which, judging by her written and oral evidence, would appear to be confined to when her twin teenage boys (now aged 16) used to climb the trees and when she and her children pick up fruit which she said happens '*sometimes but not very often*'. She said in her oral evidence that she does not go there frequently although she says that from an upstairs

window she *'can see people playing in the less dense area of the green land'*. She sees people walking on the path and in the spring and summer children are there picking fruits and using the swing.

88. Gianfranco Artesi

He is the son of Mrs Artesi. His statement is at AB2/416. Although only 16, Gianfranco gave his evidence with considerable confidence and maturity. In dealing with the Green Land in his statement (which he typed up himself) he said that he used to play on the swing and climb the trees, pick blackberries and play hide and seek in the bushes. In his oral evidence, he conceded that it was only in the past when he went onto the *'green'* land. The last time he was on the field would have been in 2009 or early 2010.

89. Suzanne Fitzgerald

Mrs Fitzgerald and her family have lived at 61 Briarfield Avenue since 2002. Her lengthy statement is at AB2/459. In relation to the Green Land (which the rear of her property abuts) she says her son (now aged 10) plays there with his friends (he has never played there unsupervised which is something he started to do in 2004). Her step-daughter (now aged 19) used to climb over the back fence and find a way through the brambles to the field. Both children played on the swing. In her oral evidence she said that she walked her dog on the main path through the Green Land. She has also picked blackberries twice on the Green Land. She also picks apples that have fallen to the ground from the Bramley apple tree which is just the other side of her back fence at T130. She said her step-daughter and her friend from No.63 felt it daring and exciting going into the Green Land over the fence at the end of her garden.

90. Mr Senar Mehemed

Mr Mehemed (who is aged 45) lives at 28 Tangle Tree Close. It was where his parents lived and where he grew up. He lived at 27 TTC between 1988-2007 but moved back to No.28 on his mother's death. No.27 has now been sold. His statement is at AB2/501. As a child (and he would have been aged 18 in 1983) he played on the Green Land (the *'woodland area'* as he calls it) and he

mentions making dens, climbing trees and playing on the swing. He recalls the allotments and the outbuildings (including the greenhouse) on the Green Land which he says were gone by around 1976-78 (in his oral evidence he said that the allotments *'finished in around the mid-1970s'*). He walks on the Green Land every day with his dog and also picks fruit, especially blackberries which he says he takes around to Helen Jacobs so that she can make jam. In his oral evidence, he said that he also played war games and cowboys and Indians on the Green Land. They also used to play hide and seek in the area of the trees numbered T62-64. He says he has been in every part of the Green Land and has seen dogs running around there. As the undergrowth has become more dense he can no longer use *'every bit of the area'* but his *'dog will cut in, not me'*. As the area around the trees numbered T26, T41 and T45 is clearer, he *'currently'* uses this area. He says that you can go across to the fencing on the Rosemary Avenue side which is not as dense *'but it is a bit of a trek'*. In general, he says that his dog runs in and around the Green Land and investigates: *'I don't go in with him'*, although in cross-examination he said that he followed his dog *'in and around'*. He conceded though that he usually watched his dog from the main path. He says he sees children on the Green Land and also sees them using the swing. He says he knows the children who play there and recognizes them as being local and he mentioned the children of Mr Malyali and Dr Hine. He says the Green Land is less dense in the winter months and that he makes use of the land every day.

91. Stuart Chambers

Mr Chambers lived at 29 Briarfield Avenue with his parents between 1962-86. He continued to use the application site until 2007 when his mother moved to Bath. His statement is at AB2/430. Mr Chambers (whose father – who died in 1992 – had been a 1910 Lease trustee although he had no idea whether anyone had succeeded him or Mr Weston who had been a co-trustee with his father) also gave useful historical evidence about the demise of the allotments, greenhouse and tennis courts which has already been explained

in paragraph 19. He also mentioned the old tennis club pavilion which he said would have been on the Red Land.

92. **Gerald Dell**

Mr Dell lived at 49 Briarfield Avenue between 1961 and the late 1960s. This property had a back access directly onto the Red Land. In 1971 he moved to 5 Rosemary Avenue where he says his 7 children grew up. He left this address in 2006. His statement at AB2/453 speaks of recreational user on 'areas 1 & 2' without going into any detail about what actually took place on the Green Land. Of interest is the fact that Mr Dell mentions that in the late 1960s the tennis pavilion was destroyed by fire and during the same period the allotments also ceased to be run as allotments. In his oral evidence he says that children played 'mostly' on the Green Land where there used to be an old Anderson (or WWII air raid) shelter where they made a camp. I think this would have been before he lived at Briarfield Avenue as he says that as a child he used to go and play with those of his school friends who lived in the nearby streets. When cross-examined Mr Dell told us that his three sons were born in 1981/83/85 and no doubt they would have been playing on the application site in the late 1980s/early 1990s. His four other children were girls and were older. The eldest left home aged 29 in 1992 and by 1987 would have been a grown woman. He said that his boys spent more time playing on the Green Land where they had their own 'little domain' which was a 'convenient place not to be seen by adults – I think they felt safe up there'. Mr Dell's statement is at AB2/453.

93. **Margaret Long**

Mrs Long lived with her husband and two sons at 55 Briarfield Avenue between 1978 and 2009. In 1978 her sons would have been aged 7 and 9. By 1987 they would have been 16 and 18 (one was at work – presumably the eldest – and the other was at home) and thus probably too old to be clambering around in trees or playing hide and seek in the wood which they no doubt would have done when much smaller (in fact they 'favored' the Green Land). This was addressed in cross-examination when Mrs Long

conceded that her sons would have played on the Green Land until the mid-1980s. Mrs Long's statement is at AB2/497.

94. **Sophie Cantopher**

Sophie is aged 17 (having been born in 1993) and her statement is at AB2/428. She has lived at 47 Briarfield Avenue since 1997 with her parents and twin brother. She says that she and her brother played on the Red Land on most days in the summer. In the case of the Green Land she says that the boys (a number of whom she mentioned by name) built a den close to the fence of 45 Rosemary Avenue. She also said she had played on the swing and was allowed out on her own on the application site once she was 6/7 (ie from around 1999 onwards). In cross examination she says she picked plums on the Green Land (*'in the southern scrubby bit'*). She says she has also picked blackberries on the Green Land whilst on the main path and has seen others doing the same. Until she was 10 (until 2003) the main path was narrower than it is today but she could still get through although it was more *'daunting for a child'*. She only visited the den built by the boys twice which she thinks could be seen from the path. By the time she was 12 the Green Land was less interesting. She says that the position on the ground today is *'more or less the same'* as it was 7-10 years ago but it was *'a little less dense in the middle on the left hand side'* (ie on the Briarfield Avenue side) which is now virtually impenetrable. She also says that she sees dog-walkers on the application site *'daily'* but does not say that she sees people walking on either side of the main path on the Green Land. This would be difficult as her home overlooks the Red Land and I doubt whether she can see (at least from where she lives – in fact she says that she cannot even see the Green Land from her house) anything other than people emerging from the main path into the field. She actually remembers seeing Mrs Jacobs (amongst others) and her dog Mutley doing this.

95. **Catherine Kelly**

Ms Kelly has lived at 45 Briarfield Avenue since 1997. She has three children aged 13, 11 and 8. Her statement is at AB2/581. In her statement she says

that for many years there has been a swing tied to (as she puts it) one of the larger trees beneath which there was a picnic bench and large table (which in her oral evidence she said used *'to move around a bit'* and which she said would sometimes be on the Red Land). I am fairly sure that this is a reference to T40. Even if it is, it is perhaps worthy of note that a picnic table is shown in the photo taken by the objector's arboricultural and landscape consultants (Tim Moya Associates) in (as I was told) April 2008, a picnic bench can be seen beneath a tree located well within Land 2 but of course the photo post-dates the date in April 2007 when the objector placed its notice on the land *'prohibiting continuing recreational use'* from which date any user would have been non-peaceable and thus non-qualifying for TVG purposes (see AB3/112a). In para 33 of her statement Ms Kelly sets out a number of recreational activities which she and others have carried out within the Green Land, including, amongst other things, bonfire parties and firework displays which in the case of the latter she said in cross-examination actually took place within the Red Land as it clearly had to have done. Her statement also mentioned bird watching on the Green Land but again when cross-examined it was evident that any bird watching took place from her back window rather than on the land itself.

