

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A NEW TOWN
OR VILLAGE GREEN AT KNOWLE, SOLIHULL UNDER APPLICATION NUMBER
213123 (DESCRIBED IN THE APPLICATION AS “NORTHERN PART OF
KNOWLE BY-PASS ROUTE”)**

**INSPECTOR’S REPORT AND RECOMMENDATION TO THE COMMONS
REGISTRATION AUTHORITY – SOLIHULL METROPOLITAN BOROUGH
COUNCIL**

Introduction

1. I am instructed by Solihull Metropolitan Borough Council (“SMBC”) in its capacity as commons registration authority (“the registration authority”) to advise on an application to register as a new town or village green (“TVG”) a narrow, linear-shaped, parcel of open space (referred to in this report, where the context permits, either as “the land”, “the application land” or “Area A”) which is approximately 1.5 hectares in area running in a roughly southerly direction between the roundabout at the junction of Warwick Road/Wychwood Avenue/Langfield Road on the A4141 and the rear of housing fronting onto Longdon Road. The land is coloured pink on the plan at A1/38 but is perhaps better shown coloured brown in Box/2 on the plan at Exhibit MS28 in the supplemental declaration of Mark Sitch at O3/83.

2. The application is made pursuant to the provisions of section 15(2) of the Commons Act 2006 (“the 2006 Act”). The application in Form 44 (being Application No.213123) is dated 16/04/2013 (A1/tab2) and was made by the Knowle Society (“the applicant”) whose Chairman, a Mr Leighton Jones, has led the Society’s effort on the application. The registration authority acknowledged receipt of the application and accompanying documents on 17/04/2013. The application is made in respect of the locality of the Ecclesiastical Parish of Knowle (Church of England) whose boundaries are shown on the plan at A1/37.

3. I should mention at the outset that this application (i.e. for Area A) is one of three applications made by the Knowle Society at the same time. The second application relates to a parcel described as Area B (Application No.213124) and the third, Area D (Application No.213125), neither of which are opposed and will be dealt with separately.
4. The application for Area A was duly publicised 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 objections were received from a Mr and Mrs G.C. Vaughan of 3 Landfield Road, Knowle and Wallace Properties Ltd in their capacity as freehold owner.
5. After being instructed by the registration authority I gave directions on 20/10/2015 dealing with the procedure at a public inquiry which took place over 3 days on the 1st, 2nd and 19th February 2016. Representation at the public inquiry was as follows: Ned Westaway acted for the applicant and Douglas Edwards QC acted for the objector. Mr Vaughan appeared in person. I heard submissions (written and oral) from both counsel. Oral evidence was taken from 16 witnesses (including the applicant) who supported the application. In the case of the objectors, Geoffrey Vaughan gave oral evidence as did Mark Sitch, the senior partner of Barton Willmore LLP ("BW"), a firm of planning consultants, who also provided three lengthy statutory declarations which will be found at O1/1, O1/111 and O3/73. I am indebted to both counsel for their assistance and helpful submissions. I am also grateful for the administrative support provided by Santokh Gill of the registration authority.

The relevant statutory requirements

6. Section 15(2) of the 2006 Act enables any person to apply to register land as a TVG in a case 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; and

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

7. One then looks at the various elements of the qualifying criteria all of which have to be made out if registration of the land as a new green is to be justified.

"a significant number"

8. "Significant" does not mean considerable or substantial. What matters is that the number of people using the land 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 (see *R (McAlpine Homes Ltd) Staffordshire CC* [2002] EWHC 76 at [71] (Admin)).
9. There is a subsidiary issue under this head involving that of "spread". The principle is that if there is a concentration of usage by the inhabitants of only a limited part of the claimed locality or neighbourhood it may indicate that the right is not being claimed by the inhabitants of the claimed locality or neighbourhood in general. In other words, that there also has to be a geographic spread of users across the qualifying area. Although the principle of spread appears to have been recognised by HH Judge Behrens in *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch) at [90], it failed to find favour with Vos J (as he then was) in *Paddico (267) Ltd v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) at [106(i)] who said that he was unimpressed with the argument and that the fact that the majority of the users in that case lived closest to the land was precisely what one would expect and would not be an appropriate reason for rejecting registration (as he put it: *"None of the authorities drives me to such an illogical and unfair conclusion"*). Although this would have been mere obiter dictum I nonetheless consider it persuasive, at least at this level. It follows, in my view, that what matters in order to ensure that there is qualifying use within the relevant community is a sufficiency of use within the claimed locality or neighbourhood rather than its spread which is bound to be uneven, if not practically non-existent, the further away one goes from the claimed TVG. I mention spread as it is an issue in this case in view of the close proximity to the application land of the homes of

most, if not all, of the applicant's witnesses. I am, I might add, reinforced in this conclusion by the view taken about spread by an Inspector of the Planning Inspectorate in the Moorside Fields application (ref: COM 493) in her decision letter dated 22/09/2015 at paras [22]-[31].

“of the inhabitants of any locality”

10. Where first used in section 15(2)(a) of the 2006 Act (which is the case here, in other words, a so-called limb (i) locality) the term “locality” is taken to mean a single administrative district or an area within legally significant boundaries. This emerges very clearly from what Vos J said at [97(i)/(ii)] in *Paddico (267) Ltd v Kirklees Metropolitan Council* whose findings on locality were affirmed on appeal at [2012] EWCA Civ 262. In short, village green rights require to be asserted by reference to a particular locality and there is no doubt that an Ecclesiastical Parish would suffice for these purposes. As this is a locality and not a neighbourhood claim I need not deal with what constitutes a neighbourhood in law.

“have indulged as of right”

11. The traditional formulation of the requirement that user must be “as of right” is that the user must be without force, secrecy or permission. The rationale behind “as of right” is that of acquiescence. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must neither resist nor permit the use.
12. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use has passed the threshold of being of sufficient quantity and of suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is *“so trivial and sporadic as not to carry the outward appearance of user as of right”* will not

count (see *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 375D-E).

13. The issue of force does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance.
14. Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner. Again, nothing of the kind arises here.
15. Permission can be express (e.g. by erecting notices which in terms grant temporary permission to local people to use the land). Permission can also be implied but not by inaction (*R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at [5]). There is a permission issue in this case arising from the grant of byelaws in light of the decision of the Supreme Court in *R (Newhaven Port and Properties Ltd) v East Sussex County Council* [2015] UKSC 7 in which it was held that the existence of byelaws regulating the use of the land impliedly permitted members of the public to use the land for leisure activities and it did not matter if the byelaws were not displayed. The effect of this is to render the public’s use of the land “by right” rather than “as of right” and thus non-qualifying.
16. I should also mention *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) briefly at this stage as it is a key element in the objector’s case. *Naylor* provides that where land has been made available for public recreational use by a local authority pursuant to an arrangement with the landowner under the Open Spaces Act 1906, ss.9 and 10, or under the Public Health Act 1875, s.164, the public will have a right to use the land for recreational purposes which the landowner will be taken to have authorised. In such a case the public would not be using the land “as of right” but “by right” (following *R (oao Barkas) v North Yorkshire CC* [2014] UKSC 31). The issue in this case concerns whether or not, on the balance of probabilities, there had in fact been an arrangement made with SMBC and the landowner within the meaning of the 1875 and 1906 Acts.

'in lawful sports and pastimes'

17. The expression “lawful sports and pastimes” (“LSP”) form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user “as of right” (see *Sunningwell* at p.356F-357E).
18. It becomes necessary in some cases (and this is one of them) to distinguish between the use of paths or tracks as potential public rights of way rather than as qualifying LSP.
19. The law under this head was addressed by Lightman J in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at [102/3] and in *R (oao Laing Homes Ltd) v Buckingham County Council* [2004] 1 P&CR 36 at [102-110] and in the *Oxfordshire* case at [2006] 2 AC 674 at [68]. There is also a very helpful analysis in the TVG report of Vivian Chapman QC in *Radley Lakes* (13/10/2007) at [304-305] who said that the main issue in such cases is whether the use would appear to a reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, then it shall be ascribed to the lesser right, ie a right of way.
20. I should also mention *Dyfed County Council v Secretary of State for Wales* [1989] 59 P&CR 275 at 279 where it was said that there is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way. *Dyfed CC* involved a footpath running around a lake. It was held that where the use of the path was merely ancillary to other uses such as sun-bathing, fishing and picnicking, the use of the path would not give rise to a highway use. On the other hand, where the path had been used for walking only and was unrelated to other recreational activities connected with the lake such use could give rise to a presumption of dedication of the path as a public right of way. In the present case the objector argues that the use of the land was predominantly that of highway use for recreational purposes and any other use (such as picking blackberries and children’s play off the main track) was merely incidental to such use.

21. I will clearly need to consider those passages in *Laing Homes* [102-105] which require me to discount user which would suggest to a reasonable landowner that users believed they were exercising a public right of way which would include situations (a) where a dog off the lead roams freely outside the footpath whilst its owner remains on the footpath; (b) where owners are forced to retrieve their dogs which have run away from the footpath; or (c) where walkers casually or accidentally stray from the paths without any intention of going onto other parts of the application land. Accordingly, it seems to me that I need to ask myself these questions: (i) whether any proven use of the land was in the nature of transit over defined routes, and/or (ii) whether any use outside these defined routes would have been only occasional and/or ancillary to the exercise of potential rights of way over the land.

'on the land'

22. The expression “*on the land*” does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part but not all of the land has become a new TVG.

'for at least 20 years'

23. The relevant period in this case is 17th April 1993 – 17th April 2013. Although the objector had at one time been alleging that there had been a material interruption, this defence is no longer being pursued.

Procedural issues

24. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority

to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

25. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested at [62] that where there is a serious dispute (as is the case in this instance), the procedure of “conducting a non-statutory public inquiry through an independent expert” should be followed “almost invariably”. However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However, the registration authority must act impartially and fairly and with an open mind.
26. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.
27. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.
28. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations follow closely the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a number of small pioneer authorities The Commons Registration (England) Regulations 2014 apply.
29. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not “duly made”, it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration

authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

30. It is clearly no trivial matter for a landowner to have land registered as a TVG 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 L.J, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, at para 2).

Consequences of registration

31. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the land.
32. Upon registration the land becomes subject to (a) section 12 of the Inclosure Act 1857, and (b) section 29 of the Commons Act 1876.
33. Under section 12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede "*the use or enjoyment thereof as a place for exercise and recreation*".
34. Under section 29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any "*disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green*".
35. Under both Acts development is therefore prevented and the land is effectively blighted.

Description of the application land

36. I visited the land with Mr Gill on 1/09/2015. I also made a longer accompanied visit on 2/02/2016. On both occasions I took a number of photographs. There are also number of photos in the bundles including ground and aerial shots taken in 1999, 2001, 2006, 2007, 2010, 2011 and 2013 to be found in A1/281-305, in the BW report dated 3/10/2013 (O1/8) and in Mr Sitch's first

declaration dated 22/12/2015 (O1/111). I am confident that I am as familiar with the land as I need to be for the purposes of this report.

