**IN THE MATTER OF**

# AN APPLICATION TO REGISTER AS A TOWN OR VILLAGE GREEN

# LAND KNOWN AS ROKEBY PLAYING FIELDS, RUGBY, WARWICKSHIRE

**- APPLICATION REFERENCE 300/159 -**

## INSPECTOR'S REPORT

**MISS MICHELLE CANEY**

**19th January 2018**

**Warwickshire County Council**

**Warwickshire Legal Services**

**Shire Hall**

**Warwick**

**Warwickshire**

**CV34 4RL**

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**RECOMMENDATION**

**This Report concludes that the Applicant has failed to establish that the application land qualifies for registration as a new town or village green under section 15 of the Commons Act 2006 and recommends that the Registration Authority should reject the application.**

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## A. INTRODUCTION

1.1 By an application dated 15th September 2016, an unincorporated community association known as SHARE – Sustainable Hillside and Rokeby Education ("the Applicant") applied under s. 15 of the Commons Act 2006 ("the CA 2006") to register land known locally as Rokeby Playing Fields, Rugby, Warwickshire as a new town or village green ("TVG").

1.2 The application was made to Warwickshire County Council as the relevant commons registration authority ("the CRA") for the purpose of the CA 2006. The application was date stamped as having been validly received by the CRA on 23rd September 2016 [**A1**][1].

1.3 The application was made on the prescribed Form 44 and contains the following details:

(i) Part 4 of the application confirms that s. 15(2) of the CA 2006 applies [**A3**].

(ii) Part 5 describes the name by which the land is usually known as:

"Rokeby Playing Fields – Land Registry Reference, WK11231" [**A4**].

(iii) Part 6 and 7, when read together, confirm that the application is made in respect of two neighbourhoods, namely Rokeby and Hillside [**A5**].

(iv) Part 7 of the application avers that Rokeby Playing Fields has been used by a significant number of the residents of the Rokeby and Hillside neighbourhoods for games and other pastimes as of right for in excess of 20 years [**A5**].

(v) Part 8 gave the name and address of every person whom the Applicant believed to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green as follows: "The land is currently in the ownership of Warwickshire County Council. Land Registry Reference, WK11231. Warwickshire County Council, Shire Hall, Warwick, CV34 4RL" [**A6**].

(vi) The application was supported by the following documents listed in Part 10:

- Rokeby Playing Fields Plan – 1:2,500 Plan @ A3
- Map B Rokeby Playing Fields Plan – 1:7,500 @ A3
- Section 7 – Justification Statement
- Section 7 – Supporting Photographs of Use
- Email correspondence from WCC confirming land eligible for application
- Rokeby Playing Fields – Completed Evidence Questionnaires/Testimonies

(vii) The application was further supported by a Statutory Declaration made by Mr Julian Thomas Woolley dated 15th September 2016, to which two plans were exhibited. These are the two plans referred to at sub-paragraph (vi) above.

[1] References to page numbers in the Applicant's Bundle are in square brackets after the letters "**A**" – "**G**".

1.4 The CRA publicised the application and a joint statement of objection dated 1st December 2016 [**O1**][2] was received from Warwickshire County Council in its capacity as land owner ("WCC") and the Education Funding Agency ("EFA"). This statement of objection invited the CRA to reject the application at that stage as it was asserted by the Objectors that their first ground of objection, namely that prohibitory notices were present on the application land during the qualifying period, gave rise to an unanswerable objection to the application.

1.5 By a statement in reply dated 24th April 2017, the Applicants disputed that any of the grounds relied upon by the Objectors constituted a "knockout blow" which would enable the CRA to determine the application without hearing and examining evidence. Accordingly, it was said that the application should only be determined following a public inquiry. By this time, the Applicant was represented by Irwin Mitchell Solicitors.

1.6 After considering the matter, the CRA agreed with the Applicant and resolved that it would only be possible to determine the application following a public inquiry. I was therefore instructed by the CRA to hold a non-statutory public inquiry ("inquiry") and to report to the CRA with my recommendation on whether the application should be accepted or rejected.

1.7 Directions were issued on 2nd August 2017, 23rd August 2017, 23rd October 2017 and 1st November 2017 dealing with matters in preparation for the inquiry. The inquiry was originally due to take place between 25th and 28th September 2017 but I vacated that listing on 23rd August 2017 following the receipt of representations on behalf of the Applicant.

1.8 The inquiry ultimately took place at The Arnold House Rugby Masonic Centre, Church Walk, Elsee Road, Rugby, CV21 3BA ("the Venue") on 9th, 10th, 13th, 14th November 2017 and 18th and 19th December 2017. I attended an accompanied site view on the first day of the inquiry on 9th November 2017 and an unaccompanied site view on 18th December 2017. Two evening sessions were held for witnesses who were unable to attend during the daytime on 9th and 13th November 2017. A further evening session was offered on 18th December 2017 but this was not required. Further directions were issued when the inquiry was adjourned part-heard on 14th November 2017. Four weeks were granted for this adjournment as the Applicant requested additional time to conduct inquiries of Rugby Borough Council ("RBC") regarding a point raised in the Objectors' Skeleton Argument.

1.9 The Applicant was represented at the inquiry by Mr Paul Wilmshurst of Counsel, instructed by Irwin Mitchell Solicitors. The Objectors were represented by Mr Douglas Edwards QC, instructed by Trowers and Hamlins Solicitors. Both Counsel provided Skeleton Arguments in advance of the inquiry and submitted extremely helpful written Closing Submissions at its conclusion. I am grateful to both Counsel for their assistance in this matter, and to the parties for the manner in which they have prepared and presented their respective cases. I also record my gratitude to Mr Michael Goucher of the CRA who provided administrative assistance during the inquiry, and to the staff at the Venue who were most helpful.

[2] References to page numbers in the Objectors' Bundle are incorporated in square brackets after the letter "**O**".

## B. APPLICATION LAND

2.1 The application provided the following description and particulars of the area of land in respect of which the application for registration is made:

> **Name by which usually known:**
> Rokeby Playing Fields – Land Registry Reference, WK11231
>
> **Location:**
> Land adjacent to Rokeby Primary School on the Corner of Long Furlong and Anderson Avenue, Rugby. Refer to attached Map – Rokeby Playing Fields [**A4**]

2.2 In part 8 of the application, the Title Number of the land was repeated as being WK11231 and the land was described as currently in the ownership of WCC [**A6**]. Both of these matters were referred to in the Justification Statement in support of the application [**A12**].

2.3 The first plan which accompanied the application [**A10**] shows an irregular shaped piece of land hatched in red with the words "Playing Field" in the centre. On this plan, there is an area in the corner of the field which appears to denote an area of water shown by a blue line. This part of the field has been referred to as the "Dead Pond" during the inquiry.

2.4 Perhaps unsurprisingly as a result of the contents of the application, it was assumed by all parties that the only owner of the application land was WCC. However, during the course of the inquiry it became apparent from a close examination of the title plan for the land registered under WK11231 [**O28**] that it may in fact exclude part of the application land, in particular part of the land which has been referred to as the Dead Pond.

2.5 Inquiries undertaken by the Objectors when this issue came to light indicated that the land in question was unregistered. As the adjoining land is owned by Rugby School, it was considered prudent to give them notice and to enquire whether the school: (i) were in fact owner of the land; and (ii) wished to make any representations in respect of the application.