96. In her oral evidence Ms Kelly spoke about the wildlife within the Green Land which her children would explore (she said there were foxes in the region of T98/T99 which lie on the boundary with WFBC and thus nowhere near the Green Land). She says they picked apples and blackberries both on and off the main path (*'we pushed the brambles down with a stick'*). She said dogs would run around on the Green Land. Her husband also put up a bat box in a tree which I was not shown. When cross-examined she said that her children were not initially allowed on the Green Land on their own. Her eldest child, Saskia, was only allowed out on her own in 2002/03, when she was 5/6. Further, when it came to picking fruit she said that this mainly occurred on the path running through the Green Land and, of course, only in season. In relation to the scouts on their field trips within the Green Land, she doubted whether they went into the dense vegetation. Finally, she mentions that in

1998 there was a mass clear-up. The brambles were cut back *'in the open space by the swing tree'*. Garden waste dumped on the land in the region of the fencing at the rear of 47 Rosemary Avenue was removed. Benches were put down in the vicinity of the main path leading into TTC. Wild flowers were also planted on the Green Land and its boundary with the Red Land was also *'tidied up'*. She claimed that the wild flowers were intended as a *'buffer-zone to prevent balls going on to the brambles'* which evidence made better sense when she said that such planting took place *'more on'* the Red Land.

97. **Graham Jardine**

Mr Jardine (who is Chairman of the Association) has lived at 43 Rosemary Avenue for 21 years although it would have been less than 20 years in April 2007 (this property has had no rear gate leading into the Green Land since 1992). His statement is at AB2/493. He tells us that a programme of works funded by the local residents included the widening of the main path. He does not say when this was or what condition the Green Land was in at the time. In his oral evidence he was asked about the photo at AB1/110 at 17 which showed someone clearing the brambles (on the initiative of the Association) back from the sides of the path (the date is 2000). This individual is almost certain to be standing on the Red Land. The point is that Mr Jardine says that there are pathways leading into the Green Land to the left of the photo. When I inspected the land there were admittedly one or two paths leading around towards the rear of 57-59 Briarfield Avenue but they were overgrown and not readily apparent and I suspect that they were not being used very often. He says that since 2007 the Green Land has been used less.

98. In terms of activities taking place on the Green Land, he says that in the last 10 years there have been 2 Easter egg hunts which have taken place on the Red Land and the Green Land. He also mentioned a den being built just behind his garden fence and the current den on the boundary of the Red Land near to T40 where I observed for myself that a good deal of undergrowth had been trampled down in the process of building this den last summer. It also appears that the remnants of the old greenhouse and its contents were

removed and/or buried (I am not sure which it was) in a clear-up which took place on the Green Land in 2001/02. He said that the *'very reason (the Association) had come into being (in 1985) was to spruce up the land and widen the pathway to enable a JCB digger to come in'*. It was at around this time that the alignment of the main path changed to its current location. It had previously run in a straight line from the end of the track leading between 20/21 Tangle Tree Close. There is nothing to show that this had been the case nearly 20 years ago. The aim had been to keep out travellers who might otherwise have spotted an opportunity when looking up between the houses from the road. Mr Jardine also says that there has been a great deal of growth since 2007. He says that the Rosemary Avenue side is now *'fully accessible'* whereas the Briarfield Avenue side *'has become more restricted'*.

99. **Karen Malyali**

She has lived with her husband, the applicant, at 41 Briarfield Avenue since 1985. Her statement is at AB2/499. It is somewhat thin when it comes to activity taking place on the Green Land although she does mention the building of tree houses. In her oral evidence she says that the land *'at the top of the field'* is a brilliant place to run around in. She says that the land opens up on the Rosemary Avenue side of T40 and is a *'fantastic place for children to play in'*. She says her children and their friends would play there. She also believes that the Scouts have used it. She has also seen people picking blackberries.

100. **Mr Orazio Sgambati**

He and his wife have lived at 17 TTC since 1997. They now have three young daughters. His statement is at AB2/509. Mr Sgambati is a local man and played on the application site, and especially within the Green Land, as a boy until (as he said in his oral evidence) 1983. Although his children have played *'in the trees and bushes of the orchard'* the bulk of his statement deals with communal activities taking place on the Red Land. No.17 has a rear gate which opens directly onto the Green Land. He said that whenever there were parties taking place on the Red Land the children, including his own children

(now aged 10, 11 and 12) would run off and hide within the Green Land and play in one of the camps there.

101. **Robert Goodliffe**

Mr Goodliffe has lived in 3 Dudley Road since 1980. His statement is at AB2/469. He mentions picking fruit on the application site with his children in the 1980s and practicing Tai Chi on the Red Land. In his oral evidence he said he exercised his dog on the application site in the period 1999-02. In relation to fruit picking, he said this was seasonal and *'you had to barge your way through – you had to be careful with brambles'*. He said he went in *'possibly 10 yards off the track on both sides'* of the pathway.

102 **Damian Cannon**

Mr Cannon has lived at 18 Dudley Road since 1994. He has two children aged 10 and 11. His statement is at AB2/419. He says that he walked *'through the areas marked 1 and 2'*. He says that *'on many occasions'* he would take his children there and his reference to climbing trees is no doubt a reference to the Green Land. In his oral evidence he said that when his children were younger he would sit on a bench on the Red Land and his children would play on either the Red Land or the Green Land and use the swing. It was evidently only in 2009 that they started going to the application site on their own. He also walked his dog through the Green Land between 1994-99. The dog would run into the scrubland on either side of the main path and would sometimes have to be retrieved.

103. **Elizabeth Murphy**

Mrs Murphy has lived at 15 TTC since 1976. Her daughter is now aged 27. Her statement is at AB2/506. In it she says that she has walked from the back of her house to the WFBC where she is a member. She says there was usually a neighbour walking a dog or children playing on the green. Evidently her daughter tethered a horse on the Green Land by a bench seat. She thinks this happened frequently but she only saw it once or twice (she told us that her daughter is now aged 24 and that this has not occurred since she stopped

riding when she was 18). In cross examination she says that from 1979 (when I think she became a member of WFBC) until the late 1990s she used to walk straight across from the back of No.15 to the club without having to use the main path (this would have been from April through until the end of the bowling season in mid September). At that time she says that the intervening land was not so overgrown (no such pathway exists through this area now – indeed I find it something of a puzzle that she would even want to do this seeing as a perfectly acceptable path existed only a matter of a few yards away from her back gate). She said that the Green Land had changed over the years. It used to be easy to get through and her next door neighbour would grow flowers and vegetables there. There were also fruit trees there. However, she says that the Green Land was '*overgrown by 2007*' (and the photos taken at that time show this to be the case). She also said that there were secret dens within the Green Land in the 1980s and 90s. She mentions a corrugated sheet under a tree where the children would play. She also says that at firework parties on the Red Land the children would run off and hide on the Green Land. She also says that there was a bench and table on the Green Land '*for a while*' but she cannot say when this was.

104 **Dr Julia Hines**

Dr Hines has lived at 37 Briarfield Avenue since 2003. Her lengthy statement is at AB2/470. Dr Hines is Treasurer of the Association. Her twin sons are aged 17. In relation to the Green Land, Dr Hines speaks of picking fruit ((blackberries, apples, plums and pears) and flowers. She also mentions the swing on which her children played, tree climbing and playing hide and seek, again within the Green Land. In 2006 her sons also built a den in the wood with other local boys ('*tucked away under the trees*' – although in her oral evidence she said it could be seen from the main path – it evidently backed on to 43 Rosemary Avenue's back fence (Mr Jardine's house)). This was clearly a memorable summer for the family. Her oral evidence dealt with fruit picking and den building. Her children obviously love to play on the application site but perhaps not so often nowadays in contrast to when they were younger. Dr Hines also dealt with the objector's allegation that (in effect) the

Association has been less than forthcoming in relation to disclosure. In a sense it was for her to deal with the allegation since she has, I think, been largely responsible for managing the application on behalf of the applicant and sat next to counsel throughout the inquiry. I accept without reservation her evidence that she *'was not trying to hide anything'* and I reject entirely any suggestion that the Association made inadequate disclosure in the case of their (non-privileged) internal records.