37. We are dealing with a linear strip bounded by housing on three sides. On the eastern side there is an open stream called Purnell's Brook. This can clearly be seen on Mr Sitch's plan at O3/83 (Box/2). The western boundary of the land is mainly a continuous wall in front of which there is what could well be the remnant of a former hedgerow. It may have been possible at one time to walk relatively easily between the hedgerow and the wall – there was some evidence on this – see, for instance, the aerial photo at A1/300 – and although I managed to do this myself in one place I doubt whether this occurs with much frequency nowadays. Roughly two-thirds of the way down the land, a combination of the stream and undergrowth on both sides creates a pinch point of sorts making the land extremely narrow to walk through and this area was certainly very muddy on both of my visits. This is clearly shown in the photos in O1/187. A number of witnesses mentioned that the land is more overgrown on both sides than it used to be but, in broad terms, the position has very probably been static for many years. This is borne out by the aerial photos as Mr Edwards was at pains to point out to me showing, as they do (at least to the south of the bell mouth), a single linear path running down through the middle of the land leading to a circular path running around the open space or field at the southern end. This is not to say, of course, that people do not walk elsewhere as on my visits I clearly saw evidence of other tracks outside the main path and elsewhere within the much wider open space at the northern end of the land.
38. At the opening off the pavement at the northern end close to the roundabout people can enter at various points in what is a bell mouth yet within only a short distance, as the walking corridor narrows, it is quite evident that users walk roughly down through the middle of the land where a single track is clearly evident (although there was admittedly more than one track nearer the northern end on both my visits which seemed to merge with the main or central track) which then runs into and loops around the open area or field at the southern end where, until sometime between 2006-10, there used to be a large tree (now a worn stump). Most, if not all, of the houses backing onto the

land on Longdon Road have gates in the fences at the bottom of their gardens. This is obviously the principal destination of most walkers and one can see, for instance, in the photos at O/294, what a pleasant walk and play area it would be in the warmer, drier weather where the brambles on the northern side of what is a large open space are bound to produce a plentiful supply of blackberries. A number of the applicant's witnesses say that they did not necessarily confine themselves to the open, grassy areas and I accept that it is perfectly possible to access much of the undergrowth on either side although in practice it seems to me to be probable that this occurs only rarely on the western side. There are certainly openings on the Purnell's Brook or eastern side where users can wander in close to the stream and in one place I found that the stream had even been bridged by those living in adjoining land in Newton Road. There are a number of photos showing this. At A/283 (photo/6) there is even a path leading through the undergrowth to the stream. There are other photos showing usable space outside the main track, such as will be seen in the photos at pp.284-287. There is also evidence of children's play in the photos at pp.284 (7), 288 (16) and 293.

39. The grass is cut and the land is maintained by SMBC which has also installed a single dog bin (O1/283) (Geoffrey Vaughan, an objector, says that the dog bin was installed in the early 2000s (O1/235)) and has also erected signage at the northern end which has also been in place for many years. The dog bin and signs can be seen in the photos at O1/225. One sign prohibits ball games (Mr Vaughan says that this sign would have been installed in the late 1980s as he and his wife were having problems with balls coming into their garden (O1/235)) and the other prohibits the deposit of rubbish. Both signs are visible on the land. SMBC also installed a locked gate in a strategic gap in the bell mouth area (O1/225) and, in association with the gate, dug a ditch with a soil bund a short way into the land. For good measure, a large tree trunk or trunks have also been placed across the entrance to the land at this location and the effect of these obstructions is to prevent unauthorised vehicular access onto the land (access on foot, with or without dogs, is otherwise unimpeded). These steps became necessary after an influx of travellers and some 18 caravans for a 3 day period in 2009-10. The trespassers were smartly

removed by SMBC utilising their powers under sections 77-80 of the Criminal Justice and Public Order Act 1994 to direct the travellers to remove themselves and their belongings from the land and it would have been an offence to fail to comply with such a direction. There are documents dealing with this episode at O1/36-37 and photos at O1/218-220. There was also evidence from Keith Jones (A1/100) that around 5 years ago a number of young trees were planted at the northern end of the land but that in the past year both the trees and their support posts had been stolen. There was also written evidence from Robert James (A1/200) who said that as a result of flooding in Longdon Road in 2007 which affected his neighbour's property and threatened his, Pinnells Brook was cleared of undergrowth (particularly the culvert outlet at the rear of No.62 Longdon Road) in the summer of that year. It appears that SMBC were responsible for this maintenance work on the stream. Mr James says that SMBC promised to keep the stream cleared on a regular basis and have evidently done so as Mr James says that he checks up on this, or at least on the offending culvert outlet, every 6 months. Mr Vaughan also said in his oral evidence that SMBC had cut back some of the undergrowth although he did not say when this occurred.

History of the application land

40. The planning history needs to be looked at. It is well covered in Mr Sitch's declaration dated 2/12/2015 at pp.118-121. Put shortly, until the relevant Development Plan (comprising the Solihull Unitary Development Plan 2006 and the West Midlands Regional Spatial Strategy) was superseded by the Solihull Local Plan adopted in 2013, the Proposals Map identified the land (with other land to the south) as the line for what was then known as the Knowle Relief Road (Policy T12/3 – see plan of projected route at O3/49 – the so-called Western Bypass proposal). However, this designation was not carried through into the current Local Plan and the land is now white land and is available for other uses and it was this outcome which no doubt prompted the application to register.
41. The retention of the land for highway improvements goes back to the 1970s. A trawl of the available records after the second day of the hearing has

unearthed minutes of SMBC's Public Works and Amenities Committee (to be found with the evidence of Leighton Jones behind A1/tab4). The minutes of the meeting held on 1/03/1979 represent an important signpost in the use and management of the land after this date. Para 229 of these minutes reveals that at the time planning permission was obtained in 1973 by the developers of the housing development 1973 on the western side of the land, the developers (who were Messrs Ashworth and Steward Ltd):-

“had indicated that they were prepared to dedicate an area of land of approximately 4.78 acres for the construction of the Knowle Relief Road and for open space purposes. A planning condition had been imposed requiring the Developers to construct a 2 metre high wall along the boundary of the housing area and the relief road as shown on Plan No.M589 submitted. The purpose of this wall was to serve as a noise insulation measure from the relief road, when constructed. To date 230 metres of the wall had been constructed by the Developers and a further 190 metres of the wall needed to be completed. Since the approval was given, ownership of the land had changed on two occasions and whilst the present owners were still prepared to dedicate the land this would be subject to the Council meeting the cost of construction of the wall, the approximate cost of which was £19,000.

The County Council had indicated that because it was not envisaged that the relief road would be included in the Transport Policies and Programme for at least five years, no funds could be made available at the present time.

The land was at present unused and in poor condition and it was considered that it would be in the residents' best interest for the Council to accept a dedication of the 4.78 acres of land for use as public open space. However, it was considered that some £4,000 would be needed to put the land into a maintainable condition. The land for the highway would be disposed of to the County Council when required for the road at an appropriate valuation, which would include the cost of construction of the wall. The remaining land not required for highway purposes would be added to the land already owned by the Council on the other side of Purnells Brook to form a permanent streamside open space.

Resolved - (i) That the offer of Ash Homes Ltd to dedicate the land shown coloured pink and green on Plan No.M589 subject to the Council reimbursing the cost of the construction of the existing wall, be agreed in principle;

(ii) That authority be given to the Chairman and Vice-Chairman to negotiate a suitable price for the transaction.

42. It seems plain, in my view, that SMBC accepted the offer of Ash Homes Ltd to “dedicate” what later became the application land for use as recreational open space until it was needed for the construction of the Knowle Relief Road at which point it would be acquired by the highway authority from Ash Homes Ltd, or any successor of theirs, for an amount which would include provision (i.e. for which the County Council would have to pay) for the additional walling required for noise attenuation purposes.

43. Consistently with the above, at the meeting of the Planning (Plans) Sub-Committee on 15/03/1979 there is a note that the Director of Technical Services reported that approximately only half of the walling had been built on the western boundary of the land and that Ash Homes Ltd were prepared to erect a close boarded fence along the remainder of the boundary with their land (known as the Copt Heath development). The Director reported that the developers had informed him that when the land was required for the relief road:

“it would then be for the Highway Authority at that time to consider upgrading the boundary screening for noise and to some extent visual purposes”.

The resolution passed noted that the Committee:

“do not consider the provision of a close boarded fence to be wholly appropriate but that further details to be left in the hands of the Chairman and Vice-Chairman to decide.”

44. Ultimately, of course, the land on the western side was bounded by a wall which no doubt satisfied SMBC in light of the obvious necessity for this in practice following the development on that side and, of course, the planning

condition to which reference has already been made which any local planning authority is unlikely to have overlooked. Indeed, and I observed for myself, the boundary starting at the open space at the southern end of the land comprises a substantial wall, no doubt in compliance with the 1973 planning condition, and this wall carries on to the northern end of the land. The impression one gets from the aerial photos is that this is a continuous walled boundary along its whole length although it is perfectly possible, of course, that there may be occasional gaps in which fencing may have been erected (it was not possible to be certain about this in view of the depth and largely impenetrable quality of the undergrowth in some places on the western side). However, judging from the aerial photos this is (or is mainly) a walled boundary with the Copt Heath development with the result that any outstanding issue involving a wall on this side would have been resolved long ago to the satisfaction of the local planning authority.

45. One turns next to the minutes of the meeting of the Public Works and Amenities Committee on 10/06/1982 (O3/21) in which the Director of Technical Services lays before the committee proposals for the landscaping of the open space (comprising the application land); as he put it, *“to bring it up to an acceptable standard for economic maintenance”*, which he thought might cost as much as £6,000 (no doubt a substantial sum in those days) which, it was suggested, might come from the proceeds of sale of land elsewhere belonging to the authority. The minute notes that the scheme:

“ .. included a walk-way through the open space ... The cost of widening the walk-way to permit its use by bicycles would be an additional £1,500.”

The committee agreed to the landscaping proposals and hoped for a grant from the County Council towards the cost of widening the path. Again, this course of action was entirely consistent with the landowner’s “dedication” which had been made over three years previously.

46. I turn next to the minutes of three meetings of the Executive Committee of the Knowle Society in 1982 (A1/110B-110D).

47. At the meeting on 15/06/1982 at item (v) it is plain that the committee did not want a walkway and the meeting agreed *“that £6,000 could be better spent elsewhere”*. Mrs Jarman thought that a pathway could be formed but *“left rough”*. The feeling was that a formal pathway might only *“encourage vandalism to gardens etc”*. It was felt that SMBC should be apprised of the views of the committee.
48. At the meeting on 19/07/1982 at item (t) the minutes note that the *“matter has been postponed”* which presumably meant that SMBC had agreed to stay its hand for the time being on its previously approved landscaping proposals. The minute tells us that the society would be calling a public meeting *“to assess public opinion”*.
49. The meeting of the Executive Committee on 7/09/1982 followed a well attended public meeting held on 24/08/1982 at which it was resolved to inform SMBC’s Public Works and Amenities Committee:
1. *That the idea of a through footpath from Wychwood Island to Longdon Road should be abandoned.*
 2. *That the whole area be landscaped and maintained as a public open space, subject to byelaw control with a single pedestrian access from Warwick Road”*.
50. Returning to the minutes of SMBC’s Public Works and Amenities Committee on 16/09/1982, it was reported that the matter of the landscaping proposals had been referred back to the committee:
- “by the full Council for further consideration in view of the number of objections which had been received to the scheme”*.
- Once the committee had been informed that at the recent public meeting there had been a majority in favour of the landscaping proposal but that:
- “the proposals for the walkway should be abandoned”*
- this course of action met with the approval of the committee.