2.6 In an email dated 19th December 2017, the Estate Manager of Rugby School commented:

> "It is difficult to be categorical about ownership of this pond because most of the original deeds for the School's land holding in Barby Road have been lost over time. As a result when the school came to register its holding here in 2007 for the first time we could not conclusively prove ownership one way or the other of the pond and therefore it was excluded from our "red lined" area at that time."

2.7 With regard to the inquiry itself, the Estate Manager confirmed that the school was aware that an inquiry had been taking place, but that as far as she was aware no formal notice had been provided to the school. This communication was disclosed to the Solicitors for the Applicant and the Objectors and consent was requested for the parties' Skeleton Arguments and Closing Submissions to be provided to Rugby School to enable them to decide whether they wished to submit any representations. The parties agreed to this course of action and the Skeleton Arguments and Closing Submissions were duly provided to Rugby School.

2.8 At the time of writing no formal response has been provided by Rugby School. However, in light of my recommendation that the application should be rejected, I do not consider it proportionate or fair to the Applicant or the Objectors to delay the provision of my report to await Rugby School making a decision on whether they wish to make representations in view of the fact that it is unlikely to make a material difference to my recommendation to the CRA. I also do not consider that Rugby School will suffer any prejudice by providing my report at this stage. On the contrary, if the CRA decides the accept my recommendation and rejects the application, it will save Rugby School from considering the matter further.

## C. LEGAL FRAMEWORK

3.1 Section 15 of the CA 2006 provides, *inter alia*, that:

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
(2) This subsection applies where—
  (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
  (b) they continue to do so at the time of the application.
(3) This subsection applies where—
  (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
  (b) they ceased to do so before the time of the application but after the commencement of this section; and
  (c) the application is made within the relevant period.
(3A) In subsection (3), "the relevant period" means—
  (a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);
  (b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation.
(4) This subsection applies (subject to subsection (5)) where—
  (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
  (b) they ceased to do so before the commencement of this section; and
  (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).
(5) Subsection (4) does not apply in relation to any land where—
  (a) planning permission was granted before 23 June 2006 in respect of the land;
  (b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and
  (c) the land—
    (i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or
    (ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied—

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right"…

3.2 As the application is made pursuant to s. 15(2) of the CA 2006, the relevant qualifying requirements are that:

(a) the land has been used for lawful sports and pastimes;

(b) by a significant number of inhabitants of a locality or of a neighbourhood within a locality;

(c) for a period of not less than 20 years ending on the date of the application;

(d) as of right.

3.3 The burden of proving each of the statutory qualifying requirements rests with the Applicant. The standard of proof is the balance of probabilities.

3.4 I remind myself of the guidance given by Lord Bingham in *R v. Sunderland City Council ex parte Beresford* [2004] 1 AC 889 *("Beresford")*, where he observed at paragraph 2:

> *"As Pill LJ rightly pointed out in R v. Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership registered as a town green…". It is accordingly necessary that all ingredient of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence of what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."*

3.5 With this in mind, I shall turn to consider the meaning of the key phrases set out above and how each of the qualifying requirements have been interpreted in the authorities.

***The land…***

3.6 A town or village green does not have to be a green in the traditional sense of a grassy area. It may include any type of land that satisfies the statutory requirements: *Oxfordshire County Council v Oxford City Council and another* [2006] 2 AC 674 *("Trap Grounds").*

3.7 Section 61(1) of the CA 2006 provides that land should be interpreted as including "land covered by water". The pond in the corner of the field is therefore capable of registration.

3.8 For registration of the whole of the land in the application to succeed, the whole of the land must have been used for sports and pastimes, not just a part of it. This does not mean that

every square foot must have been used for this purpose, but the applicant must show that it can sensibly be said that the whole of the land has been so used for the relevant period.

3.9 If it becomes apparent that only part of the land qualifies for registration, the registration authority may register a lesser area than that sought in the application: *Trap Grounds*.

***…has been used for lawful sports and pastimes…***

3.10 The expression "lawful sports and pastimes" ("LSP") forms a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided that those activities are not so trivial or intermittent so as not to carry the outward appearance of user "as of right": *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*"Sunningwell")*.

3.11 Special considerations arise where the sports and pastimes are taking place on a public right of way: *Oxford County Council v. Oxford City Council & Robinson* [2004] Ch 253 at paragraph 104. In *R (on the application of Laing Homes Limited) v. Buckinghamsire County Council* [2004] 1 P & CR 36 (*"Laing Homes")*, Sullivan J held at paragraph 102 – 104:

> "*…it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields. Dog walking presents a particular problem since it is both a normal and lawful use of a footpath and one of the kinds of "informal recreation" which is commonly encountered on village greens. Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog's owner was apparently asserting the existing of some broader public right, in addition to his right to walk on the footpath? The landowner is faced with the same dilemma if the dog runs away from the footpath and refuse to return, so that the owner is forced to go and retrieve it. It would be unfortunate if a reasonable landowner was forced to stand upon his rights in such a case in order to prevent the local inhabitants a right to use his land off the path for informal recreation. The same would apply to walkers who casually or accidentally strayed from the footpath without a deliberate intention to go on other parts of the field.*"

***…by a significant number…***

3.12 The phrase "significant number" has never been defined. In *R (McAlpine Homes) v. Staffordshire County Council* [2002] EHWC 76 (*"McAlpine Homes")*, Sullivan J held that it does not have to be a substantial or considerable number. He said that what is important "*is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.*" Essentially, this will be a matter of impression at an inquiry as opposed to undertaking some form of mathematical exercise.

***…of the inhabitants of any locality…***

3.13 The phrase "locality" identifies those who may exercise the rights that attach to land registered as a TVG. The primary meaning of "locality" is some legally recognisable administrative division of the country such as a borough, parish or electoral ward: *Paddico (267) Limited v. Kirkless Metropolitan Borough Council* [2012] EWCA 262 (*"Paddico"*).

***…or of any neighbourhood within a locality...***

3.14 A neighbourhood is a more fluid concept and need not be an administrative unit. However, a neighbourhood cannot simply be an area drawn on a map designed to identify where the claimed recreational users reside. It has been said that a neighbourhood must have a degree of pre-existing cohesiveness[3] and must be capable of meaningful description in some way[4].

3.15 In *Leeds Group PLC v. Leeds City Council* [2010] EWHC 810 (*"Leeds"*), His Honour Judge Behrens considered the meaning of the phrase and ultimately concluded at paragraph 103:

> *"I shall not myself attempt a definition of the word "neighbourhood". It is, as the inspector said an ordinary English word and I have set out part of the Oxford English Dictionary definition. I take into account the guidance of Lord Hoffmann in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have it said was the clear intention of Parliament to make easier the registration of Class C TGVs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."*

3.16 It is now settled on the present authorities that the expression 'neighbourhood' can mean either a neighbourhood or neighbourhoods and that the neighbourhoods do not have to be located within a single locality: *Leeds* at [26] and [56-7] and *Warneford Meadow* at [27].

***…for a period of not less than 20 years ending on the date of the application…***

3.17 Save where s.15(7)(b) of the CA 2006 applies, the relevant 20 year period is the period of 20 years immediately before the day that the application was submitted to the CRA.