105. When she was cross-examined Dr Hines says that she picked flowers on the Green Land on only one occasion. She also picked foliage there for flower assemblies. She also said that she would go out of her back gate and walk down to the Green Land to collect her children if they were playing there (she said she would *'pull them out'* and it could have been on either side of the main path).
106. I shall deal with my findings in the case of the applicant's live witnesses (22) later. In the case of those who submitted statements or questionnaire responses (27), I have to approach such evidence with caution as it was not tested by cross-examination. This was particularly important in this instance as the objector had no opportunity to question these witnesses on their use of the Green Land.
107. The applicant's written evidence – I propose to deal with this shortly.
 - (a) **Tim Connolly** is the husband of Catherine Kelly who lives at 45 Briarfield Avenue. They give identical written evidence. See AB2/431.
 - (b) **Linda Croucher** is the wife of Joseph Croucher and they lived at 43 Briarfield Avenue between 1974-92. They too provided identical written statements. See AB2/444.
 - (c) **Claire Gelband** lives at 39 Briarfield Avenue and says that she has used the Green Land since 1999. She mentions picking blackberries but this could well have taken place on the Red Land. See AB2/467.

- (d) **Kenneth Morrison's** statement is unsigned and he lives at 50 Manor View which is the next road up from Dudley Road, right on the periphery of the claimed neighbourhood. He regularly walks, with or without a dog, through the Green Land and has also picked apples and pears. He sees other people there. See AB2/504.
- (e) **Mrs Rukmini Singh** has lived with her family at 16 TTC since 1987. Her son is aged 19 and when he was learning to ride a bicycle he used to practice on the passageway running parallel to the road at the rear of No.16. She also speaks of picking fruit, children on the swing or playing hide and seek. She also mentions the fact that *'the woodland part'* was cleared in 2001.
- (f) **Matthew Vohs** says he has used the application site since 2002 (his statement is dated 2/12/2007 – see AB2/519). In the case of the Green Land he says that they pick blackberries in season and play hide and seek with the children who in 2007 were aged 3 and 1. They walk through the Green Land when friends visit with their dogs.
- (e) **Mrs Gloria Abramoff** (who unfortunately was away in Tanzania at the time of the inquiry) lives with her family at 47 Briarfield Avenue. Her statement is at AB2/522. She moved there in 1997. In relation to the Green Land she mentions picking blackberries and flowers and when her children were younger (they must now be 17) playing hide and seek, climbing trees, playing on the swing, building a tree house and camping out on a couple of occasions. She also helped with efforts *'to clear'* the Green Land in 2006/07 by *'hacking back the undergrowth'* and *'helped to keep the path clear and safe'*. She also says that she uses the Green Land on her way out to the main road.
- (f) **Mrs Bensilum** has lived at 4 Dudley Road since 1977 (she was unable to appear at the inquiry owing to ill-health). Her statement is at AB2/530. She was widowed in 2000 and her children are grown up and left home (I suspect) many years ago although one of them returned for a short time. Until 2000 she and her late husband regularly walked their dog or dogs around the Red Land and the Green Land. She also picked blackberries. Her grand-daughter

(who from what I can tell has never lived inside the claimed neighbourhood) also climbed trees on the Green Land and played on the swing tree.

- (g) **Karen Cannon** lives at 18 Dudley Road and gave identical written evidence (at AB2/537) to that of her husband Damian at paragraph 102 above. She also put in a completed evidence questionnaire at AB2/541. In short, she says that she has used the application site over a total of 9 years citing 'dog walking' and 'children playing'.
- (h) **Wendy Chambers** (mother of Stuart Chambers at para 91 above) now lives in Bristol but had lived at 29 Briarfield Avenue (which backs on to the bowling green) for well over 40 years. Her statement and questionnaire responses begin at AB2/546. She speaks of a number of recreational activities which she either participated in herself or observed on the part of others without going into detail as to what actually happened on the Green Land. Her evidence is though useful in that she was the wife of Ronald Chambers who, with a Mr Weston and Mr Sawyer, were the last 3 trustees. She has no paperwork dealing with this. She also says that the tennis club '*ceased to function in or around 1966*'.
- (i) **Paul Cunningham** is the brother of Michael Cunningham (para 86). His statement is at AB2/445 and mirrors that of his brother.
- (j) **Stanley Dell** is aged 93 and is presumably the father of Gerald Dell (para 92). Mr Dell has lived at 49 Briarfield Avenue for nearly 50 years. His statement is at AB2/563. He and his late wife brought up 7 children at this property. He says they all left home in the 1970s and 80s. In relation to the Green Land, his children used to play there and he also mentions blackberry picking. The distinct impression I get from his statement is that any use on his part of the Green Land in the period 1987-2007 has probably been only occasional, if that.
- (k) **Mr Ting Fon Kan**, his wife, mother and his 4 children have lived at 43 Briarfield Avenue since 1993. His statement is at AB2/570. In relation to the Green Land, the only reference in the statement is to his children climbing

trees and playing hide and seek. I rather think that he and his family mainly used the open space on the Red Land for informal recreation. Mr Kan's statement was also accompanied by a completed questionnaire form which was too generalized to be of much assistance to the inquiry. Mr Kan was unable to give oral evidence as he was away in Hong Kong.

- (l) **Mr Kotwal** has died since making his witness statement dated 14/11/2007 which will be found at AB2/594. He lived at 20 TTC since 1965 with his wife and son. In his statement he says that he has used the Red Land and the Green Land *'for recreational purposes'* and asserts that he and his family *'have taken part in all the functions and participated in most of the other activities described in paragraph 36'* of the applicant's statement which contains a whole raft of activities in the case of both areas which the applicant says has taken place in these areas. Unfortunately, the way in which this is dealt with in Mr Kotwal's statement is none too helpful to the applicant.

- (m) **John Long** is the husband of Margaret Long (see para 93). His statement mirrors that of his wife who, in her statement, confirms the contents of her husband's questionnaire responses at AB2/598, following on from his statement at 597. Mr and Mrs Long went to live at 5 Briarfield Avenue with their two small children, then aged 7 and 9, in 1978. Mr Long's statement mentions (amongst other things) his children playing hide and seek, making camps and tree climbing which, presumably, took place within the Green Land. In his questionnaire responses, in answer to how often he used the land he says regularly when the children were young (and I suspect that his children were probably too old to be scampering around the Green Land by the time we get to 1987) *'and in later years dog walking & fruit picking'*.

- (n) **John Murphy** has lived with his wife Elizabeth at 15 TTC since 1976. His statement is at AB2/603. Mrs Murphy gave oral evidence (see para 103). Their statements mirror one another which I did not find helpful. It would have been preferable if he had given oral evidence but I am told that he was away during the inquiry.

- (o) **Victor Pellegrini** says in his statement dated 4/11/2007 that he has lived at 17 Rosemary Avenue for 32 years. His statement is inadequate to deal with user in the case of the Green Land for present purposes.
- (p) **Clarence Pidgeon** says in his statement dated 8/12/2007 that he has lived at 41 Rosemary Avenue for 36. His statement mirrors that of Mr Pellegrini and is also inadequate to deal with user in the case of the Green Land for present purposes. I am told that Mr Pidgeon was away at the time of the inquiry.
- (q) **Denise Sayers** has put in a statement dated 26/11/2007 in which she says that she has used the Red Land and the Green Land for 6 years. In relation to the Green Land, she says that she mainly uses such land to pick fruit (damsons, apples, blackberries and raspberries). She also collects kindling for her fire from underneath the trees. Ms Sayer was unable to give oral evidence as she was working abroad.
- (r) **Mia Sgambati** is aged 9 and has lived at 17 TTC all her life with her parents and two sisters. She says she *'used to make dens'* in the woodland. She also picked blackberries there. Her signed statement at AB2/619 was accompanied by a charming drawing of what I take to be the field on the Red Land.
- (s) **Mrs Gladys Shewry** has lived at 24 Rosemary Avenue for over 50 years. She deals with matters on a generalized basis in her statement at AB2/621. She was unable to attend the inquiry owing to ill health.
- (t) **Pursotam Tailor** has lived at 2 Dudley Road since 1971. Despite this, his statement at AB2/625 is none too helpful. It seems that his three grown up children occasionally played on the application site.
- (u) **Thelma Rurney** (who sadly died since making her statement at AB2/628) lived at 60 Rosemary Avenue since 1982. Her three children had all left home by 1988. It seems that until about 1997 she used to walk through the Red Land and perhaps even the Green land as well with her dog. She may even have picked blackberries there but the position is far from clear in her statement.