51. It is plain that the land was eventually landscaped (Mr Vaughan says that in 1984-85 he and his wife asked SMBC to landscape the land as it was “*barren earth*” and grass was duly seeded and trees were planted – he understands that SMBC’s allowance to maintain the land would have been £6,000 pa (O1/235)) and that SMBC had assumed responsibility for the management of the land. This would undoubtedly have been the position by 1991 in view of Mr Vaughan’s evidence. Consistently with this, I was referred to the minutes of the meeting of the Public Works and Amenities Committee held on 12/09/1991 (O3/30) where one sees the Director of Technical Services reporting that essential maintenance work was required to be undertaken on a number of willow trees on or near the banks of the stream. Some needed to be felled, others needed to be pollarded and others reduced in height if the life of these trees was going to be extended. The remedial works were duly approved and officers were authorised to enter into negotiations as necessary with residents and owners to facilitate access to carry out the works.
52. It is also worthy of note that when he was recalled to give evidence on the *Naylor* issue, Mr Jones, on behalf of the applicant, agreed with me that SMBC were looking after the application land so that it could continue to be used as recreational open space. He accepted that there was no other reason why they should be doing this.
53. The assumption of control over the application land is amply reinforced if the land was included in the byelaws issued by SMBC in respect of its pleasure grounds and open spaces on 5/02/1993 and confirmed by the Secretary of State on 2/08/1993. The byelaws were made in pursuance of the exercise of SMBC’s statutory powers under the Public Health Act 1875, s.164 (in the case of land being used as public walks or pleasure grounds – and it is unnecessary that the authority should own such land). It should be noted that s.9(b) of the 1906 Act also authorises a local authority to “*undertake the entire or partial care, management and control of any such open space ... whether any interest in the soil is transferred to the local authority or not*”. The term “*open space*” is defined in s.20 as including “*any land ... on which there are no buildings ...*”. It follows from all this that if (a) the application land is included within the byelaws, and (b) if SMBC are able to demonstrate that, on

the balance of probabilities, they entered into an agreement or arrangement with the owners of such land to manage and control it until such time as it was required for highway improvements, then the principles laid down in *Newhaven* and *Naylor* may very well preclude its registration as a TVG.

54. As against this, the applicant says (a) that the byelaws do not even apply to the land (and the only likely candidate mentioned in Part 1 to the Schedule of the byelaws is “Purnells Brook Open Space”), and (b) that SMBC cannot prove that an agreement or arrangement existed with successive landowners which entitled them to manage and generally be responsible for the land to bring them within the *Naylor* principle. It would perhaps be convenient if, at this stage, I dealt with the factual background underpinning the case in relation to the arguments on the byelaws and *Naylor*.
55. The applicant does not dispute that SMBC have managed the land and that this began before 1993. As previously indicated, there is some signage, a dog bin and regular cutting during the growing season. We are dealing here with relatively low levels of management. There are, for instance, no play facilities on the land but it does have every appearance of being recreational open space to which the public have enjoyed unhindered access on foot. I should perhaps mention, however, that although the objector’s solicitors wrote to Mrs Slater at 68 Longdon Road on 13/01/2014 (O1/206) complaining of trespass, one can see that any landowner would have been rightly concerned about intrusion at the rear of No.68, particularly when one sees the photos at A1/294 which, although taken over a year later, no doubt continues to be a source of worry to the objector which may well have good reason to think that if it did nothing an area of land beyond the rear fencing of No.68 and their neighbour was at risk of being incorporated into the gardens of these properties.
56. Mr Sitch dealt with the history of maintenance in his declaration at O1/132. He says that SMBC have accepted that they manage the land. He mentions an email from Robert Ewins of SMBC’s Governance Directorate to his colleague Ben Taylor dated 6/08/2013 (O1/227) in which the former says this:

“It seems the Council has been more involved with this land than I realised. Whilst there is a “no ball games” sign on site we have no records of when it

was placed there or why. The type and condition of the dog waste bin suggests that it was installed there at least 5 years ago. Further, when the area was occupied by travellers, a ditch and gate were put in to stop occupation. I am told that there is a monthly flail mowing of the site, that tree and hedge maintenance is carried out as required, litter collection is carried out weekly, including emptying of a dog waste bin.”

57. Mr Sitch also mentions the email sent to Robert Ewins by Adrian Stringer of SMBC’s Resources department on 3/10/2013 (O1/139) in which the latter states that SMBC:

“ ... manage the respective sites through our grounds maintenance contracts (both sites are in SMBC and third party ownership) pending the implementation or otherwise of the designated bypass line ...

If an application was successful, then the landowners who we manage the land for may potentially have a claim against us for failing to protect it from an application ...

I cannot locate the other VG application for the Purnell’s Brook land to the North of Longdon Road but the above comments would also apply to that one as well ..”.

58. Finally, there is an email to the parties dated 10/02/2016 from my instructing solicitor, Mr Gill (O3/312, 315-317), who made some very helpful inquiries between the second and third days on the *Newhaven* and *Naylor* issues. He makes these points:

- (a) The 1993 byelaws are still in force.
- (b) SMBC’s Parks Officer (who has been with SMBC’s parks’ team for nearly 30 years) says that he has only ever known the application land as the “Knowle Bypass land”.
- (c) SMBC have no record of any agreement with the owners of the land with regard to its maintenance or management.

- (d) SMBC believes that it has been maintaining the land for around 25 years. The land is currently incorporated into the grounds' maintenance contract which SMBC has with its environmental contractor (Amey) who manage the authority's parks and open spaces
 - (e) The gate and log barrier were put in place after requests from residents and local members to prevent any further unlawful occupation of the land. The gate was installed to ensure that access could still be gained for maintenance purposes.
59. It is also plain that the application land is actively managed otherwise after 30 years or more from the time of the Copt Heath development in the 1970s it would by now have become an impenetrable wilderness. It is also obvious that, over the years, substantial direct costs would have been incurred by SMBC in managing the land in order to facilitate its use as recreational open space for local inhabitants. Indeed, SMBC must have considered that it was under a duty to intervene in 2010 (with the help of the police) when the land was the subject of incursion by travellers.
60. The question of ownership of the application land is touched on in Mr Gill's answer at 58(c). There is clearly evidence that in 1973 it would have been Ashworth and Steward Ltd (Mr Vaughan at O1/234 says that this firm were taken over by Barrats). By 1979 ownership had evidently changed twice and by 1/3/1979 the land belonged to Ash Homes Ltd. The ownership history is then taken up in the letter of the objector's solicitors (Stevensons) dated 16/02/2016 where they say that in 2000 the application land was sold by Gross Hill Properties Ltd to Freehold Portfolios GR Ltd which later transferred the land to the objector, Wallace Properties Ltd, under a transfer dated 26/05/2012 (the objector and Freehold Portfolios GR Ltd are within the same group of companies). It is now plain that there is no documentary evidence linking any owner of the application land before 2000 with any agreement or arrangement with SMBC in relation to the maintenance or management of such land and the objector says that following the transfer to Freehold Portfolios GR Ltd in 2000, neither they nor Freehold Portfolios Ltd ever entered into any such agreement with SMBC in relation to the maintenance of

the land. It seems to me that, ultimately, this question is probably going to turn on whether an agreement or arrangement such as this, at least since 2000, if not before, may be implied by conduct, there clearly being no documents' trail despite the researches into this on both sides.

61. I turn next to the byelaws. Mr Sitch deals with this in his declaration dated 15/02/2016. There are, he says, three candidates for the application land in the Part 1 list attached to the schedule. They are Jobs Close Park, Purnell's Brook Open Space and Purnells Brook Streamside Walk. There is unfortunately no map attached to the byelaws, nor were they ever posted on the application land. It is then a question of determining to what land this description was intended to apply in 1993. There are, as Mr Sitch contends, only these three candidate sites that come into the reckoning. He rules out Purnell's Brook Streamside Walk, which he considers to be the blue land shown within Box/1 on his plan at O3/83 (Mr Jones, for the applicant, does not dispute this), and Jobs Close Park, which he says is the green land shown within Box/3 on O3/83 which he calls Knowle Park and Jobs Close. David Tipping, SMBC's Parks and Open Space Development Officer, wrote to Mr Sitch's colleague, Ben Taylor, on 15/02/2016 saying that:

"The only named Public Open Spaces in the Knowle Ward are

Knowle Park (formerly known as Jobs Close Park)

St John's Close

Knowle Streamside Trust Land (off Wychwood Avenue)."

Since we are not dealing with the last two, it means, as Mr Sitch believes, that Jobs Close Park is likely to be the green land within Box/3 which is now known as Knowle Park (although described on the plans at O3/83&93 as "Recreation Ground" and includes the other two areas sought to be registered as TVGs). This then leaves, in Mr Sitch's view, the application land which he says conforms to the description "Purnell's Brook Open Space" in the byelaws. His view about this is reinforced by (a) the view of Mr Gill's "legal colleagues" when he discussed the matter with them, as is noted in his email at

O3/104 (Mr Jones is, I think, right to be sceptical about the apparent view held by Mr Gill's colleagues, not because they were necessarily wrong but because it seems plain that Mr Gill only had a limited opportunity of discussing the matter briefly with them and one does not know why they arrived at the view they did), and (b) the fact that the land has been managed and maintained by SMBC and he says it is not surprising that SMBC would have made byelaws in respect of such land as it has done in relation to other open spaces elsewhere in the borough.

62. The applicant contends that the expression "Purnell's Brook Open Space" was not intended to refer to the application land but to the finger of land shown in Box/3 on O3/83 which he says is not within the curtilage of Knowle Park, that is, by reference to the dotted black line boundary shown on the "Welcome to Knowle Park" sign at O3/97. Knowle Park is designated as a Local Nature Reserve and Purnell's Brook runs through the park and also through the finger of land to the south-west which Mr Jones asserts is intended to be Purnell's Brook Open Space in the byelaws (Mr Jones says that Purnell's Brook actually rises in this area having been culverted to this point in earlier times and flows through it).
63. I have not visited this area (seeing as its relevance to the case only emerged on the last day of the inquiry) but there is an aerial photo at O3/99 which shows a heavily wooded area to the south-west of the footpath which, judging by the "Welcome to Knowle Park" sign at O3/97, appears to mark the boundary of Knowle Park (in fact SMBC do not have a definitive map showing the boundaries of Knowle Park although it is probable that it may not include the finger of land claimed by Mr Jones to be "Purnell's Park Open Space" judging by the online maps at LTJ.6 and LTJ.7).
64. Mr Jones was recalled on the third day to rebut the objector's assertion that the application land falls within the byelaws. He argued that "Purnell's Brook Open Space" was in fact intended to be represented by the finger of land shown in Box/3 on O3/83 (which, in his statement dated 18/02/2016 at p.3, he described as being "the part of the Local Nature Reserve lying to the SW of

the Park towards Hillmorton Rd”) rather than the application land or Knowle Park (formerly Jobs Close Park). When asked to describe the finger of land he said that its perimeter comprised of made-up paths and that the middle section is mainly wooded although there is a small open area abutting Starbold Close. A further curiosity with this small parcel of land (which, incidentally, forms part of the “Metropolitan Borough of Solihull Jobs Close Local Nature Reserve No.102004 – see LTJ.1 – this is land acquired and managed by SMBC as a nature reserve within the meaning of the National Parks and Access to Countryside Act 1949, ss.19/21) is that it is actually held by SMBC for highway purposes (see A1/8) which is hardly consistent with the inclusion of such land in the schedule of SMBC’s open spaces in the 1993 byelaws.

65. When asked about this Mr Sitch said that he would not call Mr Jones’s candidate for the expression Purnells Brook Open Space an open space as the land is heavily wooded and only partly accessible on foot which he put at around 25% of the area as a whole. He agreed, however, that there was “*no categoric answer*” to what was meant by the expression “Purnell’s Brook Open Space” which he nonetheless considered applied to the application land even though, since 1993, it may have become more overgrown. Mr Sitch also considered that there was no evidence to associate the Mr Jones’s candidate land with the expression “Purnell’s Brook Open Space”.