3.18 In *Hollins v. Verney* (1884) 13 QBD 304, it was said that use has to be continuous throughout the 20 year period in order to satisfy the requirements of a prescriptive claim. It has to be shown that a right is being asserted and must be more than sporadic intrusion onto the land. Essentially, the test is one of fact and degree. At page 315, Lindley LJ observed:

> *"No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in*

[3] *R (Cheltenham Builders Limited) v. South Gloucestershire District Council* [2003] EWHC 2803
[4] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530

*possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended."*

3.19 Accordingly, where the use is interrupted for a sufficient period of time during the 20 year period, the claim will fail. In *Betterment*, an interruption in the use of the land defeated the claim where works had taken place on one part of the land for a period of four months.

3.20 On the other hand, the use of the land by the landowner will not be sufficient to interrupt the use by local inhabitants for LSP where it is possible for the two users to peacefully co-exist. Furthermore, the fact that the local inhabitants may show deference / civility to the landowner when they use the land will not necessarily undermine their TVG application: *R (Lewis) v. Redcar and Cleveland Borough Council (No. 2)* [2010] AC 221 (*"Redcar"*).

***…as of right…***

3.21 The term "as of right" connotes use of land which is without force, secrecy or permission (*nec vi, nec clam, nec precario)*: *Sunningwell*.

*Use by Force (vi)*

3.22 In *Redcar,* Lord Rodger of Earlsferry held at paragraph 88 – 89:

> *"The opposite of 'peaceable' user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is 'vi' only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vi was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi… English law has interpreted the expression in much the same way. For instance, in Sturges v Bridgman (1879) 11 Ch D 852, 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:*
>
> > *"Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, <u>or which he contests and endeavours to interrupt</u>, or which he temporarily licenses." (Emphasis added.)*
>
> *If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him."*

3.23 In *Taylor v. Betterment Properties (Weymouth) Limited* [2012] 2 P&CR 3 ("*Betterment")*, Patten LJ confirmed at paragraph 38 that if a landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. In those circumstances, it is not necessary for the landowner to show that the inhabitants used force

or committed acts of damage to gain entry to the land as the signs are sufficient in themselves to render the use "by force". In that case, however, some of the inhabitants did break down fences to gain access to the land, and also removed signs so that they were not seen by others. As to the correct approach to such behaviour, Patten LJ said at paragraph 62-63:

> *"…the inquiry panel was not entitled in my view to shut its eyes to what some residents had done to the fences and to the signs in considering whether the landowner was to be taken to have acquiesced in the user. The evidence before them and before Morgan J was that inhabitants of the locality who were seeking to obtain registration of the land as a town or village green had seen the signs; had understood what their meaning and purpose was; and, for that reason, had removed them. The landowners had therefore made their opposition known to the local inhabitants even though, by the actions of some members of that class, the signs may have disappeared within a few days of being erected and may not therefore have been seen by many users of the land. It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger on Redcar (No. 2)) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious."*

3.24 In the recent private law case of *Winterburn v. Bennett* [2016] EWCA Civ 482 *("Winterburn")*, the key issue on appeal was whether two signs erected in a car park were sufficient to prevent the owners of a fish and chip business from acquiring a right to use the land as a car park for themselves and their suppliers and customers. The signs read: "Private car park. For the use of Club patrons only. By order of the Committee." No further steps were taken to prevent use, and the users of the car park were never excluded or evicted. The appellants argued that the signs were insufficient and that further steps should have been taken in order to render the use *vi*. The Court of Appeal disagreed with this contention, drawing heavily on the dicta in *Betterment*. At paragraph 40-41, David Richards LJ held:

> *"In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land."*

3.25 Where a question arises over the interpretation of a notice, it is necessary to have regard to the guidance given in *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (*"Warneford Meadow"*). After reviewing the authorities, His Honour Judge Waksman QC said at paragraph 22:

> *"From those cases I derive the following principles:*
> *(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;*
> *(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;*
> *(3) The nature and content of the notice, and its effect, must be examined in context;*
> *(4) The notice should be read in a common sense and not legalistic way;*
> *(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in Brudenell-Bruce (supra) to "consistent with his means". That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. (The reference to means by Pumfrey J seems to have its source in the quotation in the judgment from Dalton v Angus (1881) 6 App Cas 740 at p 773, 46 JP 132, 50 LJQB 689 where Fry J quotes Willes J's reference to the need of a party claiming a right by acquiescence to show that the servient owner could have done some act to put a stop to the claim "without an unreasonable waste of labour and expense". That suggests that reasonableness comes into any means-related argument. So a simple consideration of means does not seem to be enough. Hence my reservation about Pumfrey J's formulation.) As it happens, in this case, no point on means was taken by the Authority in any event so it does not arise on the facts here.*
> *In my judgment the following principles also apply:*
> *(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean – that is simply another way of asking the question as to what the reasonable user would have made of it;*
> *(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;*
> *(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users."*

*Secrecy (clam)*

3.26 To qualify under s. 15, the use must be without stealth or secrecy. In essence, the use must be open, so that the landowner can see that it is taking place and can resist it if he wishes.

*Permission (precario)*

3.27 "Permission" can be express, for example by erecting notices which grant temporary permission to local inhabitants to use the land. Permission may also be implied in certain circumstances. However, mere inaction by the landowner will generally be insufficient to give rise to implied permission: *R (Beresford) v. Sunderland City Council* [2004] 1 AC 889.

3.28 If the land is used pursuant to a legal right, the use is "by right" rather than "as of right". In *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31 (*"Barkas"*), the Supreme Court held that the public's statutory right to use a field for recreational purposes meant that the use was lawful. Accordingly, it was "by right" and did not qualify for TVG purposes.

3.29 In *R (Newhaven Port and Properties Limited) v. East Sussex County Council* [2015] AC 1547, the Supreme Court held that harbour byelaws impliedly permitted the public to use a beach for recreational activities. Despite the port's failure to display the byelaws, they operated as an effective licence which rendered the use of the beach by members of the public "by right" rather than "as of right". As in *Barkas*, there was a public law right, derived from statute for the public to go onto the land and use it for recreational purposes.

3.30 The question of implied permission arose again in *R (Goodman) v. Secretary of State for Environment, Food and Rural Affairs* [2016] 1 P&CR 8 (*"Goodman")* in which a planning inspector had rejected a TVG application on the basis, *inter alia*, that the local authority landowner had impliedly re-appropriated part of the application land and held the land as recreational open space, rendering the use "by right". The High Court quashed the planning inspector's decision as simply managing the land as recreational open space was insufficient to imply appropriation. Dove J held that the statutory test for appropriation in section 122 of the Local Government Act 1972 required a conscious decision and that appropriation could not simply be inferred from how a local authority managed or treated the land.

## D. <u>SITE VIEW</u>

4.1 Before dealing with the evidence which I heard at the inquiry, I will provide a brief description of the land as I saw it during the accompanied site view on 9th November 2017, and the unaccompanied site view on 18th December 2017. By way of overview, the application land is roughly diamond in shape with some irregular edges. The land covers an area of approximately 15 acres. It is broadly flat with a slight fall from north to south and consists almost entirely of grassland. A concrete cricket square occupies a small area in the middle of the filed. A pair of goal posts have been erected within the northern section

of the site. A seasonally wet pond known locally as Dead Pond is found at the junction of the south-eastern corner. A mature Oak Tree is located along the north-western boundary. A public bridleway runs along the south-western boundary of the field. The land is enclosed by fencing on all sides save for the south-western boundary where the bridleway runs.