- (v) **Robin Jacobs** used to live at an address given as 22 North Circular Road (now TTC) and he says he used the application site between 1976-86. His questionnaire responses at AB2/633 are insufficiently precise when it comes to the Green Land.
 - (w) **Lt Col E.K.H Krishna** has lived at 14 TTC since 1969. As I read his statement at AB2/639, he is likely to be a regular user of the main path through the Green Land. The rear access to his home is right at the end of the passageway behind the properties in TTC.
 - (x) **Tom Russo** used to live at 20 Briarfield Avenue and his questionnaire responses dated 23/11/2007 at AB2/645 tell us that he used the application site after 1988. He no longer lives at No.20. As I read his statement, he is likely to have been a regular user of the main path through the Green Land.
 - (y) **Faraz Tafti** now lives in Canada. It seems that between 1992-99 she lived at 18 Briarfield. Her responses are at AB2/652. Her questionnaire responses are insufficiently precise when it comes to the Green Land although I daresay that like everyone else she would have walked through it from time to time.
108. I was also presented with a file of papers (within AB3) dealing with the administration of the tenant / trustee interest under the 1910 Lease. Whilst the tennis club thrived the interest appears to have been well managed. One sees, for instance (and the date I am given for this is sometime between 1949-55), that 4 named trustees issued '*regulations*' as to the user of the demised premises which, amongst other things, required residents with back gates to pay an annual fee of 5 shillings and for dogs to be kept on a leash. Further changes of trustee were also notified to the landlords' agents in the 1930s, 40s and 50s. By the time we get to the mid-1960s the tennis club is running down and the landlords' agents are complaining about dilapidations. However at a trustees' meeting on 23/10/1964 the trustees resolved not to approach the landlord with a view to surrendering the 1910 Lease and instead to negotiate over the dilapidations and the use of the land for recreation other than for tennis. In the meantime, WFBC carries on. Lastly, there is a balance sheet showing the trustees' account for the period 1962-66. It shows (a) that

no gate fees were collected after June 1964 (b) that insurance was maintained, and (c) that £21/0/03d was paid into the tennis club account on 5/06/1967. I cannot see that any of this assists the applicant.

Evidence for the objectors

109. **Philip Burrows** put in a statement dated 15/09/2010 which will be found at OB1/208. He was formerly employed by the objector as their Construction Director. He dealt with the fencing off of the Green Land in 2007 (thus preventing passage through to WFBC from TTC). I have already covered this aspect in para 40 and the evidence about this was not challenged. I should perhaps mention that when Mr Burrows dealt with fencing around what he describes as the '*car port and boat adjacent to the access to the properties on Tangle Tree Close*', there is in fact a photo within AB3/113 showing fencing in this location which was taken in (as I was told by Steve Hancocks who had spoken to Mr Moya about this) April 2008. Mr Burrows concludes by saying that he visited the application site on a total of 6 occasions in 2007/08. He says his visits lasted between 20 minutes to 1.5 hours and the only use of the Green Land which he observed was use of the main path running across it.
110. **David Maxwell** gave oral and written evidence. His statement is at OB1/216. He is a Chartered Town Planner and his firm has been assisting the objector since 2004. His first visit to the site was in July of that year. Until 7/05/2010 he made another 5 visits to the site and he says that, apart from seeing a free-standing children's swing, he never saw (as he puts it) '*any evidence of recreational use of Land 2*'. In his oral evidence he made it clear that the swing he saw in 2004 was a free-standing children's swing rather than a swing hanging down from a tree, which he cannot recall seeing at any later stage. Mr Maxwell says that on his first visit to the site in 2004 he did not venture into the undergrowth on the Briarfield Avenue side as it was too dense. He merely walked around the perimeter. He says there were no paths through the vegetation in the south west corner. He went on to say that on his second visit on 11/03/2005, apart from seasonal changes, the position was unchanged.

111. **Steve Hancocks** is the objector's Development Director. He provided a short statement at OB1/211 and also gave oral evidence. Put shortly, Mr Hancocks says he visited the application site on 5/6 occasions between 2004 until he signed his statement on 15/09/2010 but he never saw anyone on the Green Land (he says the duration of his visits would have been 20-30 minutes). In addition, he also came on my accompanied site inspection on 29/09/2010. Mr Hancocks contrasted the position he had observed on his earlier visits to what he saw on 29/09/2010. He said that on his earlier visits there had been less evidence of tracks leading off into the undergrowth on the Rosemary Avenue side of the path and that this area had been less easy to walk through than was the case on 29/09/2010 when he said that the whole way across to the fencing on the Rosemary Avenue side was more open than it had been before when (as he put it) *'you couldn't go further across to Rosemary Avenue without negotiating a lot more undergrowth – there wasn't an obvious track in that position – difference in relation to the changes of visibility at the back of the gardens in Rosemary Avenue – easier to see yesterday – in July I couldn't see through to the den area, yesterday it was more open – I could see the Inspector standing by the fence by the den (ie at the back of Nos.43/45 Rosemary Avenue) but I was walking into the undergrowth at that point'*. He also said that the path leading into the undergrowth on the Briarfield Avenue side was more visible on 29/09/2010 than it had been before (*'Access to it a lot more obvious yesterday'*) when he had not even noticed the track as its point of entry had not been obvious. He also mentioned that the second swing that I had observed hanging from T40 had not been there on his previous visit on 28/07/2010. He also said that when he visited in July there had been a pile of bricks in what I understood to be an area close to the *'Delap Shed'* on the land survey drawing, whereas on 29/09/2010 these bricks were strewn around. He said that in July the area had been *'less easily passable'*. Finally, in relation to the 2006 surrender, Mr Hancocks also said that there was *'no question in my mind'* that Messrs O'Connor and Nicholls of WFBC (as senior members of the club) *'were not the people I should be talking to'*.

112. Mr Hancock returned to give evidence following a phone call which he had had that same day with Mr Dennis Nicholls whom he told us was the treasurer of WFBC. Mr Hancock had asked Mr Nicholls how (as he put it) the club had '*come into possession of the 1910 Lease*'. He was told that during the 1970s the Watts family had circulated a note to locals inviting them to take over the lease. He was not sure what the response was to the freeholder's circular but the outcome was that WFBC were offered the lease and they accepted it. Mr Nicholls had been unable to tell him when this happened and that he would get the papers out and make them available to the inquiry. Unfortunately no documents have been put to the inquiry about this other than what we have in OB2.
113. **Antony Wolton**, the objector's solicitor of Edwards Duthie of Ilford, also gave oral and written evidence. Now that the issue of surrender is no longer being advanced by the applicant to defeat the objector's case on *precario*, it becomes unnecessary to devote time to an analysis of the relevant conveyancing transactions where, to my mind, the disclosed documents speak for themselves, and I have already gone into this in some detail when I dealt with the history of the application site.
114. Mr Wolton is an experienced conveyancer with 26 years' post qualification experience. In his written evidence at para 7 (and his statement begins at OB1/224) he says he inspected the site on 15/06/2004 with a Mr Steve Kuschel, who was then employed by the objector at a time when it was considering making a planning application. They had agreed to meet on site '*to ascertain so far as possible the existence of any rights affecting the property*', by which he meant the Red Land and the Green Land. Mr Wolton says that '*the density of the undergrowth made it difficult for me to fully walk around Land 2*'. Whilst on site he prepared a rough plan which he attached as '*APW1*' to his statement. This is a helpful document as it not only showed (shaded blue) the passageways leading off the road and running parallel to it at the rear of the houses in TTC, which he noted on his sketch as '*Subject to rights of way*', but that an area of land near to the fencing running up alongside the boundaries of Nos.41-49 Rosemary Avenue comprised of (as

he put it) *'impassable undergrowth'* whereas it was not as dense as this when I made my accompanied inspection with the parties on 29/09/2010.