The applicant’s evidence

Oral evidence

66. Although I will endeavour to summarise the evidence that I heard, what follows is not intended as a verbatim account, or even necessarily a complete account, of the evidence given by the applicant’s witnesses at the public inquiry. It is simply a summary of some of the more salient issues dealt with in the evidence, particularly those that form the basis of my findings of fact. The summary is simply intended to be a sufficient account of the evidence for the registration authority to understand the reasoning behind my conclusions.

Leighton Jones

67. Mr Jones is a Trustee Director of the applicant and was its Chairman between 2012-14. Mr Jones has lived at 23 Newton Road since 1975. His home backs onto Purnell's Brook where he lives with his wife. They use the application land for recreation as did his children when they were living at home (they would have been aged around 12 and 15 in 1993 – his eldest son has put in written evidence at A1/201). He tells us helpfully that the land is around 65m wide at the point of entry in the north, narrowing to about 35m alongside his home before widening to an open space of some 65m by 45m at its southern end. He says that the gate (which is normally locked unless contractors need to gain access to the land) and bank constructed in 2010 to deter travellers are located some 40m from the northern end of the land.
68. Mr Jones states that some of the houses in Newton Road have access to the land via crossings over the brook. Indeed he too had the use of a plank over the stream until 2007 when the stream was dredged and widened. He mentions the presence of rope swings (which would come and go), children's dens and various constructions (that is, on or against trees) over the years (his own son would have stopped building dens by 1993 although his younger son would have continued doing this for a few more years). He says it is also possible to gain access to the walling behind the undergrowth and trees on the western side and I recall that we did this at one place on my accompanied site visit.
69. Mr Jones says that his own use of the land *"has been limited since 2007"* since his children left home and the plank he used as a crossing was not wide enough once the stream had been widened although I think that he still crosses the stream very occasionally. Normally he walks up to the roundabout and comes in at the northern end. He says he likes to pick sloes and blackberries and he obviously has to walk outside the main path to do this and he gave ample evidence of how and where he did this on the land (*"to get the best one's you'd always have to go further in"* – evidence which took no one by surprise). He says he has seen many people using the land over the years, either dog walkers or children playing on their own either with balls or just

generally chasing around and rushing in and out of the trees and undergrowth. He says that many of them are locals and he would recognise them. He says that dog-walkers generally follow one or more of the many worn paths but that the dogs will roam off the lead. However, he accepted in chief, that there was no doubt that *“there is a single path running down the centre”*. He also mentioned the fact that on a few occasions the southern or open area at the end has been used as a place for kickabouts and on around half a dozen occasions there have been bonfires and fireworks’ parties.

70. In terms of maintenance, he says that the area closest to the roundabout is mowed more regularly (say 4/5 times a year) than the land to the south (say 2/3 times a year). He said that the “No Ball Games” sign has been in place for a considerable time whereas the dog bin was only installed fairly recently. Indeed, when cross-examined about the mowing, Mr Jones said that *“most of us felt that the land belonged to the local authority and that it was their responsibility”*.
71. When cross-examined he accepted that walking, with or without dogs (Mr Jones is not a dog-walker), is the most frequent use of the land and that children’s play (mainly in the southern and central sections) mainly occurs at weekends or in the holidays. He also accepted that there was a principal path running through the land with other paths deviating off the main path often serving private accesses.
72. Mr Jones was recalled on the third day to deal with *Naylor* and byelaws’ points and the location of what he considered to be “Purnell’s Brook Open Space”. He put in written evidence about this (statement dated 18/02/2016) and also briefly gave some oral evidence although the documents found on the trawl between the second and third days of the inquiry tended, I think, to speak for themselves and the matter was subject of submissions by both counsel and I propose to leave it at that as far as Mr Jones’s evidence is concerned on these issues.

Ian Green

73. Mr Green has lived at 47 Newton Road since 1964 and can use a plank to bridge the stream if he wants although he does not leave it there all the time. He grew up at this property which he purchased from his parents and as a child he played on the land in all manner of ways with other children. His own children were born in 2000/2005. He has been walking dogs on the land since 1993 (he lets them off the lead when they are around 100 yards in from the northern entry point). Until around 2014 he walked on the land twice a day but more recently, as his dog is getting older, it has gone down to once a day. He said he walks along the path to the southern end of the land, does a loop around the field and then walks back again along the same path. However, when the path is muddy he keeps to the side of the path and, as he put it, when the dog is interested in something outside the path he would normally follow it elsewhere. He said that his children, who often accompany him on his walks (and are now also starting to use the land unaccompanied), would also run off the path if they saw something they were interested in elsewhere. He also said that they often saw other people using the land for walks whom he knows are local.

David Page

74. Mr Page has lived at 11 Newton Road since 1992. He and his family (he has two boys who were born in 1993/98 and are still at home) use the land regularly. His children regularly played there when they were growing up. He says that they built dens, met friends and paddled in the stream. This was mainly when they were of primary school age. Since 2008 he has walked his dog on the land which he lets off the lead just beyond the gate. The dog is walked on the land by he or his wife or his children three times a day some three or four times a week (they have a collie). He said that he mainly sticks to the path, including the circular path around the field in the southern section, although if the dog runs off, say to the stream, he will follow it into the undergrowth or wherever else it goes. He made the point that the stream could be bridged by a plank at the rear of his property before around 2006 but this is no longer possible (although, having said that, it can still be crossed by

laying down a plank towards the northern end of the land where the stream is narrower) since the dredging and widening work which was undertaken to overcome flooding which was occurring at Longdon Road.

Kathleen Delaney

75. Mrs Delaney lives at 21 Holland Avenue since 2001 and before that, after 1989, she lived at 1286 Warwick Road. Both these properties are within 400 yards of the application land. She has used the land throughout the whole of her time in the area. There appear to have been four phases when it came to her use of the land. The first was between 1989-92 when she met up with other mothers of pre-school children (virtually every day) as it was closer to gather there than at Knowle Park. The second was between 1992-99 when her sons were of school age yet still needed to be accompanied on walks. The third phase was between 1999-2003 when her children met up on the land and played there with their friends without being accompanied by adults (she says that they played ball games at the southern end). The fourth (and current phase) has involved occasional dog-walking. Mrs Delaney looks after dogs for friends and members of her family. She thought she walked a dog on the land daily one week in every six weeks. She sees people on the land whom she knows are local. Like her many of these people have been using the land for years, albeit, as she puts it, with different dogs, children and grandchildren. When the 2001 aerial photos were put to her she accepted that she normally stuck to the path even when walking dogs unless she has to pick up mess made by her dog.
76. Mr Delaney ran into problems during cross-examination. First she claimed in her oral evidence to have had picnics on the land between 1989-98 (i.e in the first and second phases mentioned above) whereas she did not tick this box in her evidence questionnaire dated 8/04/2013 at A1/66. Second, she claims in her statement at A1/64 that she saw no signs on the land whereas there is, of course, some signage (i.e. No Ball Games). Third, in her evidence questionnaire at A1/65 at [9], she claims to have used the land "*Most days*" which has not, I think, been the case for some years. However, Mrs Delaney nonetheless struck me as an honest and genuine witness and I suspect that,

in hindsight, she probably did not deal with her evidence questionnaire with sufficient care. It is, after all, entirely plausible that young mothers with children would stop and eat snacks and enjoy cool drinks on the land, especially after school in the warmer weather. Indeed, Mrs Delaney speaks of *"impromptu picnics"* in her statement at A1/63. I think this is probably what she meant when she deals with picnics rather than something more elaborate than this. The same goes for her *"Most days"* answer which was very probably true at one stage (again see A1/64 where she says that in the first phase (1989-92) she used the land *"virtually every day"*). On the face of it, her answer *"Most days"* was correct in answer to the first part of the question at [9] which asks her *"How often did you"* use the land, but is less clear in relation to the second part which asks her *"How often ... have you used"* the land. It seems to me that both the question and the answer suffer from a lack of precision. Mrs Delaney's answer that she had not see any signs on the land is also something of a curiosity as there are two signs present. One is admittedly close to the gate on the right hand side of the northern entry point and is certainly partially obscured at the moment by undergrowth but it has been there for some years and it is possible that if she enters on the left hand side she would miss it or simply forget that it was there. Unlike those of use involved in this case as professionals, she was not looking out for signage which she had been told was there. The other sign in relation to dumping rubbish is actually close to the pavement and it is perfectly feasible that she may either not have seen this or otherwise, if she had done, had not associated it with the entirety of the land to the rear of the houses at Longdon Road which is probably a couple of hundred yards or more away. At any rate, she was adamant in her evidence that she had not seen any signage on the land and I am prepared to accept that there was no intention on her part to mislead the inquiry and that when she says that she never noticed signs this was an honest answer. Indeed, if she had wanted to embellish she could have done so in her answer to where she walked when questioned about the 2001 aerial photo when she said that normally she *"tended to follow the path even when walking dogs"*. In my view, she plainly gave what was an honest answer and there was no embellishment as indeed there might have been in the case of a witness who was truly partisan.

Michael Burrows

77. Mr Burrows has lived at 45 Newton Road since 1974. He has used the land for recreational walking some two or three times a week throughout the whole of this period. He usually walks from one end to the other. He does not stick to the central path, which he accepts he uses, but also wanders around the land generally. He also sees other local people using the land, including dog-walkers and young children playing around with their parents. It is perhaps also worthy of note that (as he put it and in common with Mrs Delaney) the signs did not “register” with him either although he was aware of the dog bin.

Philip Bates

78. Mr Bates has lived at 33 Abbots Close since 1980. He has walked dogs on the land for most of this time. He lets his current dogs off the lead about half way down the land. He mainly uses the land at weekends early in the mornings when it is quiet. He lives on the western side of the land and has not only seen other dog-walkers on the land as well as children playing by the stream, but can also hear dog-walkers calling their dogs from his house. He also accepted that the tracks shown on the aerial photos had been created by dog-walkers but that he and his wife (see his statement at A1/45) had *“roamed all areas off the footpaths”*.

John Grieves

79. Mr Grieves and his wife are also regular dog-walkers (that is, except for a gap between 1991-2006) and have lived close to the land since 1980, firstly at 14 Wytchwood Avenue until 2006 and since then at 37 Abbots Close both of which addresses are said to be around 300 yards from the land. Mr Grieves said that they predominantly use the track. Their children, now grown up, used the land for play whilst they were growing up. They also see others on the land whom they know to be locals. They also pick blackberries there every year.

Claire Gibney

80. Mrs Gibney has lived at 49 Abbots Close since 1996. She regularly walked her dog on the land between 1996-2011. In common with others with young children growing up in the area, Mrs Gibney's two children (now grown up) also used the land for playing around in and also helped to walk the dogs (they would have been aged 8 and 5 in 1993). Mrs Gibney now uses the land for walks, either on her own or with friends with dogs. She says she probably uses the land once a fortnight or more often when she is on holiday. Although she follows the main path and walks around the loop at the southern end, she does say that she also uses all the land to walk on unless it is too muddy. Mr Gibney also mentions seeing families out walking on the land either with or without dogs.

Peter Ewin

81. Mr Ewin lives at 46 Chantry Heath Crescent only a five minute walk away from the land or thereabouts. As a dog walker his use of the land appears to have been confined to the periods 1983-93 and 2000-08 when, in total, he thinks that he would have used the land on some 20-30 occasions. He says that he and his family did not restrict themselves to the main path (which was not always in the same place but which was usually in the middle of the land) but they also walked elsewhere where the ground was also worn but not as worn as the main path. He also says that he normally saw children in groups playing on the land.