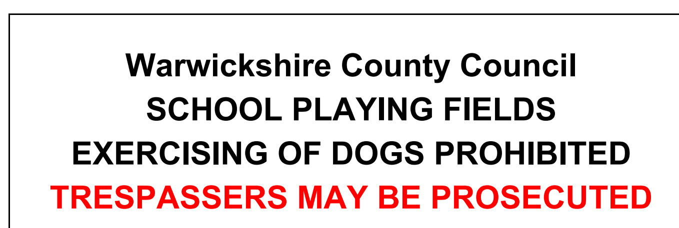
**9th November 2017**

4.2 The accompanied site view took place immediately after Counsel for the Applicant and the Objectors had opened their cases and matters of housekeeping had been dealt with. In order to place the site view into context, it would be useful for the reader of this report to have available a copy of Map D which was helpfully prepared by the Applicant in order to show "Accesses" to Rokeby Playing Fields [**G234**]. This indicates that there are, or were, 14 access points marked with the letters "A" to "J" running around the perimeter of the field.

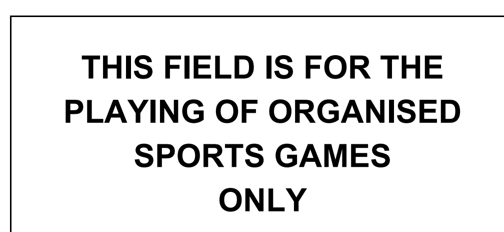
4.3 We commenced the site view on Long Furlong where a tarmac path leads from the road to Rokeby Playing Fields. A circular sign is present where Long Furlong meets this path prohibiting entry to vehicles and motorcycles [**E98**]. A fingerpost is also present at this juncture indicating that a bridleway crosses the road and leads to Rokeby Playing Fields. Although the sign is obscured when looking towards the east, the other side is clearer [**E98**].

4.4 We proceeded to walk along the bridleway path until we reached the entrance to the field, which is marked as Entrance C on Map D [**G234**]. At this juncture, there is a wooden fence to which three signs are attached [**E101**]. There is also a dog bin adjacent to the bridleway immediately outside the wooden fence [**E101**]. The signs read as follows:

Sign 1:




Sign 2:



Sign 3:

4.5 This sign has a picture of a person playing golf within a red circle with a red line diagonally across the middle. This sign has the RBC logo on it, as does Sign 2.

4.6 Upon entering the field through Entrance C, I noted the presence of a bin just inside the field where the bridleway is situated [**O308**]. This bin is not designated for dog waste but appears to be a council installed waste bin for general use. We then walked along the bridleway towards Entrance D. About halfway along the bridleway, I noted the presence of a single metal post which appears to have had a sign attached to it previously [**O306**]. I was unable to discern anything noticeable at the point marked as Entrance I on Map D [**G234**].

4.7 Upon reaching Entrance D, there is a sign erected onto two metal posts which are similar in construction to the single post present halfway along the bridleway. This sign has no writing on the rear (i.e. as you approach it from within the field itself) [**O304**] but has the same wording as Sign 1 which is referred to at paragraph 4.4 above on the front (i.e. as you approach the field from the bridleway leading from the direction of Fawsley Leys) [**O303**]. Also in this corner of the field is a dog bin, which is set back from the bridleway [**O302**].

4.8 After viewing Entrance D and walking along the path leading to Fawsley Leys for completeness, we returned to the field and walked along the south-eastern boundary, which is bounded by an ancient hedge. This boundary was marked with the letters "N", "M" and "L" said to denote further access points to the field from nearby agricultural land. However, at the time of my site view I was unable to see any open access points along this boundary. Instead, it appears that post and wire fences are present at some points, or tree trunks have been placed in the way to shore up gaps in the fence. The same was true for Entrance "K".

4.9 As we walked between point "D" and "L" on Map D, I observed a worn track along the perimeter of the field. At the point marked "K", I noted the presence of wooded area in the corner of the field. I was informed that this area fills up with water during rainier times (this is the area referred to as Dead Pond). However, it was dry at the time of my inspection.

4.10 We continued the site view by walking along the north-eastern boundary of the field, which again was marked by a worn track indicative of use of the field by walking. The position at Entrance H was similar to that observed along the south-eastern boundary, namely that there was no gap or entrance into the field (although one may have existed previously).

4.11 As we walked along this edge of the field in the direction of Rokeby Primary School, there was a football pitch with two metal goal posts on the field between the letters "H" and "L". The year of manufacturer on one of these goalposts was 2010 [**SB232**][5].

[5] References within square brackets to the letter "SB" are to page numbers within the Supplementary Bundle prepared by the CRA for the part-heard inquiry on 18th and 19th December 2017.

4.12 The northern boundary of the field was marked with a metal palisade fence [**SB227**] which separates Rokeby Playing Fields from Rokeby Primary School. I was informed that it used to be possible to access the field from the Primary School at the point marked "J" on Map D. However, this was no longer possible at the time of my site view for security reasons.

4.13 From this point, we proceeded around the edge of the field to where the palisade fence meets a wooden fence which then forms the physical boundary of the field until it reaches Entrance B on Map D. A small gap was present in the fence along this part of the boundary [**SB141**], and I noted that some repairs had been completed to the fence in the corner of the junction. I pause to observe that at the time of the site view the point in the corner which is denoted as Entrance A on Map D did not allow access into the field [**SB138**]. However, I was informed that this was previously open and allowed access from the corner of Anderson Avenue and Long Furlong. I will deal with Entrance A in more detail below.

4.14 The point marked Entrance B on Map B was in fact a locked metal gate [**S238**]. A number of padlocks were present on the chain at the time of my inspection, indicating that the lock had been replaced on a number of occasions. A metal plate was attached to the fence to the right of the gate which indicated that a sign had been present at some point previously. However, this was blank at the time of the site view. I also noted the presence of a white wooden post which was attached to the rear of the fence but did not display anything.

4.15 After leaving the metal gate my attention was drawn to a wooden gate in the fence surrounding one of the dwellings on Long Furlong [**D179**], marked by the letter "E" on Map D. I later learned that this is the home of Michelle Lines, a witness for the Applicant.

4.16 The final stretch of the field took us past Entrances "F" and "G" on Map D. Once again, no access points were visible at these junctures although they may have existed in the past. Roughly in the vicinity of the letter "G", I noted the presence of a large oak tree [**D124**].

4.17 After completing the perimeter of the field, we exited the site via Entrance C on Map D.

**18th December 2017**

4.18 I returned to the site on the morning of 18th December 2017 to complete a further unaccompanied site view. Both parties agreed to me undertaking an unaccompanied site view at the conclusion of the fourth day of the inquiry on 14th November 2017. In particular, I was asked to review the position of Entrance A on Map D with reference to certain photographs which had been the subject of discussion during the inquiry.

4.19 The photograph which had been particularly contentious during the inquiry was marked "Plate 4" and exhibited to the statement of Michelle Lines dated 23rd October 2017 [**D178**]. Although this was said to show Entrance A, the angle of the photograph rendered this unclear. I therefore placed myself in the position of the photographer and noted (as had

been confirmed by Julian Woolley when recalled to give evidence on 14th November 2017) that the photograph did indeed show Entrance A on Map D when viewed from the road.