115. Following his inspection on 15/06/2004 Mr Wolton wrote to his client on 20/07/2004, a copy of which will be found appended to his statement at 'APW2'. In the letter he described the area between Nos.41-51 Rosemary Avenue (behind which lies the Green Land) as being *'covered by very dense undergrowth'*. Again, in the case of the land beyond 51 Briarfield Avenue, Mr Wolton said that there were *'trees and undergrowth on the remaining stretch of Briarfield Avenue'*. He also mentioned the *'fairly well trodden pathway leading from the access at the rear of Tangle Tree Close through the undergrowth to the open side of the site'*.
116. The remainder of Mr Wolton's statement deals with the events after 2005. He makes the point that it was only in August 2007 that there was any suggestion on the part of locals that they intended to make an application to register the application site as a TVG. Mr Wolton deals with the article in the Hendon & Finchley Times on 30/08/2007 in which it is noted that locals *'are hoping to have a plot of land near their homes named as a village green in order to protect it from a developer'*. Mr Wolton wrote to Mr Graham Jardine about this article on 14/09/2007 in which he questioned the right of locals to be on the land. Mr Jardine responded saying that the article was nothing to do with the Association and appeared (as he put it) *'to have emanated from representatives of the Green Party who do not speak ... on behalf of the Residents Association'*. See OB1/190-193.
117. In his oral evidence Mr Wolton dealt with his observations of the application site since 2004. He deals with his first visit on 15/06/2004, the plan he prepared and his letter to Mr Kuschel. He said that there was *'dense undergrowth generally – couldn't see an obvious way through at the time'*, which was a reference to the area of the Green Land close to Rosemary Avenue. He said that he was able to access as far as the points marked T59/T61 on the Land Survey but *'I gave up trying to get any further into the green land'*. He said that the *'only route through was the one I saw'*, which he

marked in red on his drawing at OB1/232, namely the path through the Green Land.

118. His next visit took place on 28/07/2010 which he says looked *'very similar'* to what he had seen on his previous visit. One difference he observed was the fact that the area around T40 was *'relatively open'*. He said there was a clear pathway leading from the main path to the area of the tree which he had not noticed in 2004. When asked about his visit on 29/09/2010 he said that the principal difference was that *'it was more open into where the Ash was – could see bricks – was freshly trampled yesterday in the area of the den'*, this being a reference to the new den on the Red Land/Green Land boundary close to T40. In re-examination, Mr Wolton reiterated that the *'open space perimeter near the (Ash) tree had widened to include beaten down grass to include the 2010 den'*. He also said that it was *'evident that there was a quantity of trees and branches which had been cut'*. He also said that on his visit to the site before 29/09/2010 there had been *'no obvious path'* on the Briarfield Avenue side of the path.
119. He also dealt with the 1910 Lease and, in effect, his evidence was that it seemed clear to him that the tenant interest was held by the trustees of WFBC and documents produced by the objector also showed that the club had been paying the ground rents for some years before 2006 and had also been held out by their vendor in 2000 as lessees in the agents' particulars (see OB1/238-250). Mr Wolton said that he understood that the ground rent had been paid by WFBC before 2000 although there was no documentary evidence of any assignment or underletting to the club by the original trustees or their successors. Despite not having taken statutory declarations from Messrs Nicholls and O'Connor at the time of the 2006 surrender, no requisitions were raised by the Land Registry. The view was taken that it was better to deal with the surrender and a simultaneous re-grant in favour of WFBC trustees whilst the 1910 Lease was still subsisting, rather than after it had expired, in view of (as he put it) *'statutory renewal complications'*. He also said that the McBride Wilson & Co letter written by the applicant to the objector's managing director on 12/01/2004 (see OB1/123A), in which his firm

stated that they were acting on behalf of WFBC in their capacity as *'the tenants of the site who have a lease over land situated between the entrance of Dudley Road and the southern Boundary leading to Tangle Tree Close ..'*; reinforced the objector's belief that the land was in fact tenanted by WFBC. The letter itself (written shortly before completion of the objector's purchase of the Green Land on 8/03/2004) complained about activities on the part of the objector on the Red Land.

120. Mr Wolton was cross-examined on the surrender issue. He said that he considered that Messrs Nicholls and O'Connor had been validly appointed as trustees (OB1/57) and he questioned as to who would be entitled to give a surrender, if not these individuals, on behalf of WFBC. The objector's concern was to ensure that the 1910 Lease was brought to an end and with it the restrictions contained in the so-called garden leases affecting some of the properties in Briarfield Avenue.
121. A statement was also provided by a **Mr Joseph Leedham** who is currently employed by the objector as a 'Bid Writer' but between May 2001 and November 2008 worked for the objector as a Development Surveyor/Manager (see OB1/213). He says he would have visited the Green Land six times between 2001-08 and can only remember seeing two people walking through the land on the main path (one walking their dog, the other not). As with the written evidence of Mr Burrows, this evidence was not challenged.
122. Finally, a statement dated 18/08/2010 was put in by **Ms Ann Sherwood** who in 2006 conducted an ecological appraisal of the Red land and the Green Land (see OB1/218). She says that she spent approximately 1-2 hours on site on 21/11/2006 and saw no one using the Green Land. She says the Green Land *'was covered by dense areas of Bramble scrub, a small area of open space and occasional trees'*. She also mentions the *'well-used pathway'* running through the Green Land and *'areas of rubble and other rubbish and debris (grass cuttings according to my field notes and a Target Note showing old cars and an old boat) which could have been deposited by local householders'*. She continues: *'I did not see anyone on or using the scrubland*

known as 'Land 2' during my visit and none of the photographs I took during the survey show clear evidence of usage'.

The closing submissions of the parties

123. The written and oral submissions on both sides were wide ranging and detailed. To do justice to these submissions in this report would require a considerable amount of elaboration and discussion. I have though read this material very carefully and I hope that counsel will forgive me if I do not set out their very helpful submissions at great length. I will though summarize what I consider to be the most important conclusions on both sides. I should perhaps say at this point that the scope of the inquiry was narrowed by Mr Phillips who, in his closing oral submissions, very sensibly abandoned the applicant's position on surrender since there was no evidence of an express surrender or of a surrender by operation of law at any stage, either before or after the relevant 20 year period.

The applicant

124. The applicant's closing arguments (omitting surrender) were as follows:
- (a) There has been sufficient qualifying user on the Green Land. Mr Phillips addressed this point in meticulous detail in his written submissions when he analyzed and reviewed the nature and extent of the evidence given by the applicant and his supporters.
 - (b) The user alleged to have taken place on the Green Land would have been apparent to the landowner – in other words, that I should find against the objector on the inaccessibility / stealth points.
 - (c) The areas of the Green Land which have been subject to qualifying user can always be severed from those which have not.
 - (d) The user alleged to have taken place on the Green Land would have been apparent to the landowner.
 - (e) Mr Phillips submitted that I should not attribute bad faith to the applicant's supporters who, as he said, had *'done a bad job if they were making up the*

site'. This was in the context of the evidence of Mr Hancocks and Mr Worple that the Green Land had appeared to them to be more open than in previous year. He also said that the second swing was an *'irrelevance and distraction'*.

- (f) User *as of right* on the Red Land is not precluded by the 1910 Lease, particularly (but not limited to) in light of the fact that (as it is put) *'the overwhelming majority were blissfully'* unaware of its terms and had *'used the land as if they had an unquestioned right to do so'*.
- (g) Reference was made to Gale on Easements at p.252: *'If the enjoyment was originally by permission, it is a question of fact, depending upon the evidence, and the inferences to be drawn therefrom, whether it has so continued'*.
- (h) It is also argued that the death or disinterest of the 1910 Lease trustees operates to suspend user *as of right* under the lease until such time as substitute trustees have been properly appointed (and it is argued that the 'cascade' process under the lease would have to be followed and there is no evidence that it was) and are able to permit access under the terms of the lease. The submission is that as there was no trustee living or interested in giving permission there was, therefore, no one available to permit access under covenant 9 of the lease, as there had to be *'in order for the Objector's lease argument to go anywhere'*. It was submitted that there was no evidence of any control exercised by trustees over the land or of permissions granted to locals *directly* by the lease trustees during the relevant 20 year period. It is not enough merely to argue that the lease itself existed so as to give rise to *precario* and until there was such evidence any user on the part of locals would be *as of right*. It is submitted that this *'falls within Betterment'*, namely that active steps must be taken by the landowner (and no such steps were taken here *'at any material time by any person'*) to indicate that use is permissive, as opposed to mere acquiescence in the use of the land. In the meantime, the rights under covenant 9 are suspended. Mr Phillips also submitted that the applicant's assertion of rights under the 1910 Lease was mistaken and this does not prevent prescription.