Richard Newton

82. Mr Newton has lived at 42 Wychwood Avenue for 35 years. His children also played there (they would have been 18 and 15 in 1993). It seems that after 1993 until around 2012-13, he and his wife only used the land between 2-10 times a year for walks (sometimes even more than this) and, in the last 3 years, on I think one day a week, for walking his daughter's dog.

Brian Ashton

83. Mr Ashton is a retired police officer who has lived at 1467 Warwick Road since 1993. Mr Ashton and his family have been walking dogs on the land, almost without interruption, since 1994. The walks are virtually daily, usually in the mornings and sometimes more often than this in the summer, and in all weathers. He meets up with other dog-walkers whom, he says, come from virtually every road within a 200m radius and occasionally by car from further afield. He often sees children playing on the land and dens are built in the bushes. There is also a rope swing and they also ride around on bikes in the middle wider section.
84. In his walks Mr Ashton said that he did not stick to the main path (although he would have to in the narrower section) and he tended to follow his dog closely. He said walked wherever the ground was drier and, of course, he followed his dog to collect any mess which had to be picked up.

Gerald Blackburn

85. Mr Blackburn is retired and has lived at Copt Heath Manor for around 10 years. He has regularly walked on the land with a friend and has observed others there walking with or without dogs as well as children playing, sometimes on bicycles. Mr Blackburn's evidence was not challenged.

Gerald Topsom

86. Mr Topsom has been using the land regularly and virtually without interruption for dog-walking since 1980. He is now living at 25 Blackdown Road (to the east of the land) and before that he lived at 44 Copt Heath Drive (to the west of the land). He says that he has seen other dog-walkers on the land along with children using the land (as he put it) as "*a playground*". He says that these are local children who have access to the land from adjacent houses. He said the children either play in the trees and shrubs (and he said that there has been more than one tree house over the years or else they play games in the southern area.

87. As to his movements, he says that he meanders down the land and goes wherever the dog goes. Sometimes he sticks to the path, sometimes not. He says it can get “*sticky*” in the winter and at times he has to walk wherever he can. In fact he says that the land opens up in winter and there is more land to walk on. He too says that whilst the path has broadly followed the same alignment it has not always been in the same place. The precise location of the circular path in the southern section has also slightly changed. He says there used to be a path running across the field. The obvious point he makes is that if the path is muddy or blocked then people will walk outside it with the result that, over time, a new alignment will emerge.

Joanna Nicholls

88. Mrs Nicholls has lived at 70 Longdon Road since September 2012 (only 9 months or thereabouts before the relevant application date on 17/04/2013), although she lived with her parents elsewhere in Knowle (at an address just inside the ecclesiastical parish) in the period 1992-2001 when she says she would have used the application land for recreation approximately once a month with her brother and friends. Her back gate (installed in July 2015 – the photo on A1/294 (23) shows their back fence before it was replaced located between two much larger fences, both with gates – in fact Mrs Nicholls said that pretty well everyone in Longdon Road backing onto the application land (have rear gates) leads into the southern part of the land and is used by her family on a weekly basis for recreation. She says that from their upstairs window they can see people walking on the land with their dogs and children playing football. Their neighbours also have a back gate and their children also play on the land.
89. Mrs Nicholls also told the inquiry that the grass is cut regularly during the growing season. She said it never grows higher than shin height. She says that she has seen walkers using the circular path in the field. She said that it was a “*well-established feature*”.

Keith Jones

90. Mr Jones is a retired Chartered Surveyor and has lived locally since 1979. Between 1979-82 he lived at Abbots Close (on the western side of the land). Since 1984 he has lived at 6 Wychwood Avenue which is roughly 150 yards from the roundabout at the northern end of the land. He says that until 1992, when he last had a dog, he walked the land daily and ever since 1992 it has still been once or twice a week depending on the weather (other than between 2008-10 when he looked after his son's dog when he walked on the land twice a day for 5 days a week). His routes vary and have not been limited to the main path which is worn by regular use and which he agreed is where people mainly walk. He meets other dog-walkers whom he recognises are local. Sometimes he has seen runners using the land, walkers and children playing or riding their bikes. At the southern end he has seen frisbee throwing, groups of youngsters playing ball games (once or more every summer) and kite flying (about 10-15 years ago). About 10 years ago he observed the construction of a communal bonfire. He says that his own children played on the land only occasionally. When asked precisely where he walked he said that it was 50/50 on the central path and outside it when it was dry.
91. Mr Jones was also able to give evidence that about 5 years ago young trees were planted towards the northern end of the land but in the past year both the trees and their support posts were removed by persons unknown. Presumably this work had initially been carried out by SMBC. Mr Jones says that the land is used "*by all members of the community, especially children and older residents*". He says it is the only area of accessible open land within easy walking distance of the majority of those living on the Copt Heath Estate.

Dr Adrian Jickells

92. Dr Jickells has lived close to the land for more than 30 years, initially in Longdon Road (1982-88) and later at Wychwood Avenue. He is not a dog-walker but says that he would probably walk on the land around 4 times a month. He says that he meanders around the land looking at the stream and at the plant and wildlife near the stream. He sticks to the central path where the land is narrower to walk through because of the undergrowth on each side

but (as he put it) he does not accept the constraint of the paths and likes to walk within the vegetated areas (he always wears walking boots). At the southern end he says he wanders around and does not stick to the circular path.

93. Accordingly, the applicant adduced oral evidence from a total of 16 witnesses.

Applicant's written evidence

94. The applicant also adduced written evidence in the form of separate statements and the latter's accompanying evidence questionnaires from a total of 32 witnesses. The total of those giving oral evidence and those providing statements with accompanying evidence questionnaires is accordingly 48.

95. The applicant also provided summaries of the user evidence (a) in the case of those whom it was contemplated might appear to give oral evidence, which totalled 40 (A1/tab8), and (b) in the case of those not giving oral evidence but providing statements where the total is 52 (A1/tab9). In the result, we have oral evidence and/or statements from a total of 92 witnesses along with a further 165 completed evidence questionnaires (but not oral evidence and/statements) from those identified in A1/tab13 along with a very helpful map on which the addresses of the latter are marked with a green dot, all of whom live close to the application land.

The objectors' evidence

96. Oral and written evidence was adduced by Geoffrey Vaughan (O1/234) and Mark Sitch, a local planning consultant and senior partner of Barton Willmore LLP. I shall take Mr Vaughan first.

Geoffrey Vaughan

97. Mr Vaughan (a retired surveyor) and his wife live at 3 Langfield Road which is located on the western side of the bell mouth or northern end of the land. They have lived at No.3 since 1983 and their joint letter of objection to SMBC will be found at O1/242. Mr Vaughan says that he can see over to the stream from his first floor office where he spends around 3/4 hours a week (see photo

at O1/244 where the view is quite limited). They cannot see the land from their ground floor. In his statement dated 16/12/2015 he says that he walks the land with their two dogs some 2 days a week and he uses the “*clearly delineated path*”. However, in his oral evidence he claims that he no longer uses the land other than occasionally in the summer (he said that it was too wet and full of dog excrement) and now walks around the golf course with his dog.

98. Mr Vaughan says that users of the land usually use the main path. He thinks that no more than 12 dogs a day are walked on the land and in view of what he says on O1/246, user, other than in the case of dog-walking, is extremely limited (no ball games and cycling during the school holidays on the main path). When Mr Vaughan and his wife wrote to SMBC on 2/09/2013 they said that registration might lead to an increase in people parking outside their home and to a greater risk of security in the case of the houses and gardens adjacent to the land. He also thinks that there might be more noise and nuisance. Mrs June Vaughan also put in a statement in similar terms at O1/250.

Mark Sitch

99. I have already dealt with the largely written evidence Mr Sitch gave in relation to the byelaws and to the likely identity of Purnell’s Brook Open Space which he considered to be the site of the application land. The main focus of Mr Sitch’s evidence concerns the use of the land for informal recreation. Mr Sitch’s firm, BW, has carried out a survey of the land in three periods and the conclusion drawn is that the land is used predominantly by dog-walkers many of whom repeatedly follow the same worn path which runs through the land. It is also suggested that, apart from dog-walkers, there is a lack of evidence to suggest that the land is used to any significant extent by local inhabitants for informal recreation. It is said that there is no evidence, for instance, of children’s play, ball games, kite flying, picnicking, cycle riding, community celebrations, drawing and painting or of fruit picking occurring whilst the BW surveys were carried out. In other words, what he is saying is that what we

have here is mainly dog-walking along a worn path and precious little else and certainly nothing which would justify registration of the land as a TVG.

100. Three surveys were carried out by BW as follows:
 - (a) 24/07/2013 to 13/08/2013: surveys took place three times a day, seven days a week for 30 mins per visit. There were a total of 63 visits. During 26 of these visits (41%) there were no users seen on the land.
 - (b) 16/09/2013 to 22/09/2013: on 7 of the 21 visits (33%) there were no users seen on the land.
 - (c) 13/06/2015 to 19/09/2015: on 7 of the 21 visits (33%) there were again no users seen on the land.

101. In the result, there were a total of 105 visits and recreational activity was noted to be occurring on only 65 occasions (62%) or, put another way, not at all on 38% of these visits. Mr Sitch has provided a very useful form (entitled: "Land at Knowle User Survey Matrix (22550)" at O1/201-203, 208-210, and 212-213 which cover the three survey periods. These entries show that visits were made by BW personnel (including by Mr Sitch and on one occasion by the mother of one of his staff) throughout the day but only during working hours and not in the evenings. A record was kept both within and outside of school term time. The entries are obviously detailed and no one has sought to question their veracity and neither do I in relation to what was observed taking place on the application land during the various visits made by individuals who were, I am satisfied, well aware of what was required of them in order to carry out proper surveys in relation to the use of the land by local inhabitants.

102. Mr Sitch has also presented evidence (which he updated in his oral evidence) on the issue of sufficiency of use. We are dealing with the document entitled: "Analysis of Knowle 'Locality' Boundaries". What he aims to do is to ascertain in percentage terms the number of people supporting the application to register within the ecclesiastical boundary. His figures are based on the overall number of returned evidence questionnaires (which is put at 241) and the 2011 census data. The new document at O3/306 is an update of O1/152.

103. The Ecclesiastical Parish boundary contains some 3,719 households. On the basis of 2.4 persons per household, the parish has an estimated population of 8,719. As a percentage of this, the respondees of 241 evidence questionnaires represent only 2.7% of the population of the Ecclesiastical Parish. If we were looking at the matter by reference to the number of households within the parish (3,719), the percentage rises to 6.4%. Mr Sitch explained these figures in his oral evidence. This is Mr Edwards's numerical insufficiency point.
104. It was also Mr Sitch's oral evidence that SMBC's maintenance of the application land is consistent with the fact that it had been "dedicated" in 1979 for the purposes of public recreation. He also accepted that it was possible to walk outside the main track. He agreed with me that there was nothing stopping people from walking anywhere on the land. He also accepted that although there were multiple routes as you enter the land, he said that these fall away to two routes and then only to one path where the land is at its narrowest. He also said that use will vary with the seasons. For instance, in the summer when the land is drier and harder there will be more wear on the ground.
105. On the byelaws issue (i.e. where is Purnells Brook Open Space?), Mr Sitch also conceded that there was no categorical answer to this. His view is that the expression "open space" means that the land is open, usable and formal open space. He thought that since the making of the byelaws in 1993 the land had become more overgrown and this would be consistent with the land being classified as open space in 1993. He was though of the view that there is no evidence that the finger of land identified by Mr Jones as Purnells Brook Open Space was intended to refer to the application land. For his part, Mr Sitch was firmly of the view that Purnells Brook Open Space could only be referring to the application land. He cited the fact that Mr Jones's finger of land was heavily wooded. Some of it is impenetrable and he thought that only 25% of it was accessible on foot. He instanced the fact that whereas in a few cases in the schedule to the byelaws (and I counted four) certain grounds are referred to as "Wood" this is not the case in relation to Mr Jones's finger of land, to which such description would be apposite, and it is accordingly unlikely that it

was even included in the schedule as a separate byelaws' location. In other words, what I think Mr Sitch was saying was that Mr Jones's candidate for Purnells Brook Open Space would not even have been open space in 1993 seeing as it was most likely an area of largely wooded land and therefore not appropriate for inclusion in the byelaws which concerned pleasure grounds and open spaces to which the public had ready access.