4.20 After inspecting Entrance A, I viewed Entrance B from Long Furlong. I then entered the field at Entrance C and walked the perimeter of the field as we had done during the accompanied site view. None of the key features had changed between my two visits.

4.21 After inspecting the land itself, I drove a short distance to the row of shops on the Kingsway and Norton Leys so that I could familiarise myself with their distance from Rokeby Playing Fields. It was apparent that they were only minutes away. I noted in particular that the Kingsway Premier store states that it is "*Proud to Serve Rokeby*" [**D235**]. The shops on Norton Leys include a store which displays the sign "*Hillside News and Wine*" [**D236**].

4.22 During the unaccompanied site view I took a series of photographs, which were disclosed to the parties by email so that they could see what I have viewed during the site visit.

## E. APPLICANT'S EVIDENCE

### (1) Mr Julian Woolley

5.1 Mr Woolley provided a short form questionnaire dated 17th September 2016 [**D250**], a written statement dated 20th October 2017 [**D230**], an additional statement dated 11th December 2017 [**SB78**] and a document described as the 'Bridleway Document' [**SB48**]. Mr Woolley also gave oral evidence to the inquiry on 9th and 14th November 2017.

5.2 Mr Woolley lives at 12 Anderson Avenue with his wife, Sally Chant, their son, Edward, and daughter, Alexandria. When he made his statement in October 2017, Edward was three years old and Alexandria was five months old. Mr Woolley and his wife purchased 12 Anderson Avenue in June 2012 and moved in during July 2012. In cross-examination, Mr Woolley told me that they had formerly lived off Overslade Lane at the edge of Bilton. He said that they had had no reason to visit the application land before moving to the area. Accordingly, his evidence of use is relevant to just over four years of the qualifying period.

5.3 In section 2.0 of his statement, Mr Woolley confirms that he and his wife are members of a local community organisation called SHARE, which comprises local residents from the Hillside and Rokeby estates who are concerned with the proposal by WCC and EFA to develop Rokeby Playing Fields by building a new school on part of the land. I understand that Mrs Chant is the Chair of SHARE. It is clear from reading paragraph 2.2 of his statement that Mr Woolley is very concerned about the proposal to build a new school and the impact it may have on the area. However, as he quite rightly notes this is not the forum to voice those concerns and it is not a matter which is relevant to the TVG application.

5.4 At paragraph 5.1 of his statement, Mr Woolley states that the main accesses to the field that are used by the majority of residents are Entrances A – D as identified on Map D [**D237**]. These are described in Mr Woolley's statement as follows:

- **Entrance A** – "*A gap in the fence by which residents of Rokeby Estate and ourselves accessed the field. No signage is provided.*" [**D237**]
- **Entrance B** – *"Local residents access the field over this vehicular gate. I have never seen any signage at this entrance since I've known the land from 2012."* [**D238**]
- **Entrance C** – *"There are three signs at this location, two from Rugby Borough Council and one attributed to Warwickshire County Council."* [**D238**]
- **Entrance D** – *"This access is from the bridleway (RB30) that connects to Ecton Leys. Since we started using this field I have been aware of this sign, mostly because it obstructs the bridleway…"* [**D240**]

5.5 As to his use of the land, Mr Woolley stated that the nearest access point to his home is Entrance A. He said that he could recall using this entrance into the field from 2015 onwards when bringing his son, Edward, into the field. During cross-examination, Mr Woolley was taken to photographs of Entrance A which showed the state of the fence at different times. Mr Woolley agreed that in order to access the field via Entrance A in the condition as shown in the photograph referred to at paragraph 5.3 of his statement [**D237**], it would be necessary to step over the bottom rail of the fence which remained intact when he started using this access point, and that it would be obvious that he was passing through a gap in the fence.

5.6 As to how the gap in the fence appeared, Mr Woolley was reluctant to accept that it may have been damaged by local residents, instead preferring the explanation that it may have been caused by an act of god or that the fence had simply fallen down over time. I am bound to say that Mr Woolley's refusal to acknowledge as a possible explanation for the gap in the fence vandalism by other local residents did not give the impression of someone who was being entirely objective and caused me to treat his evidence with some caution.

5.7 Similarly, I had reservations about Mr Woolley's dismissal of the innocuous suggestion in cross-examination that fences are usually erected by a landowner to prevent access onto land. Instead, Mr Woolley was quite insistent that the fence was only there to prevent vehicles gaining access, potentially travellers, rather than pedestrians.

5.8 When asked about Entrance B, Mr Woolley confirmed that he had never seen the metal gate on Long Furlong unlocked. As such, when Mr Woolley used this entrance, it was necessary for him to climb over the gate to enter the field. He also saw other residents do likewise. Mr Woolley had never seen any sign present at that gate whilst he had been using it.

5.9 When questioned about the messages conveyed by the signs present at Entrance C and D, Mr Woolley became quite combative. For example, he did not accept that the golf sign prohibited playing golf *per se*, stating that it does not say "no golf" and suggesting that it meant that people could not hit golf balls for a distance as opposed to merely chipping them.

5.10 Mr Woolley was also keen point to out any factors which he perceived to be in support of the application (for example the presence of dog bins) rather than focus on the questions asked. He sought to enter into a debate about the difference between the word "may" and "will" in reference to the sign which stated that "Trespassers May Be Prosecuted". Rather than answer questions about the meaning of the "Organised Sports" sign, Mr Woolley preferred to say that it only related to the land leased to Rugby Borough Council.

5.11 Mr Woolley had clearly analysed the signs and the surrounding circumstances to a much deeper degree than the reasonable user of the land and I was not confident that I could rely upon his views as being indicative of how a reasonable user of the land may view the signs.

5.12 When asked about his specific use of the land, Mr Woolley confirmed the answer in his short form questionnaire [**D250**] that he had used the land 2 to 3 times per month. He stated that he would walk around the field, and would walk across it. Mr Woolley gave an example that they went to the field to play around the day after a Halloween party in 2015. Mr Woolley said he had never seen formal games of football taking place whilst he was there.

5.13 In his statement, Mr Woolley informed the inquiry that he and his wife also used to run around the edge of the field at least once a month from 2012 to early 2013. When their son was born in October 2013, their use of the land was reduced to intermittent walks with the pram from spring 2014. At least twice a month he would take Edward out for a stroll in the pram in order to give his wife a rest and get Edward to sleep. This tended to include laps of the field, although this would be weather dependent. As Edward got older, their use of the field changed as described at paragraph 6.8 to 6.10 of Mr Woolley's statement [**D244**].

5.14 Finally, Mr Woolley was asked about evidence gathering techniques which had been adopted to obtain evidence in support of the application. I will return to this issue below.

5.15 Although I have reservations about some of Mr Woolley's evidence as indicated above, he gave his account of his use of the land freely and I had no reason to doubt its veracity. I accept his evidence of his use of the land.

5.16 Mr Woolley was recalled on the fourth day of the inquiry to clarify certain matters and adduce documents to explain points which been the subject of discussion at the inquiry. Mr Woolley was also taken through the photographs that Councillor Bill Lewis had produced.