- (i) It is also submitted that the 1910 Lease itself still did not amount to *precario* because such permission as resulted from the lease was not, by its nature, revocable by the grantor at his will at any time (see Lord Rodger in *Beresford*). Mr Phillips argues that to the extent that the use on which the applicant relies was '*permitted*' by the lease, it was not revocable at the grantor's will at any time. The most that can be said was that it was of limited duration and / or terminable on breach of covenant: '*Those possibilities for termination of the lease do not amount to the possibility of withdrawal of permission at the grantor's pleasure. Such a possibility is a necessary and critical feature of precario*'. As it is put: '*In any event, the landowner did nothing active to indicate that the use was by his permission. He put up no signs for instance saying so, nor charged the inhabitants a fare for using the land. There were no overt and contemporaneous acts of the owner to make clear that he was giving permission. This was a case of mere acquiescence, which is perfectly consistent with 'as of right' use*'.

For the objector

125. The objector's closing arguments were as follows:

- (a) In the case of the Red Land, user had been by permission or license – *Beresford* concerned implied permission. Miss Ellis cites from Gale on Easements at 4-95 where it is stated that '*The grant of oral or written consent is the clearest and most obvious expression of permission*'. She also cites from *Healey v Hawkins* in which (as previously indicated in para 65) Goff J stated that once permission had been given the user remains permissive and is not capable of ripening into a right unless and until, having been given for a limited period only, it expires, or, being general, it is revoked or there is a change of circumstances from which revocation may fairly be implied.
- (b) Reliance was also placed on what Lord Bingham said in *Beresford* at para 3, namely that applicants for registration should not have a legal right '*since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period*'.

- (c) Miss Ellis also referred to the evidential question posed by Lord Scott in *Beresford* at para 49 as to whether there was '*any sign that the permission was intended to be temporary and revocable?*' On the facts of *Beresford*, which she says were only ever argued to support a case of *nec precario* by implication or conduct, all of their Lordships concluded that there was no such evidence. She says in this case that in view of the terms of the 1910 Lease there was the clearest sign that permission was intended to be temporary or revocable and the fact that the lease was for a long term and that users may have been unaware of it, is irrelevant seeing as the matter is to be viewed objectively. She also cites from Lord Walker in *Redcar* (para 18) that the unifying element in the three vitiating circumstances (namely *nec vi, nec clam, nec precario*) '*was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right ... in the third because he had consented to the user, but for a limited period ..*'
- (d) Miss Ellis also deals with the terms of the 1910 Lease in which she notes that there are two provisos which provide that '*no present Trustee or future Trustee his executors administrators and assigns shall or will be held to be discharged from his duties and responsibilities under this Indenture until the appointment of a new Trustee to take his place has in fact been completed in manner hereinafter provided*'.
- (e) Miss Ellis also submits that the statement drawn up by the applicant in 1998 to enlist the support of WFBC for the making of a Millennium Award (OB2/115) constituted a '*contemporaneous acknowledgement, roughly half way through the relevant period, of the Bowling Club's status as leaseholder of the whole of the Red Land and of their need for permission*'. I agree, and the fact that the Watts family (who regarded themselves as bound by the lease when they sold the land) looked to WFBC for the payment of rent in respect of the whole ground up to the sale in 2000, and thereafter to the new owners, is, I think, further important corroboration of this. It is clear that the 1910 Lease could only have been surrendered in 2006 and the allegation that there had been a surrender by operation of law before this was misconceived and was rightly abandoned by the applicant in closing. Miss Ellis was also

right to point out to me that it was clearly important that the Land Registry, having thoroughly investigated the matter at the applicant's behest, proceeded to register the freehold subject to the 1910 Lease.

- (f) Miss Ellis submits that it is unnecessary for the purposes of the application to register to decide the true status of WFBC under the 1910 Lease – whether as assignees or under-lessees or merely users under clause 10 upon terms that they took over the trustees' responsibilities so as to preserve the lease. She argues that the result is still the same and that user is non-qualifying seeing as locals were entitled to use the Green Land for recreational purposes for the duration of the term until 2006, some 19 years into the relevant period. And that as well as being by right, and not *as of right*, their user was permissive in the sense of being (i) at best only running to the end of the term, and (ii) would also have been subject to sooner determination at the will of the landlord in the event that the lease was rendered forfeit. She accordingly argues that the objector has '*a complete defence to the claim in relation to the Red Land*'.
- (g) In relation to the Green Land, Miss Ellis cites from the judgment of Lord Walker in *Redcar* at para 71 where he says this: '*The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right*'. As she says, what is determinative is how matters appeared to the landowner if present, or would have done to a reasonable landowner on the spot, in the case of an absentee owner (see *Redcar* at paras 36/75). It follows, she argues, that to establish the requisite user, the applicant must demonstrate that for the period 1987-2007 there was such an amount and quality of user being made of the Green Land as to make it clear to the landowner that the land was generally in use by local inhabitants of the claimed neighbourhood for lawful sports and pastimes.
- (h) Miss Ellis argues that limited weight should be attached to those witnesses who did not give oral evidence, not only as a matter of general principle, but because of the presence of the path through the area and the questions of

vegetation, accessibility and visibility. She says these were matters which it would have been important to *'explore with 'live' witnesses'*.

- (i) Miss Ellis endeavours from the evidence to piece together *'an understanding of the state of the Green Land during 1987-2007'* and she provides what she refers to as a *'general chronology'* which I have already run through in this report and it is unnecessary to repeat such evidence. Some points are though worth mentioning:
 - (1) The degree of vegetation on the Green Land is relevant both to the extent of user and also to questions of *clam* and of how the land would have appeared to the reasonable landowner – she submits that the evidence is *'overwhelmingly to the effect that the land was overgrown throughout the period'*.
 - (2) Considerable weight should be attached to the evidence as to what Mr Wolton observed in 2004 seeing as he specifically went to the site to look for signs of adverse rights and other activities which would have been of importance to his builder client and he also made a contemporary record of what he saw; similarly he did not accept either that the changes between July and September 2010 were attributable solely to the change in seasons because of the freshness of the vegetation; reference is also made to Mrs Sherwood's statement (she is an expert ecologist) which is supported by her contemporaneous notes.
 - (3) Allegations of fruit picking on the Green Land should also be looked at with care since it was submitted that these activities would have been most confined to areas next to or near the path or the passageway; there may also have been understandable confusion about fruit picking which may also have taken place on the Red Land or even on or about the boundary between the two areas.
 - (4) Only some 8/9 witnesses who gave oral evidence spoke to the early years from 1987 onwards.

- (5) Apart from a few photos of the clear-up, we have no photos of recreational activity taking place on the Green Land.
- (6) The presence of a worn path *'may throw a landowner off the scent of a more general assertion of right because if use were more widespread, there would not be such a marked difference in vegetation'*. She says this is what happened when Mr Wolton went to the site in 2004 when there was nothing to alert the landowner to a TVG claim in respect of the Green Land.
- (7) A good deal of the evidence relates to seasonal user – say fruit picking for one month a year and hidden children's games / dens. Miss Ellis notes that Gerald Dell had volunteered that he believed his sons had used the Green Land for *'crafty smoking'* with the Cunningham boys and that part of the attraction was that it was *'convenient not to be seen by adults'*. She goes on to note that Sophie Cantopher had described the den built by the Hines boys (which was in situ for around 3 months) as being surrounded by vegetation, off the path and said that you had to duck and weave through the brambles to reach it. Mention is also made of the fact that Mr Mehemet said that he makes use of the Green Land *'at 5.30 every morning'* which Miss Ellis submits is not an activity which it is reasonable to expect a landowner to observe. Further, she notes that the same witness also said that he saw children on the land but despite having lived on TTC for the whole of his life he could not give names or addresses, apart from the Hines and Malyali children.
- (8) She says that although several witnesses spoke of a *'swing/concentration of activities at T40, no one gave a definite date for the arrival of the swing ..'*. It is said that the evidence on this aspect *'is insufficiently precise to support registration'*.
- (j) Miss Ellis submits that what it all boils down to is that the evidence for the use of the Green Land during 1987-2007 *'is unclear in some respects and/or does not satisfy the test that it should have been, throughout the period, of such quantity, quality and manner as to indicate to the landowner that the whole of the Green Land was in general use by local residents for LSP, as opposed to sporadic acts of trespass. The position with the path was different ..'*

- (k) Severance: Miss Ellis accepts that the registration authority could register the Red Land or the Green Land, although in the case of the latter, the registration authority would need to reject the defence based on path user and legal entitlement to use the passageway as constituting sufficient explanation to the landowner of the presence of locals on the land. She says it would also need to be satisfied that evidence in support of any smaller area was sufficiently precise to enable its identification on the basis of user of that particular area. She says that this applies in the case of the claimed activity in the area of T40.
- (l) In her oral submissions Miss Ellis argued that the question of consent coming from the tenant trustees was only relevant as part of the general context. What was crucial was the relationship between the landowner and the trustees seeing as in the case of an easement claimed by prescription there must have been enjoyment as against the freeholder. She also said that the locals' knowledge of the existence of the lease was legally insignificant.
- (m) Lastly, Miss Ellis also argued that Mr Phillips had not rebutted the defence that user had been by right of the lease and was accordingly not *as of right*. She says that the search for overt acts within the meaning of *Beresford* is irrelevant and unnecessary since she is able to rely upon an express permission. The issue in *Beresford* was whether such overt acts existed to support an implied license.