Closing Submissions

The applicant

106. I doubt whether I will do justice to the very full and helpful written arguments of the applicant's counsel, Mr Westaway, in his closing submissions dated 19/02/2016, on which he also elaborated in his oral submissions. What follows is what I consider to be the essential thrust of his case, the burden, which he rightly accepts is the case, being upon the applicant to demonstrate on the balance of probabilities that the elements necessary for the registration of land as a new green have been made out on the evidence. I also agree with him when he says that the burden shifts onto the objector if any one or more of the usual vitiating circumstances are contended for which, if correct, will mean that user will not have been qualifying as it will not have been "as of right". This arises, for instance, where user during any part of the relevant qualifying period has been "by right" (see *Barkas*) which, as Mr Westaway rightly says, is now regarded as a form of user which is permissive and thus non-qualifying. In the first instance, Mr Westaway addressed the inquiry on questions of law.

Locality

107. The applicant relies on use by the inhabitants of the Ecclesiastical Parish of Knowle. There is no doubt that an Ecclesiastical Parish can be a qualifying locality in law.

Significant use

108. The question is whether there has been sufficient use by the inhabitants of the Parish. As previously indicated, what matters is that the number of people

using the land 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 (see *McAlpine Homes Ltd*). The applicant contends that there is no separate test that qualifying use also has to be sufficiently widespread across the claimed community, or, as he put it, that there is no separate test of “geographic spread”. It is argued that the amendment of the law in 2000 was aimed at simplifying the law. It is also argued that the observations of Vos.J in *Paddico* at [106(i)] (where he robustly rejected the argument of spread – at least on the facts of that case) represent highly persuasive obiter and should not be limited to the evidential finding in that case.

“By right”

109. The issue on the present facts is whether the landowner came to an agreement or some kind of arrangement with SMBC that it would manage the land on its behalf the effect of which would be to bring the case within the principle of *Naylor* and the powers of local authorities to manage land which did not belong to them under the powers contained in the 1906 Act, s.9, and the 1875 Act, s.164. Mr Westacott refers to s.9(b) of the 1906 Act which authorises a local authority to “*undertake the entire or partial care, management, and control of any such open space* [referring to s.9(a)] ... *whether any interest in the soil is transferred to the local authority or not*”. S.9(a) stipulates that the local authority may acquire by agreement and for some consideration some right over (although not necessarily interest in) the open space. S.9(c) empowers the local authority to make agreements with reference to the open space. Accordingly, Mr Westacott submits that what is required in a case where the local authority is not the landowner is a formal agreement with the latter giving it rights over the open space. He does not though say what the essentials of a formal agreement might be such as whether it must be reduced to writing or not. In the case of s.164 of the 1875 Act, Mr Westacott submits that the section enables a local authority to “*purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks and pleasure grounds, and may support or contribute to the support of public walks pleasure grounds provided*

by any person whomsoever". Mr Westacott correctly points out that while it may not be expressly stipulated as such, any laying out, planting, improvement or maintenance of such land for the purposes of s.164 would be pursuant to an agreement or arrangement of some kind. This must be right as these steps would otherwise be an actionable trespass.

110. Mr Westmacott accepts that it is now well established that where a local authority holds or controls land under either Act it will be held in trust for enjoyment by the public for open outdoor recreation (see 1906 Act, s.10, and the Local Government Act 1972, s.122B). The result of this is that such land falls within the principle of *Barkas* under which the public's entitlement to use land for public recreation as a result of the exercise of statutory powers is user "by right" which would preclude its registration as a TVG.
111. Mr Westacott very helpfully deals with the facts of *Naylor* where the local authority in that case (Tendring District Council) maintained the land as public open space for a great many years. From 1945 until May 2009 it had been owned by a Mr Ted Carter and (after 2004) by his executors when it was sold to Silverbrook Estates Ltd. With the exception of a period in 1993, the land had been managed and maintained by the local authority as if it were an area of public open space available and open for all to use. There was no evidence as to the basis on which the land had been managed by the local authority. The local authority did not provide any evidence and the efforts of the parties to understand the circumstances under which its management of the land had taken place were met with only "*limited success*" [64]. The Deputy Judge noted that the Inspector had found [15] "*that it was probable that there had been a much longer term arrangement for [the land's] management and maintenance going back to before 1974 (when on local government reorganisation under the Local Government Act 1972, the District Council replaced Frinton and Walton Urban District Council)*". It was also the Inspector's view in that case (see [16]) that it had to be assumed, unless there was clear evidence to the contrary, that, what the local authority had done, it had done lawfully and that it could not have done so lawfully other than in the discharge of some statutory function. Accordingly he had found that the most probable explanation was that the local authority had managed and controlled

the land under the 1906 Act, ss.9/10 or the 1875 Act, s.164. In other words, the Inspector had been prepared to infer that there had in fact been an agreement between the landowner and the local authority which had continued well into the relevant qualifying period. That arrangement was one which he considered was likely to have been entered into under the 1875/1906 Acts the effect of which was to authorise the local authority to permit public use of the land for recreation for an indeterminate period (see [27] and [39]).

112. Mr Westacott is, I think, probably right when he says that *Naylor* is a case of implied permission on the basis that the local authority's management of the land in the exercise of statutory powers is effective to communicate the landowner's permission to use the land. The applicant's true case under *Naylor* is that it calls for an evidential base. He says that it will not apply where there is, as he puts it, "*an evidential void*" which, he submits, is the case here which, in contrast to *Naylor*, involves multiple owners. Nor does he accept that the public law doctrine of regularity would necessarily arise to validate the acquisition of rights by prescription. What, I think, he is saying is that the evidence in this case best fits the explanation that the local authority acted as they did out of public spiritedness but not under an agreement or arrangement made with successive landowners from which it presumably follows that SMBC acted throughout as trespassers in which case their outlay in maintaining such land would have been in excess of their powers for over 30 years. By referring to *R (Malpass) v Durham CC* [2012] EWHC 1934 (Admin) and *R (Goodman) v SoSEFRA* [2015] EWHC 2576 (Admin) (both of which concern the evidential base required to justify a finding of appropriation), Mr Westacott is, I think, inviting me to caution myself against making a *Naylor* finding unless it is warranted by a sufficient evidential base (for instance, in *Goodman* Dove J found that the exercise of the power of appropriation in s.122 LGA 1972 required "*a conscious deliberative process*" and could not be inferred or deduced solely from the management of the relevant land (see [26] and [43]).

The byelaws

113. It is accepted, following *Newhaven*, that validly made byelaws (in this instance made under the PHA 1875, s.164) may amount to a license or an implied permission to use land and so preclude registration even though such byelaws may not have been brought to the attention of users of the land. I understand the applicant's position on the byelaws to be that they do not apply to the application land on the basis (a) that Purnells Brook Open Space (the only likely candidate in the byelaws schedule) does not apply to the application land, and (b) that this fact is consistent with the notion that a local authority is very unlikely to have made byelaws in the case of land which it did not own. I remain to be convinced about this in a case where land managed by a local authority is held as open space for an indeterminate period under powers contained in the 1875/1906 Acts.

Evidence of use

114. Mr Westaway takes me through the history of the land which he accepts has been maintained for many years as general amenity land. He also disputes that this is a case involving a single track running through the land. He says that there are "*multiple routes across the land*". He asserts that the land would certainly have been accessible for LSP even though before being cut in the summer it might get to shin height (Mrs Nicholls). The fact that the land is a cul-de-sac and is not a place of transit to a destination elsewhere makes it even more likely that the whole area has the attributes of a TVG. It is obviously a safe place for informal recreation and for children to play around in or for dogs to run off the lead. Mr Westaway has also very helpfully provided me with thumb nail sketches of the applicant's oral evidence on which the case for registration is based. He also deals with the objector's evidence. He suggests that Mr Vaughan is hostile to registration and that his evidence should be viewed in that light. Mr Westacott also highlights the evidence of Mr Vaughan who did not think that the "No Ball Games" sign located at the north-west corner near his own home at 3 Langfield Road (which was erected at his request) applied to the whole of the application land. He may have a point. In relation to the survey evidence provided by Mr

Sitch, Mr Westacott's principal complaint is that it is merely a snapshot anyway and says nothing about use at other times. He also makes points about methodology, in particular he says it is unclear what locations the surveys were being conducted from or why there is no mention of use by children (the tree swing is evidently not even mentioned).

115. Mr Westacott's primary conclusions on use are these:

- (a) it is quite natural that a broad linear site would be used in the way the application land has been, namely that walkers would proceed broadly down the centre of the land, do a loop around the field at the end before walking back to the northern entry point where they had started out;
- (b) dogs are let off the lead and walkers are free to meander around outside the main track (where there is the attraction of a stream and an abundance of interesting vegetation and wildlife) which is nothing like mere perimeter walking around large fields or a lake or anything resembling highway use in the accepted sense;
- (c) the case on spread (were it to apply) also fails on the evidence in that there is use across the parish, albeit sparser and more scattered the further away one goes from the land (not forgetting Joanna Nicholls's use when she was living at Barcheston Road);

116. On *Naylor* Mr Westacott says that there is no sufficient proof that there was ever an agreement or arrangement made between SMBC and the various landowners with regard to the management of the land. A trawl of the available records has been carried out yet the landowners appear to have played no role at all in how the land was managed over the years. The absence of any reference to landowners in the records (such as they are, including the conveyancing records in 2000 when Freehold Portfolios GR Ltd purchased the land) is alleged, in effect, to be consistent with multiple absent owners with no interest in the land which is hardly surprising as it had been earmarked for a new road and had no hope value for development. Mr Westacott thinks that a combination of the records, SMBC's management of

the land and the absence of owner involvement is in fact more consistent with SMBC thinking, albeit erroneously, that it actually owned the land. It is said that some aspects of SMBC's control over the years go beyond mere management of the land (tree management, flood alleviation work and expulsion of travellers). If this is right then SMBC has been managing the land without the consent of the owner in which case *Naylor* will not apply and the use by local inhabitants will have been trespassory in nature in which event the land would be registrable as the user will not have been permissive.

117. In relation to the case on the byelaws, I am invited to accept Mr Jones's candidate when it comes to the location of Purnells Brook Open Space. The location is so vague that byelaws affecting the application land are unlikely to be enforced. Nor is there any evidence that the application land and Purnells Brook Open Space are one and the same. Indeed, Mr Westacott reminds me that even SMBC's Parks Officer of nearly 30 years standing considers the application land to be known as the "Knowle Bypass" land (O3/312). In the circumstances, Mr Westacott submits that the objector has failed to discharge the burden of proof under this head. This is not to detract from the submission that byelaw making powers exercised in the absence of an agreement or understanding with the legal owner could render public use "by right".