**(2) Mrs Heleen Inger Den Haan**

5.17 Mrs Den Haan provided a written statement dated 17th September 2017 [**D88**] and gave oral evidence first on 10th November 2017. She did not provide an evidence questionnaire.

5.18 Mrs Den Haan is a specialist immigration law advisor who works part time at Coventry Law Centre. She and her family moved to Rugby in March 2012, when they originally lived in Cawston (a different area to the application land). They then moved to 167 Norton Leys in April 2014 when they first became familiar with Rokeby Playing Fields. As such, Mrs Den Haan's evidence of use is only relevant to just under 2 ½ years of the qualifying period.

5.19 In her written statement, Mrs Den Haan confirmed that her usual access to the field is via Entrance D, which is about a quarter of a mile from her home. Her use of the field commenced during the summer of 2014 when she started taking her son (who is in a wheelchair) onto the land. Initially, she says that she stuck to the right of way that she had seen on the map when she first moved in. However, she soon saw other people using the field itself and therefore decided to deviate from the bridleway onto the field. She notes at paragraph 10 of her statement that there is a circular path all around the field which has been formed by footsteps flattening the grass. This is consistent with what I saw on the site.

5.20 In cross-examination, Mrs Den Haan stated that she uses the land up to five times per week in summer and once a week in winter. Her usual walking route with her son and dog is set out at paragraph 11 - 13 of her statement. During the walk, her dog will be running around off the lead. She also sometimes includes the field in her bike rides with her dog. When asked how frequently this occurred, she said it would be once or twice per week.

5.21 With regard to other people's use of the land, Mrs Den Haan stated that she often sees someone jogging in the evening and there are usually at least three other dog walkers. She agreed that the worn track around the field is consistent with how most dog walkers used the field. There is also a man who she sees playing golf in the middle of the field.

5.22 During cross-examination, Mrs Den Haan was taken to a photograph of the sign at Entrance D [**E303**]. She confirmed that she had not seen that photograph before but was aware of what the photograph shows. She described this sign in her statement as "overgrown and frankly not in [use]". When asked what she meant by this, Mrs Den Haan said that there was more vegetation around the sign when she first saw it, which partially obscured the message. However, she confirmed that she had seen it when she walked past and said she drew her conclusion from the state of the sign as to whether the Council were enforcing it.

5.23 Notably, when Mr Edwards QC put to Mrs Den Haan that she saw the sign and understood it but because she saw other people using the land she didn't pay attention to it, Mrs Den Haan stated without hesitation: "*I decided to disregard it*".

5.24 In re-examination, Mrs Den Haan was asked how often she saw people in the middle of the field walking their dogs and confirmed that she sees them every other time that she is there.

5.25 I found Mrs Den Haan to be a candid witness and I accept her evidence of use of the land.

**(3) Mr Paul Fisher**

5.26 Mr Fisher provided a written statement dated 19th October 2017 [**D108**] and gave oral evidence. He had not previously completed an evidence questionnaire.

5.27 Mr Fisher was born at 49 Charlesfield Road, Rokeby in 1963 and lived there until 1983. Whilst living at 49 Charlesfield Road, he attended Rokeby Junior and Middle Schools. He also went to Bishop Wulstan RC High School from 1975 to 1979. Mr Fisher moved away from the area when he got married at the age of 20. He and his wife had two children whilst living away, a son who was born in 1989 and a daughter in 1992. They returned to the area in 1996 when they bought their current home at 47 Norton Leys, Hillside. They were keen to live in this area as they wanted their children to go to the Rokeby Schools.

5.28 Much of Mr Fisher's statement concerns the period prior to 1983 and therefore falls outside the qualifying period. However, there are some salient points which I will touch on below.

5.29 At paragraph 11, Mr Fisher advises that when he was living at Charlesfield Road, he would access the field via one of four entrances, Entrance A, B, C or J (the informal path entrance which ran behind the school). The closest entrance to his home was Entrance B (the gate). Since moving to 47 Norton Leys, Mr Fisher stated at paragraph 16 of his statement that he uses either Entrance C or D. However, during cross-examination, Mr Fisher indicated that he also uses Entrance A, and that he had fallen over using that entrance in the last 18 months.

5.30 When taken to a photograph of Entrance A [**D237**], Mr Fisher confirmed that this showed the gap in the fence that he had used to gain access to the field. He stated that at one stage he also had to step over the middle rail (which is shown partly broken off in the photograph). He was unable to explain how that part of the fence had changed from having a middle and bottom rail to there being a larger gap with only the bottom rail intact.

5.31 At paragraph 17 of his statement, under the heading "How I and my family have used the field whilst living at 47, Norton Leys, Hillside", Mr Fisher states that they used to go up to Rokeby Playing Fields to play with the children and that the children, mainly his son, also went up there to play with their friends from the neighbourhood. The remainder of this section of the statement deals with the period from November 2014 when they got a family dog, Dexter, and describes in some detail how Mr Fisher takes Dexter on walks on the field.

5.32 I am bound to say that paragraphs 18, 19 and 20 of Mr Fisher's statement are significantly more detailed than paragraph 17 which, in contrast, provides very little information on the use of the land or as how frequently the land was apparently used by Mr Fisher and his family from 1996 until 2014. Even when questioned about these matters, I was unable to form any real impression on how frequently the land had been used or draw any useful conclusions in relation to the period between September 1996 and November 2014. Insofar

as the period following November 2014 is concerned, I accept that Mr Fisher has regularly used the land to walk Dexter and that he has also seen other dog walkers on the field.

5.33 Mr Fisher was also asked about the signs at Entrance C and D. He confirmed that he had seen the golf sign because he is a golfer, and was aware of the "Organised Sports" sign at Entrance C. However, he said that he had not seen the "Trespassers May Be Prosecuted" sign at Entrance C, although he was aware of the same sign which is in place at Entrance D.

5.34 Mr Fisher accepted that there was no doubt about what the golf sign was intended to convey. He also accepted that the inclusion of the word "only" in the "Organised Sports" sign means that this was the only activity permitted, but caveated that by saying this is only if you read it. When asked whether the "Trespassers May Be Prosecuted" sign is clear, Mr Fisher said: "*It is, yes. But I see signs of speed limits and not everybody takes notice. If people had wanted to keep me out they would have fenced it off.*"

5.35 Mr Fisher was taken to paragraph 32 of his statement, which states: "*I do not think any of these signs are meant to be taken seriously*" and was asked whether this meant that people are accustomed to using the land, and that as far as the signs are concerned the signs are there but nobody takes any notice of them. Mr Fisher agreed with this interpretation. In relation to the presence of the dog bins on or near the application land, Mr Fisher agreed that it was quite reasonable to install dog bins given the presence of the public bridleway.

5.36 In re-examination, Mr Fisher confirmed that Entrance C is his primary entrance but this has not always been the case as he used to go through the gate at Entrance B. He amplified this by stating that the gate never used to be locked, but it is now. Mr Fisher did not know when that happened. When asked about the sign that he had not previously seen, he said that he had not really noticed it until SHARE put notices up and drew his attention to it.

5.37 In answer to my questions, Mr Fisher confirmed that he had never used Entrance B since he returned to the area in 1996. He said that he had not even tried the gate during that period.