Discussion and Findings

The Red Land

126. I prefer the submissions of the objector to those of the applicant. I am firmly of the opinion that the existence of the 1910 Lease until 2006 meant that user by local inhabitants of the claimed neighbourhood would have been by permission or license of the landowner and accordingly by right and thus sufficient to preclude user *as of right* within the meaning of section 15 of the Commons Act 2006. It makes no difference how long ago the permission was given provided that user was in fact enjoyed under it (rather than under a

claim to use *as of right*) as, in my view, is bound to have been the case in this instance seeing as the (tenant) trustees held the demised premises on trust to permit access by those living on the lessor's Manor Park Estate, albeit subject to regulation by the trustees from time to time.

127. As Lord Bingham said in *Beresford* at [3]: '*... it is plain that "as of right" does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period*'.
128. In the result, I find that Miss Ellis is correct when she submits that the objector has a complete defence to the claim in relation to the Red Land. It is, in my view, irrelevant that the locals, or at least a number of them, may have been unaware of the terms of the 1910 Lease.
129. I also reject as misconceived the submission that as there was no trustee living or interested in giving permission there would, therefore, have been no one available to permit access to locals under the terms of the lease. In other words, the absence of any control by trustees over the land or of permissions granted to locals directly by the (tenant) trustees during the 20 years is, I consider, irrelevant . What is crucial in these matters is the relationship between the freeholder and the trustees seeing as in the field of prescription there must have been enjoyment as against the freeholder (as Miss Ellis put it in her oral submissions: '*you can only prescribe against the freeholder*'). In other words, where the servient land is let, the question to be asked is whether the freehold owner of that land acquiesced in the relevant user, and in this case the existence of an express permission precludes this possibility – the search for evidence of a kind which would support an implied license that arose in *Beresford* simply does not arise for consideration in this case as the objector can point to an express permission.

The Green Land

130. I have to assess the value and appropriate weight to be given to the oral and written evidence presented to the inquiry having regard to the detail of such

evidence and the extent to which it supported by other evidence or, conversely contradicted by other evidence. As regards the evidence of the applicant and his supporters from the local area who appeared at the inquiry, I did not get any real sense that they were setting out to mislead the inquiry. Of course, their evidence may have been inaccurate because they had misremembered or overstated the relevant facts but I certainly think that they were attempting to describe matters as they were able to recollect them. I do though bear in mind that, for the most part, they were passionate in their belief that the land should be registered in order to prevent undesirable development in the future. That degree of commitment to a cause can unconsciously distort recollection.

131. It seems to me that I must address the quality of the user during the 20 year period. It must have been by a significant number of the local inhabitants. They must have been indulging in lawful sports and pastimes on the land and they must have been doing so *as of right*. As was said by Lord Hope at [67] in *Redcar*, such user has to be '*openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right ... the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied in his case*'. We are then looking at the sufficiency and quality of the claimed user within the Green Land and whether such usage has also been *as of right* during the 20 years ending in 2007.
132. I start by finding that there cannot, in my view, have been qualifying user in the case of (a) the passageway leading between Nos.20/21 TTC, or (b) the passageway at the rear of Nos.15-22 TTC, or (c) on the main path running across the Green Land to the field. This arises from the fact that the evidence of user relied on is, in my view, that of user of defined routes for the purpose of passage and not of informal recreation upon such land or of the land on either side. In fact, those who live at TTC are very likely, if not certain, to have rights of access to the rear of their properties over the passageways in (a) and (b). In fact, the registered title to the Green Land has a note in the Charges

Register that the passageway at (a) 'is subject to rights of way', which, for the reasons gone into previously in the case of the Red Land, would preclude user as of right.

133. It seems to me that recreational walking on these parcels would have appeared to the landowner as referable to the exercise of a public (or private) right of way rather than a right to enjoy lawful sports and pastimes thereon (as it did to Mr Wolton when he visited the land in 2004 – see blue parcel on his drawing at OB1/232). It has been held that use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public (or private) right of way to the green. I hardly imagine that general walking, with or without a dog, or pushing a pram on these parcels would suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land or any lesser part of it. Nor is it likely either that a dog wandering off a path or the owner's attempts to retrieve his dog would suggest to the reasonable landowner that the dog walker believed that he was exercising a public (or private) right to use land beyond the footpath for informal recreation. These questions were addressed in *Oxfordshire* at first instance at [2004] EWHC 12 (Ch) at paras [102] – [103] by Lightman J, and in *Laing Homes* at paras [103] – [110] by Sullivan J (as he then was).
134. On the evidence I have heard at the inquiry and on the basis of my own inspection of the application site, the parcels mentioned in para 132 above at (a), (b) and (c) are not lightly used. In my view, usage of the main path in particular as a thoroughfare across the Green Land is, and has for very many years, been its principal use by local inhabitants (it is not as if users are easily able to veer off these parcels and play or meander leisurely over and enjoy the land on either side, which user may be referable to use as a green – see, for instance, *Oxfordshire* at para [103]). Occasional fruit picking for only a few weeks a year on or near the boundary of the path is, in my view, merely an incident to this.

135. I also find that lawful sports and pastimes cannot have taken place either in the south east corner of the Green Land (ie in the area which has, for many years, been used as a place for storage). One only has to look at the photos at OB1/114/120 and at AB3/113 to see why this must be the case.
136. I then turn to the area of woodland, brambles, nettles and scrub on either side of the main path which comprises the Green Land.
137. Put shortly, the history of the land shows that in the early years of the 1910 Lease a tennis club was established and in 1922 the WFBC was also established. This state of affairs was, as Miss Ellis says, consistent with covenant 10 of the 1910 Lease which enabled the trustees (with the landlord's approval) to '*grant the use of the whole or any part*' of the land to a lawn tennis or other sports club.
138. By the time we get to the 1930s (and the dates are not material) the Green Land was largely allotment land on which a large greenhouse had stood for a number of years on the eastern part. No doubt during the war the allotment user was intensified. By the time we get to the 1950s (see filed plan at OB1/236) we have two tennis courts on the Red Land with a pavilion building on the southern periphery of such land with allotments and the greenhouse beyond running up to the passageway at the rear of the dwellings which then fronted onto the North Circular Road.
139. By the 1960s/70s the tennis club had, to all intents, folded and the allotments had also fallen into disuse (Mr Mehemed said that the allotments '*finished in around the mid-1970s*') and the structures on the land had also gone (it seems that the old tennis club pavilion was destroyed by fire in the late 1960s and the old greenhouse had, as I understand it, collapsed at some stage – Helen Jacobs said that it was in a state of dereliction by 1964). By the time we get to the mid-1970s the Green Land was, in all probability, seriously overgrown (Joseph Croucher said the land was overgrown in 1975 although children used it for camps and picking fruit) with the possible exception of the main path which ran across it which may have been wider at that stage seeing

as Mr Bogucki said that more than 20 years ago you could actually drive on the path.