Closing Submissions

The objector

118. The closing submissions of Douglas Edwards QC are also very full and helpful and what follows are the main points of objection. As I have already covered the main issues and the competing contentions of the parties, there is, as it seems to me, no necessity to over-elaborate.

Ground 1

119. This is the well known objection founded upon use of the land as a public right of way and uses ancillary thereto (citing Lightman J in *Oxfordshire* at first instance, Sullivan J in *Laing Homes Ltd* and the advice of Vivian Chapman QC in *Radley Lakes* at para 306. The issue is whether the use relied on would be perceived by a reasonable landowner to be use for LSP over the whole of

the application land or merely use consistent with an actual or potential right of way and thus non-qualifying for present purposes. It is plain (*Oxfordshire* at [102]) that if the position is ambiguous the inference should normally be drawn of the exercise of the less onerous right (i.e. as a public right of way) rather than the more onerous right to use the land as a TVG.

120. Mr Edwards then proceeds to make those points which arose in the course of the evidence, not least in his cross-examination of the applicant's witnesses. He would have me focus on the fact that the predominant use of the land is that of walking, with or without dogs, along the worn path running up through the middle of the land before continuing on the circular walk around the field behind the houses in Longdon Road and then returning along the same route to the entrance close to the roundabout. Such a pattern of use arises, it is claimed, from the narrow and linear nature of the land over much of its length and is also consistent with the BW surveys and representative of how this land is mainly used by local inhabitants. As Mr Edwards puts it: *"It is difficult to suggest credibly that a reasonable landowner would attribute this use to anything other than the assertion of a public right of way"*. Mr Edwards invites me to treat use off the path by dogs or picking blackberries as being no more than incidental to the use of the land in the mind of a reasonable landowner as an actual or asserted public right of way. Other uses such as bike riding, jogging, sledging and horse riding would also have been confined to the worn path and should be viewed in the same light. He also says that sledging, picnics and horse riding were infrequent activities anyway. In the case of children's play (the building of dens etc. and the use of the rope swing), he says this would have been localised in the area where the land is narrow close to the entry point into the field at the southern end behind the houses in Longdon Road. In other words, children's play was not widespread across the land. Mr Edwards suggests that the use by children of land outside the worn central path either for building dens or otherwise was only sporadic or limited. The positioning of the rope swing on or close to the path also falls to be regarded as use incidental to the potential right of way over which the rope swing is hung. In substance, Mr Edwards contends that occasional user by children of land off the main path comes nowhere near demonstrating that the

whole of the application land has been sufficiently used for LSP for the whole of the qualifying period. In the case of ball games, it is said that this falls foul of the “No Ball Games” notice and should be discounted. He does not, however, deal with the location of the single notice and the likely geographic extent of such prohibition. For instance, would any reasonable person consider the sign to apply to the field behind the gardens of the houses in Longdon Road?

Ground 2

121. This is the sufficiency of use point. Mr Edwards relies on two matters in order to justify his assertion that the use relied on is insufficient to justify registration: (a) the updated analysis on O3/306 showing that those who put in the 241 evidence questionnaires in support of registering the land as a TVG represent only 6.3% of households within the Ecclesiastical Parish or only 2.7% of the Parish population (on the basis of 2.4 persons per household) (in other words, the contention here is that there is an insufficiency of use numerically); and (b) the lack of a sufficient geographic spread of users (in other words, the second contention under this head is that the claim should fail on the ground of an insufficiency of spread). On either basis, Mr Edwards submits that Ground 2 is “*compelling and unanswerable*”.
122. Mr Edwards says that in this case the evidence “*shows vast swathes of the Parish yielding no users at all*” and that this cannot sensibly meet the requirement to prove use of the land by a significant number of the inhabitants of the locality. The point made is that the law of prescription (which admittedly is at the heart of village green law) rewards long use and should not reward non-use. Mr Edwards argues that “*there is a compelling case to justify interpretation of s.15 so as to require users to be spread spatially throughout the locality relied on*”. Mr Edwards confines the observations of Vos J in *Paddico* to the adequacy of the distribution of user in that case rather than to any rejection of the applicability of the principle of spread under s.15.

Ground 3

123. This is the *Naylor* ground. The objector contends that the “*intentional acts of management and maintenance*” over many years (vis: landscaping, mowing, tree and stream management, dog bin and signage) can only sensibly be explained by the exercise of statutory powers under the 1906 Act, s.9, and the 1875 Act, s.164 (both of which are set out in the *Naylor* decision at [17] - [18] – although if the byelaws do apply in this instance the exercise of such powers will have taken place under the 1875 Act, s.164, as the byelaws were actually made under that enactment and not under the 1906 Act), and the holding in that case that a local authority may exercise powers under both these enactments in respect of land vested in a third party with its agreement (there being no requirement that the third party’s agreement needs be evidenced in writing as such an occurrence will not involve the disposition of an interest in land). *Naylor* is similar to the facts of this case in that land belonging to a third party was managed by a local authority for many years. No agreement existed yet the Inspector nonetheless determined that the local authority had probably acted lawfully under the foregoing provisions of the 1875/1906 Acts and that as a result, following *Barkas*, user had been “by right” and was accordingly non-qualifying.
124. I think that until shortly before the third and final day of the inquiry the objector’s case under this head had been premised solely by the close comparison between this case and that of *Naylor*. In other words: (a) to the probability on the evidence that SMBC would have acted as they did with the concurrence and approval of the landowners, and (b) by reliance on the doctrine of regularity (or that of legal certainty) and with it a presumption that SMBC must be taken to have acted lawfully pursuant to an available statutory power. This being so, Mr Edwards contended that the presumption was one which needed to be rebutted by evidence as opposed to mere speculation. In other words, that it was incumbent on the applicant to adduce evidence which must demonstrate at least a probability that the events inherent in the presumption did not occur (citing from *Parmar v Upton* [2015] EWCA Civ 795, per Briggs L.J at [37] – a case involving the hedge and ditch presumption).

125. The position, however, changed with the introduction of the minutes from 1979 (where the land was to be “dedicated” as open space until the need for the land for highway improvements) and thereafter by the landscaping, management, control and the resulting availability of such land over many years for open air recreation for the benefit of local inhabitants at not inconsiderable expense to SMBC. Mr Edwards rightly says that it is not possible to “dedicate” land as open space. I agree. Dedication is a concept that is applicable to highway law and that what in truth was envisaged by the expression “dedicate” in the minutes of the meeting of SMBC on 1/03/1979 (see para 41 above) was that the land would be made available as open space and would be managed on this basis by SMBC until the new road scheme supervened. If this interpretation of events is correct then I think Mr Edwards is correct and that the minutes may obviate the need to rely on the presumption of regularity anyway although he doubtless continues to rely on it if necessary.

Ground 4

126. Mr Edwards argues that this ground, although free-standing, underscores the correctness of his submissions under the previous ground in that if byelaws were made in relation to the management of the land under the PHA 1875, s.164, in order that it might be used (in the words of the statute) as public walks or pleasure grounds, then this would be entirely consistent with the principle adumbrated in *Naylor* and (following *Newhaven* on the effect of byelaws) to render use “by right”.
127. There is no difference of opinion between the parties on the effect of the byelaws if they are found to apply to the application land. I do not intend to repeat the debate on whether Purnells Brook Open Space is intended to refer to the application land or to the finger of land to the south-west of Knowle Park (see Box/3 at O3/83 and the useful aerial photo at O3/99).
128. Mr Edwards makes the obvious point that the application land is certainly publicly maintained open space through which Purnells Brook passes and is certainly a good fit for the term Purnells Brook Open Space. He says that the applicant’s finger of land is an altogether bad fit as not only is it land which is

held by SMBC for highway purposes but it is also included in the Solihull Jobs Close Nature Reserve No.10/2004 under the declaration made by SMBC in 2004 under the provisions of the National Parks and Access to Countryside Act 1949 (a declaration as a LNR under the 1949 Act is conclusive and does not require an appropriation onto such purposes). What this means is that before 2004 and absent an appropriation from highway to open space purposes (and there was none and is something which cannot be inferred either from mere use of the land - see *Goodman*), the applicant's candidate land would, at the time of the making of the byelaws in 1993, presumably still have been held for highway purposes and not as land held for the purposes of the 1875/1906 Acts. For these reasons, the applicant's candidate land is, on the balance of probabilities, rejected with the result that Mr Edwards contends that Purnells Brook Open Space is the application land for the purposes of the byelaws which is sufficient to render use of such land "by right".

Discussion

Significant use

129. I do not accept that the principle of "spread" is applicable to s.15 of the Commons Act 2006. Mr Westacott is, I think, right when he contends that the obiter dictum of Vos J in *Paddico (267) Ltd* is highly persuasive (at least at this level) and was not intended to be limited to the evidential finding in that case. In my view, what counts is whether there is a sufficiency of use within the relevant community rather than its geographic spread which is bound to be uneven and may well even be non-existent the further away one travels from the claimed TVG, especially in limb (a) locality cases. If, however, I am wrong about this then I would have to concede that user is by no means widespread and that large areas of the Ecclesiastical Parish are under-represented or are not even represented at all in the applicant's oral and written evidence. In such circumstances, the case for registration would undoubtedly fail as it was insufficiently widespread across the claimed community.
130. I also reject the argument advanced by Mr Edwards that there is a numerical insufficiency because 241 evidence questionnaires represent only 2.7% of the

population of the Ecclesiastical Parish or only 6.3% of households within such area. By my reckoning, the applicant adduced oral evidence and/or statements from 92 witnesses along with a further 165 completed evidence questionnaires making a grand total of 257 supporters for registration. In my view, this is a significant sample and is enough to justify registration.

131. I invariably find these population statistics unhelpful. If such an approach were correct it would mean in practice that applications within the larger settlements would invariably fail because the applicant has failed to adduce the vast quantities of oral and documentary witness evidence which might arguably be necessary to justify registration if, for instance, it had to be supported by as many as 5% or even as many as 10% (or perhaps even more) of the population of the relevant community. It is certainly not an approach which finds support in the CA 2006, nor is it, I think, even consonant with the approach in *McAlpine Homes* or even on the facts of that case where registration was found to be justified.
132. Such an approach to sufficiency of use also overlooks the evidence of the oral witnesses in this case in relation to others whom they observed engaging in informal recreation on the land such as other dog-walkers and children playing. It also overlooks the realities of the location of the application land as a safe place for dog-walkers and for children to play in and to its likely use by substantial numbers of local people who live to the north of Longdon Road who choose not to go as far as Knowle Park for their regular walks.
133. We are, for instance, dealing here with land which is easily accessible and located within easy walking distance of a fairly sizable settlement. There are no signs forbidding entry and an absent landowner with no current use for land which is sufficiently well maintained in order that it may continue to be available for use for informal recreation within the local community. On the face of it, the evidence is, as it seems to me, quite clear, namely that it is probable that there has been ample use of the land for more than at least 20 years by a significant number of the inhabitants of an Ecclesiastical Parish (although I dare say that most local people would be amazed to learn that

their entitlement to use the land derives from their status as parishioners of a Church of England Parish).