**(4) Dr Varsha Joshi**

5.38 Dr Joshi provided a written statement dated 23rd October 2017 [**D160**] and gave oral evidence. She had not completed a questionnaire in relation to her use of the land.

5.39 Dr Joshi and her husband, Dr Ravindra Joshi, grew up in the Mumbai region of India where they trained as medical practitioners. They were married in India and have two sons. In 2001, Dr Joshi's husband started work at the Walsgrave Hospital and the Hospital of St Cross Rugby. Dr Joshi initially stayed in India with their sons until their older son completed his secondary school certificate at Year 10. They relocated to Rugby living in hospital quarters from May 2001, before moving to 21 Drayton Leys, Hillside in May 2002.

5.40 During cross-examination, Dr Joshi confirmed that her oldest son (who was born in 1985) left home to go to university in 2004. Her youngest son (who was born in 1987) left in 2006. Dr Joshi stated that she had used the land since 2002, but that her most intensive period of use was between 2002 and the autumn of 2006 when her youngest son left home to go to university. Since then, she indicated that their use has been much less frequent.

5.41 When accessing the field, Dr Joshi stated that she uses Entrance D, which is about 100 metres away from their front door. As to her use of the field, Dr Joshi informed me that their first and principal use of the field was to play informal games of cricket and football. This was during the period of their most intense use. Dr Joshi also used to accompany her son, Gaurav, when he went running. She would ride her bike but did not like it as it was a bumpy ride, and she no longer uses the field as a cycle track.

5.42 At paragraph 15 of her statement, Dr Joshi comments that she always thought that these playing fields should have had a path and a cycle track for walkers, runners or bicycle riders to carry out some exercise in a safe manner. Additionally, she says that there could have been one or two tennis courts to attract the residents. This creates the impression that Dr Joshi did not consider that the field was being made attractive for local residents to use.

5.43 In relation to the sign at the entrance that she uses (Entrance D), Dr Joshi states at paragraph 27 of her statement that she had not noticed any sign at this entrance until the future of the field became a matter of controversy some 18 months previously. She continues: "*I thought it was a new sign and asked myself what was the legal basis for putting the sign up. I am now prepared to accept that the sign predates the county council's announcement in February 2016. I had not noticed the sign before then but I am unable to explain why not. We chatted and giggled as we approached or left the fields. Perhaps I was distracted and did not take any notice.*" [**D164**]

5.44 During cross-examination, Dr Joshi was taken to a photograph of the sign at Entrance D [**E103**] and was informed that the evidence suggests that this sign was erected in 1989. She was asked whether she thought that the sign was not there before or she did not recall seeing it; she said that she did not notice the sign until the issues started. Although I had no reason to doubt what Dr Joshi said when she stated that she had not noticed the sign at Entrance D prior to the matter becoming contentious, this is surprising given its size and prominent location. It seems that the most likely explanation is that, as she says, she was distracted when entering the field coupled with the fact that she was so familiar with her surroundings.

5.45 Having now seen the sign, Mr Edwards QC asked Dr Joshi whether there was anything unclear about it. Dr Joshi initially avoided answering the question directly by referring to the fact that there is a bridleway at the back of the houses which she knows is for public use, commenting also that she had seen so many people using the field and had never been stopped from using it. When pressed on the issue, Dr Joshi agreed that the sign was clear.

5.46 In re-examination, Dr Joshi was asked what she understood by the phrase: "Exercising of Dogs Prohibited". Dr Joshi said that this meant that you should not train dogs, for example

making them jump or fetch balls. She did not think that this meant just walking the dog. I will deal with the interpretation of the notice below, but record at this stage that I did not consider Dr Joshi's opinion likely to accord with that of a reasonable user of the land.

**(5) Mrs Pauline Walker**

5.47 Mrs Walker gave evidence as the first witness on 9th November 2017. She had not provided a written statement but her husband, Mr Neil Walker, had provided a statement dated 19th October 2017 [**D204**] and it was agreed between the parties that she would give evidence in his place as he was unavailable. At paragraph 2 of his statement, Mr Walker confirms that he had not previously completed a questionnaire in relation to the land, but his wife had completed a short questionnaire on behalf of their household in September 2016.

5.48 At the start of her evidence, Mrs Walker confirmed that her husband's statement represented her views and that she had written most of the statement although he put his name to it.

5.49 In her husband's statement, the following activities were detailed:

(i) Their sons playing football, riding their bikes and playing model aeroplanes;
(ii) As they got older, their sons used to meet friends at the field up until 1994;
(iii) Picking blackberries every autumn, which has continued to the present day;
(iv) Their grandchildren playing on the field, between 1994 and 2008;
(v) Exercising their granddaughter's dog on the field from 2010 onwards.

5.50 Mrs Walker informed me that she moved to the area in 1979. She has two sons, who were born in 1967 and 1970. By 1996, her sons were 29 and 26 and had already left home. As such, the references in her husband's statement to her sons' use of the land predated 1996. When asked about the picking of blackberries, Mrs Walker stated that this had continued throughout the 20 year period, but then moderated this by saying that the blackberry picking had not taken place every year in contrast to what was said in her husband's statement. As to dog walking, Mrs Walker confirmed that this usually took place around the edge of the field, where there is a worn track which is consistent with it having been used for walking.

5.51 During the course of cross-examination, Mrs Walker was taken to the questionnaire referred to in her husband's statement [**F683**]. It is only a short document which I will set out in full:

**Rokeby Playing Fields – Use as of Right**
**Name**: Pauline Walker
**Address**: 21 Badby Leys CV22 5RB
**Contact Number**: 811919
**Over what period of time have you used the land?** 1989 to present
**How often do you use the land?** Four times week at least. Whole family including grandchildren.
**Have you ever been told not to use Rokeby Playing Fields?** No
**Please provide a short statement of how you use the Playing Fields:** Walking
**Signature:** *PWALKER* 17/09/16

5.52 If one turns to the document itself [**F683**], it can be seen that the box for the person completing the questionnaire to provide a short statement of how they use the playing fields is approximately half a page long. There is therefore sufficient space to at least include some detail of the nature of use, although it will obviously never be as detailed as a full statement. As noted above, the only activity inserted in this box was "*Walking*".

5.53 When this point was put to Mrs Walker in cross-examination, her immediate reaction was say that was not her handwriting. Upon closer inspection, she confirmed that her name, address and contact number were her writing, and she had signed the document. However, the answers in the four boxes in between was not her handwriting. She also took issue with the contents of the form, saying she does more than merely walking. Mrs Walker was asked whether she was able to explain how her signature appeared on the document, but the answers did not seem to be given by her. She simply said that she could not answer that.

5.54 As cross-examination continued, Mrs Walker was asked about the reference to the Natterer's Bat Oak at paragraph 22 of her husband's statement and seemed genuinely confused about it, stating that she did not know where it was or how it had got into the statement. When asked how the process had worked in relation to the composition of the statement, Mrs Walker said she and her husband had written the statement and someone else had typed it. However, she was unable to understand how the reference at paragraph 22 had appeared.

5.55 In relation to her access to the land, Mrs Walker said that her usual entrance is now Entrance C, but she sometimes also uses Entrance D. Between 2010 and 2016, she used Entrance A, which she accepted was a hole in the fence which she would have to step over to enter. She had occasionally used Entrance B, which she would have to climb over as the gate was locked. As with the other witnesses who used multiple access points, Mrs Walker did not distinguish between the entrances when describing how the application land had been used.