140. In 1983 the applicant went to live at 41 Briarfield Avenue and in 1985 the Association was formed. The applicant says that in 1993 earthworks were carried out to clear the land and make it *'more accessible'*. He also recalled that the first time he swung his own children on T40 would have been in 1996/97. In 1998 we see the applicant writing to WFBC to enlist their support to an application for a small grant to enable residents to purchase a sit-on mower and thus continue to cut the grass on the field on a regular basis, as well as make provision for the clearance of what he described as *'the top embankment and the planting of that area and the fringes around the embankment with wild flowers to enhance its appearance'*. The applicant also noted that the embankment was covered in thistles and needed to be cleared.
141. Catherine Kelly says that in 1998 there was a mass clear up. She mentions the brambles being cut back *'in the open space by the swing tree'*, benches being put down in the vicinity of the main path, wild flowers being planted and the boundary between the Green Land and the Red Land being *'tidied up'*. Graham Jardine told the inquiry about a programme of works funded by the Association which included the widening of the path and there is a photo, taken in 2000, showing brambles being cleared on the path (see AB1/110 (at 17)) and what looks like clearance work elsewhere on the Green Land (see AB1/111 (at 20)). The path was actually changed to its current location in 2000 as part of these works. Indeed, Mr Jardine said that the *'very reason (the Association) had come into being was to spruce up the land and widen the pathway to enable a JCB digger to come in'*. There was also written evidence from Mrs Rukmini that *'the woodland part'* was cleared in 2001. Indeed, the agents particulars described the Red Land and the Green Land as *'Wasteland'* in 2000.
142. Next there is the evidence of Mr Hancocks and Mr Wolton which starts in 2004. It will be recalled that Mr Hancocks contrasted the position he had observed on his earlier visits with what he saw on 29/09/2010. He said that on

his earlier visits there had been less evidence of tracks leading off into the undergrowth on the Rosemary Avenue side of the main path and that this area had been less easy to walk through than was the case on 29/09/2010 when he said that the whole way across to the fencing on the Rosemary Avenue side was more open than it had been before when (as he said) *'you couldn't go further across to Rosemary Avenue without negotiating a lot more undergrowth – there wasn't an obvious track in that position – difference in relation to the changes of visibility at the back of the gardens in Rosemary Avenue – easier to see yesterday – in July I couldn't see through to the den area, yesterday it was more open – I could see the Inspector standing by the fence by the den (ie at the back of Nos.43/45 Rosemary Avenue) but I was walking into the undergrowth at that point'*. He also said that the path leading into the undergrowth on the Briarfield Avenue side was more visible on 29/09/2010 than it had been before when he had not even noticed the track as its point of entry had not been obvious.

143. For his part, Mr Wolton said that when he inspected the site on 15/06/2004 *'the density of the undergrowth made it difficult for me to fully walk around Land 2'*. His plan at 'APW.1' also mentions *'impassable undergrowth'*. Moreover, following his inspection on 15/06/2004 Mr Wolton also wrote to his client in which he described the area between Nos.41-51 Rosemary Avenue as being *'covered by very dense undergrowth'*. Again, in the case of the land beyond 51 Briarfield Avenue, Mr Wolton said that there were *'trees and undergrowth on the remaining stretch of Briarfield Avenue'*. He also mentioned the *'fairly well trodden pathway'*. In dealing with his visit in 2004 in his oral evidence, Mr Wolton said that there was *'dense undergrowth generally – couldn't see an obvious way through at the time'*, which was a reference to the area of the Green Land close to Rosemary Avenue. He said that he was able to access as far as the points marked T59/T61 on the Land Survey but *'I gave up trying to get any further into the green land'*. He said that the *'only route through was the one I saw'*, namely the main path running across the Green Land. Both Mr Hancocks and Mr Wolton considered that the

area on the Rosemary Avenue side of the path was more open than it had been in 2004, particularly in the vicinity of T40.

144. We then have the evidence David Maxwell who first visited the land in 2004 when he said that he did not venture into the undergrowth on the Briarfield Avenue side as it was too dense. He merely walked around the perimeter. He says there were no paths through the vegetation in the south west corner. He said that the position was no different when he visited in 2005.
145. We then have the Land Survey at OB1/122 showing the results of a survey carried out on the land in April 2002 which was updated in 2005 showing areas of dense vegetation within the Green Land.
146. Next there is the statement of Ms Ann Sherwood who conducted an ecological appraisal on the land in 2006. She says that the Green Land *'was covered by dense areas of Bramble scrub, a small area of open space and occasional trees'*. She also mentions the *'well-used pathway'*.
147. Finally, there is the statement of Mrs Gloria Abramoff who says that she helped with efforts *'to clear'* the Green Land in 2006/07 by *'hacking back the undergrowth'* and she says she also *'helped to keep the path clear and safe'*.
148. In my view, the likelihood is that the Green Land is and has for a number of years past been used mainly as a thoroughfare to the Red Land and elsewhere. It is also probable that during the 1990s the Green Land was considerably more overgrown than it is today and that it has only been during the last few years (probably from around 2000 onwards, and perhaps even earlier than this) that more use has been made of it by local inhabitants.
149. I consider that the usage claimed during the period 1987-2007 has been overstated by the applicant's witnesses and that the only significant usage is likely to have taken place in the vicinity of T40. Elsewhere on the Rosemary Avenue side of the main path user is likely to have been occasional or trivial and limited to children playing around in the trees or undergrowth from time to time in the warmer weather. On the Briarfield Avenue side of the main path, user is and has, I believe, for some years past, been negligible. I also find that

the evidence of fruit picking has also been exaggerated and in any case is liable to have taken place in season and only then on or near the boundary of the path. Miss Ellis is, I think, also right when she says that there may also have been understandable confusion about fruit picking which may also have taken place on the Red Land or even on or about the boundary between the two areas.

150. It does not follow that, just because it may be possible to leave the main path and walk generally on the Green Land from time to time, qualifying user has been made out. In my view, the quality and extent of the claimed usage on the Green Land is not nearly substantial enough to be qualifying for TVG purposes, and even if I was wrong about this I still do not consider that it would have continued during the whole of the relevant period of 20 years in view of the evidence given by the objector's witnesses (which I accept) in relation to the overgrown state of the Green Land as recently as 2004.
151. I suspect that user has intensified in recent years as a direct result of the efforts of local inhabitants to thwart the objector's attempts to obtain planning permission. Indeed, amongst the documents within AB1/tab15, it is evident that locals have been actively encouraged to use the application site by the Association. For instance, at the AGM in 2002 (when the applicant was in the Chair) it is noted in the minutes that *'It was explained to the members present that they should continue to actively use the field for recreational purposes and lobby local councillors ... to ensure that people are aware of the Bowling Club and the land at the back'*. In a circular letter sent to local residents in 2003 Mr Jardine notes: *'We need to continue to use the field and Bowling Club facilities for recreational purposes in order to have a fighting chance of defeating any planning application in the future'*. In 2004 Mr Jardine sent another circular to local residents saying that they *'need to continue to use the field and the Bowling Club facilities for recreation purposes in order to show that the land is of an important amenity value to the local people'*. In 2005 another circular from Mr Jardine (and the applicant in his capacity as secretary) noted that it was *'important to use the land for recreational purpose and maintain it in a neat and tidy condition. The council need to be able to see*

that we use the land and the club for social and recreational purposes and that it is not being neglected ... For us to have any chance of opposing any planning application we must support the club and continue to maintain the field in a neat and tidy condition'. In 2006 Mr Jardine's circular to local residents noted that 'we will continue to use the field for as long as we are able to access the same'.

152. It is probable, therefore, that any user after 2000 (other than on the main path) has been largely attributable to these exhortations by the Association and that before such time user would have been limited or trivial and very largely confined to use of the main path which, in view of what I have seen and heard about the application site, is exactly what one would have expected. Against this background, it seems to me to be a very real possibility that the commitment of the applicant and his supporters to prevent development has unconsciously distorted their recollection of matters in so far as it concerns the evidence which they gave in relation to their own usage of the Green Land and the use which they observed on the part of others during the relevant period of 20 years.
153. In the circumstances, I prefer the submissions of the objector, in particular the submission that the applicant has failed to demonstrate that for the period 1987-2007 there was such an amount and quality of user being made of the Green Land as to make clear to the landowner that the land was generally in use by local inhabitants of the claimed neighbourhood for lawful sports and pastimes.

Conclusion

154. In light of the above discussion, I find that the qualifying criteria laid down in Section 15(4) CA 2006 for a new green in the case of the application site (referred to in the application as Greensquare Field) are not satisfied.
155. Accordingly, I recommend that the application to register such land in the register of TVGs should be rejected.

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Inspector

26th November 2010