134. It is, therefore, my view that the number of people supporting the case for registration was sufficient to justify registration in light of all the evidence before the inquiry and all the surrounding circumstances. In my experience, this was a well-supported application and the number of oral witnesses called was enough. There were 16 oral witnesses, 13 of whom could lay claim to at least 20 years use and, of course, the evidence of those called to give oral evidence was entirely consistent with the written evidence of those who did not and I bear this in mind even though such evidence obviously lacked the weight of those whose evidence was tested in cross-examination.
135. It is, I think, also worthy of note that Mr Edwards did not say how many witnesses in this instance would have sufficed for the purposes of his numerical insufficiency argument. It would, I think, be reducing the s.15 requirement to the point of absurdity if, say, in the case of a claimed community such as this with a population of around 9,000, an applicant had, in order to justify registration, to provide written evidence from as many as, say, 10% of the local population or, for that matter, to adduce oral evidence from as many as 50 people (or from 0.5% of the population). Would even this sample be large enough? Quite possibly not if Mr Edwards's numerical insufficiency point had any basis in law, which I very much doubt.

Evidence of use for LSP

136. I say at once that I accept the evidence of those witnesses who gave oral evidence on behalf of the applicant. I have no doubt they were all honest and genuine and did their best to assist the inquiry. In the case of Geoffrey Vaughan, I am inclined to the view that I must treat his evidence with some caution as he seemed to me to be very strongly opposed to the application and would also have had only a limited view of the land from his first floor office in the relatively few hours a week when he used it. His own use of the land was also infrequent. It is though pertinent to note from his evidence (and I take this from Mr Westacott's own note) that he did not think that the "No Ball Games" sign positioned near his home would obviously apply to all of the

application land and so act as a deterrent to youngsters playing ball games on the land behind the houses in Longdon Road.

136. Accepting, as I do, that there was a sufficiency of use for informal recreation there are then three questions. Firstly, has there been qualifying user to a sufficient extent? Secondly, was there qualifying use, for all practical purposes, of the whole of the land during the qualifying period?
137. The first question raises the claimed highway use. The issue is whether the use by local inhabitants of the main path, including the circular walk around the field at the southern end, would have appeared to the reasonable landowner on the spot to be referable to the exercise of a potential right of way rather than the more onerous right to use the land as a green. If this is right then is what is left by way of LSP sufficient for registration?
138. This highway argument is invariably relied on by objectors whenever the subject land has visible tracks on the ground. It seems to me that such a defence to registration only has credibility when local inhabitants only or mainly use such tracks and do not generally walk outside the tracks. Where, however, the user is much wider in scope it may as a matter of fact and degree be more referable to use as a green. For instance, where one is dealing with a large field with circular walks around the perimeter and a virtual absence of evidence of user within the field itself (particularly where the land has at one time been used for arable cultivation and/or is soft and/or tussocky) the potential right of way argument undoubtedly has force. However, in a case as like this where it is only natural that a broad linear site would be used in the way in which the application land has been (which, as Mr Westacott says, involves walkers proceeding broadly down the centre of the land and doing a loop at the end before walking back again) the same argument is, I think, much less convincing, not least as the land in this instance is a cul de sac anyway rather than a natural place of transit to a destination elsewhere.
139. In this case there was ample evidence that users veered off the track or tracks and meandered leisurely over and enjoyed the land on either side, at least where it was accessible on foot. One can easily imagine users walking

outside the main track to view the goings on in the stream and, as I saw for myself, there are obvious tracks off into the undergrowth on either side (albeit mainly on the eastern side). It was also plain on the evidence that a good deal of informal recreation takes place in the field at the southern end and I too agree with Mr Vaughan when he questioned whether, as a matter of fact, the “No Ball Games” sign positioned near his home at the northern end near the road, would obviously apply to all of the application land. I rather doubt whether this sign is so located as to make it plain to youngsters playing ball games on the land behind the houses in Longdon Road that they had no right to do so. Moreover, the obvious disregard of this notice over several years and, of course, the fact that it has never been enforced by SMBC, seems to me to imply that it was probably never intended to apply to the whole of the application land anyway. I doubt whether this matters anyway as I find that there has been ample qualifying use of the whole of the application land, including the field at the southern end, other than with reference to use for ball games. It is, I think, clearly a destination for most of those who use the land who, more often than not, are bound to take full advantage of the whole of the field, not least in the drier, sunnier weather. There also strikes me as being an air of unreality in the objector’s case that, in the circumstances of this case, picking blackberries and sloes or walking off the path for whatever reason (including children’s play) is merely use which is incidental to the primary use of the land for highway purposes. In my view, a reasonable landowner on the spot would scarcely imagine that locals were, in this instance, merely asserting the potential acquisition of a right of way rather than rights sufficient to support a TVG registration. The evidence discloses, in my view, that local inhabitants are regularly using the land for informal recreation outside the tracks and that their use of such land is neither trivial nor occasional and is certainly sufficient to justify registration.

140. I should perhaps mention the BW survey evidence. The argument is that it is indicative of general use of the land in the 1993-2013 period. Clearly land does not have to be used all the time to justify registration. There will be times when the land is more regularly used than at other times. Early morning and early evening dog-walking is just such a time (when BW were not present), as

are those times of the year when the grass is not invariably wet and boggy although even on my recent visit there was evidence that people had been on the land. There was, for instance, more than a single track and the main track was extremely muddy at the pinch point where the usable land was at its narrowest. I am, therefore, inclined to the view that the BW survey evidence does not require me to find that use of the land is numerically insufficient to justify registration and I find that such evidence is apt to be unreliable as evidence of the overall pattern of qualifying user throughout the whole of the qualifying period. Such evidence is no more than a snap-shot of use at particular times and, in the circumstances, I prefer to rely on what I was told by those whose evidence was tested in cross-examination and by all the other relevant circumstances of the case pertaining to the land and to those who claim to use it.

141. For the avoidance of doubt, I also find that although in the region of say 30% of the land was not used by local inhabitants, it could, in the circumstances, be said that the whole of the land had nonetheless been used for LSP for the relevant period. In my view, the unused areas in this instance, are plainly integral to the enjoyment of the whole of the land as might apply, for instance, in the case of borders, overgrown areas or an ornamental lake which can form part of the function and attractiveness of an area. This is certainly not a case where severance would be warranted.

As of right

142. I now deal with the objector's case on *Naylor* and the byelaws. In my view, the objector's case is unassailable on both counts.
143. Mr Edwards is right when he says that there have been intentional acts of management and maintenance over many years (vis: initial landscaping, mowing, tree and stream management, dog bin and some signage) which, in my view, can only sensibly be explained by the exercise of statutory powers under the 1906 Act, s.9, and the 1875 Act, s.164, under which latter enactment the 1993 byelaws came to be made (that is, if applicable to the application land). *Naylor* is very similar to the facts of this case in that land belonging to a third party was managed by a local authority for many years.

No agreement or arrangement existed yet the Inspector nonetheless determined that the local authority had probably acted lawfully under the foregoing provisions of the 1906 or 1875 Acts and that, following *Barkas* and as previously explained, user had been “by right” and was accordingly non-qualifying.

144. The factual backcloth is entirely consistent with this having been the case, namely that the land had indeed been maintained pursuant to an agreement or arrangement with the various landowners from time to time and I am certainly prepared to infer that this must have been the case after Ash Homes Ltd had disposed of their interest in the land. The alternative is that SMBC merely acted on a whim and (without authority) simply went onto the land (no doubt with the most laudable of intentions) and, at public expense, landscaped it so that it would thereafter be available as recreational open space (something which was said would cost £6,000 in 1982) and thereafter maintained and protected it in all manner of ways (and indeed still continue to maintain it) without either the concurrence of successive owners or otherwise being under any obligation to do so. I consider this to be inherently unlikely.
145. What, in my view, clearly happened here is that land earmarked for highway improvements was taken over by SMBC following its temporary “dedication” by the then owner (Ash Homes Ltd) in 1979. SMBC clearly accepted the “dedication” as being the equal of an offer to them to take over and manage the land for use as public open space until it was needed for highway improvements. This was, as the records of both SMBC and the Knowle Society show, the subject of keen debate at the time and is also something which local people would have wanted.
146. The documents show that the land is likely to have been improved and generally made available for public use sometime by the early to mid-1980s. Indeed, it will be recalled that Mr Vaughan said that in 1984-85 he and his wife had had to ask SMBC to landscape the land as it was then only “*barren earth*” and he said that grass was duly seeded and trees were planted. This would undoubtedly have been the position by 1991 when the Director of Technical Services reported that essential maintenance work was required to

be undertaken on a number of willow trees on or near the banks of the stream and, of course, the assumption of control over the application land is amply reinforced if the land had been included in the byelaws issued by SMBC in 1993.

147. Whilst it is true that, after 1979, SMBC have no record of any agreement with the owners of the land with regard to its maintenance or management, it is equally plain that the land has been actively managed and that, over the years, substantial direct costs would have been incurred by SMBC in keeping the land available for use by local inhabitants. It seems to me that no reasonable owner of this land would have been unaware or oblivious of this state of affairs and no doubt would have welcomed it as it necessarily relieved it of any obligation in relation to the upkeep of land which had no development value and for which it had no use. I think this is one of those cases where successive owners of the land and SMBC have, by their conduct, objectively agreed to the latter's assumption of responsibility for the management and control of the land until such time as it was required for highway improvements and local inhabitants no doubt had a legitimate expectation that this had in fact been the case and that their use of the land would not have been trespassory. This means in practice that, following the abandonment of the Knowle by-pass, the objector would be free to serve notice on SMBC that its historic use, management and probable de facto occupation of the land is being brought to an end and that as a consequence, in the absence of registration of the land as a TVG, public access to such land is accordingly being terminated.
148. I therefore accept Mr Edwards's submissions on *Naylor* and it accordingly follows (following *Barkas*) that throughout the whole of the qualifying period the use of the application land by local inhabitants was non-qualifying as it was "by right" and not "as of right" since the land was held and managed for public use under the provisions of the 1906 Act, ss.9/10, and the 1875 Act, s.164. The issue of byelaws in 1993 under the 1875 Act, s.164, is, of course, entirely consistent with this having been the case.

149. I also have little difficulty in accepting the objector's case on the byelaws which I have no doubt apply to the application land. If this is the case it follows from *Newhaven* that registration is precluded as user after 1993 will have been "by right".
150. The issue under this head is whether Purnells Brook Open Space was intended to refer to the application land or to the finger of land to the south-west of Knowle Park. In my view, for the reasons advanced by Mr Edwards and Mr Sitch it is highly likely to be the former as it was clearly publicly maintained open space in 1993 and is generally a good fit for the above description in view of its proximity to Purnells Brook which passes through the land.
151. I do not consider that the applicant's candidate for this description works in practice as it is land which is held by SMBC for highway purposes which, presumably, was also the case in 1993. There is certainly no evidence that before 2004, when the land in question became incorporated in the 1949 Act declaration, it had been appropriated onto the purposes of the 1875/1906 Acts. I also accept the analysis on this by Mr Sitch at O3/81 whose view it is that there is no other area in the locality which can realistically be described as Purnells Brook Open Space. For these reasons, the applicant's candidate land must be surely rejected and I accordingly find that Purnells Brook Open Space is the application land for the purposes of the byelaws which, following *Newhaven*, is sufficient to render use of such land "by right" and thus non-qualifying for registration.

Findings of fact and recommendation

152. I find that a significant number of the local inhabitants of the claimed locality (being the Ecclesiastical Parish of Knowle) indulged in LSP on the whole of the application land for the period of at least 20 years ending on or about 17/04/2013.
153. However, I find that the use of the application land by local inhabitants does not qualify for registration as it was use "by right" and not "as of right". This conclusion arises from the decisions in *Naylor* and *Newhaven*.

154. Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 213123) should be rejected.
155. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *“the reasons set out in the Inspector's report dated 15/03/2016.”*

William Webster

3 Paper Buildings

Bournemouth

Inspector

15th March 2016