5.56 As to the notices, Mrs Walker confirmed that she had seen the notices but said that you stop seeing them after a while because you just walk past them. She also mentioned that sometimes they have been overgrown. Mr Edwards QC took Mrs Walker to paragraph 33 of her husband's statement which suggested that she was not aware that there was a "Trespassers May Be Prosecuted" sign at Entrance C and asked why she had just confirmed that she was aware of all of the notices. Mrs Walker acknowledged that she had seen the sign but probably just ignored the sign as it had been there for so long. Notably, she said: "*I made a mistake, I was aware of them. Just because I have walked past them so often I stopped taking notice of them*."

5.57 In re-examination, Mrs Walker confirmed that she is aware that there is an oak tree on the land (which she identified as being present on the field after turning left at Entrance C) but she was unable to say why the phrase "Natterer's Bat Oak" was used in her statement. In relation to the signs, Mrs Walker stated that they were sometimes more overgrown than

other times as the foliage was allowed to grow over the signs. The "Trespassers May Be Prosecuted" sign also appeared to have been cleaned at some point as it was greener before.

5.58 Mrs Walker was not asked any questions in re-examination about the provenance of the short form questionnaire or how it may be that it contained her signature but not her answers. However, over the course of the four week adjournment, Mrs Walker completed a Statutory Declaration dated 11th December 2017 [**SB131**] which was said to correct a statement made at the inquiry about the provenance and accuracy of the short form questionnaire [**F683**].

5.59 In her Statutory Declaration, Mrs Walker states that when she was questioned at the inquiry she had forgotten that she had completed a questionnaire in 2016 as she had completed a longer questionnaire in 2017 (which was not submitted in support of the application). In relation to the 2016 questionnaire, Mrs Walker states that Councillor Lewis had visited her home on 17th September 2016 and she part completed the form on her doorstep. She says that she then gave the answers to Councillor Lewis to complete. Mrs Walker then signed the questionnaire which Councillor Lewis took away and SHARE submitted.

5.60 The difficulty with this account is that it still does not explain the significant discrepancies between the statement provided by Mrs Walker's husband which she confirmed as true, and the questionnaire which suggests that Mrs Walker's only activity on the land was walking. Indeed, even Mrs Walker had suggested that the form was inaccurate when she was questioned about it. Unfortunately, no adequate explanation has been provided for this. As noted above, there were also points in the statement which Mrs Walker disagreed with, for example the reference to Natterer's Bat Oak, and whether she had seen all of the signs.

5.61 Whilst I have no doubt that Mrs Walker was a sincere witness, I am unable to ignore the unexplained discrepancies between her questionnaire, statement and oral evidence. In the circumstances, I am unfortunately unable to place any significant weight on Mrs Walker's evidence. At the very least, the questionnaire was completed with a lack of care given that Mrs Walker now states that she signed the document even though it was not accurate.

5.62 The questionnaire also has an impact upon the way that I treat the written evidence in support of the application more generally. I will address this issue in more detail below.

**(6) Mr John Craig**

5.63 Mr Craig provided a written statement dated 21st October 2017 [**D84**] and gave oral evidence. He had not previously completed a questionnaire in relation to the land.

5.64 When asked why he had not completed a questionnaire, Mr Craig said that it was probably because he had not been asked to complete one. He was asked how he had completed his statement and said that he had given a verbal statement to Mr Woolley at his home. Mr Woolley recorded this and transcribed it. Mr Craig was then asked to sign the statement.

5.65 Mr Craig lives at 3 Belmont Road within the Rokeby estate. He has lived there since 1971. He has two children, a son born in 1971 who lived with him until 1991 and a daughter born in 1976 who lived with him until she went to university in 1994. Accordingly, by 1996 both of his children were young adults who had moved away to university.

5.66 Mr Craig stated that his use of the field had declined in recent years. When his children were young (which was prior to 1996), he used it at least weekly with the children. When his grandchildren were small, he used the field at least monthly as they liked to run about, playing football. He also used to occasionally fly model aircraft with the grandchildren.

5.67 In the last ten years, Mr Craig stated that his use of Rokeby Playing Field is part of a regular weekly walk along the bridleway (typically spending about ten minutes in the field or longer if foraging) with some incursions into the field to forage for crab apples in late summer. This takes place at the back of the field between the letter "N" and "M" on Map D [**G234**].

5.68 Mr Craig's grandchildren are now 18, 14 and 8. The 18 and 14 year old live in Banbury and therefore their visits have curtailed. His youngest granddaughter occasionally visits the field with him, around 6 times over the last few years. Mr Craig confirmed in accordance with the evidence of a number of the witnesses for the Applicant there were a number of formal football pitches on the field in the past.

5.69 In relation to his access to the field, Mr Craig stated that he had always used Entrance C and D, and that he had seen the signs at Entrance C and D. He also recalled that there was a Warwickshire County Council Sign at Entrance B (Long Furlong Gate) although it is no longer evident. Under cross-examination, Mr Craig said that he believed that the sign was on the post which is affixed to the fence [**O307**] but could not remember what it said.

5.70 In relation to the visibility of the signs at Entrance C and D, Mr Craig stated at paragraph 20 of his statement that these are "obscured by foliage" at the height of summer. He was asked whether this meant that the foliage clears in the winter, and agreed that it did. Mr Craig said that he had witnessed dog walkers entering the field regardless of the signs and he has thought that if they are using the field then there is no reason why he can't use it.

5.71 When asked about the signs and the presence of dog bins, he accepted that it was sensible for a landowner to install dog bins for people to use given the presence of the bridleway. Whilst he was initially reluctant to accept whether the signs applied to the field as opposed to the bridleway, he ultimately agreed it was clear what "School Playing Fields" referred to.

5.72 In re-examination, Mr Craig clarified that he thought that the "Trespassers May Be Prosecuted Sign" was too large to be on the single post at Entrance B and that it was more likely to be on the fence itself. In answer to my questions, Mr Craig said that he could not remember what the sign had said but he presumed that it was similar to the other signs.

5.73 Mr Craig struck me as an honest witness and I accept his evidence about his use of the land.

**(7) Mrs Judith Hicks**

5.74 Mrs Hicks provided a written statement dated 24th October 2017 [**D143**] and gave oral evidence. She had not completed an evidence questionnaire.

5.75 Mrs Hicks lives at 245 Norton Leys, Hillside, where she has resided since September 2000. She has two sons who are now 14 and 11.

5.76 Mrs Hicks said that she started to use the land as soon as she moved to 245 Norton Leys in 2000. Her father-in-law is a guide dog trainer. He visits once per month and they go to the field to exercise his trainee guide dog. When her children were small, Mrs Hicks said that she would walk around the field with their pushchair to try to get them to sleep. Once they were old enough to walk, she would take the children to the field to play at least once a week after school, during weekends and in school holidays. Mrs Hicks also said that they have enjoyed BBQs and picnics on the field every three weeks or so and flew kites previously.

5.77 In relation to her access to the land, Mrs Hicks said that she normally uses Entrance D, although she has used Entrance C and B. When using Entrance B, Mrs Hicks stated that she would usually have to climb over the gate although she did recall that it was unlocked once.

5.78 Mrs Hicks confirmed that she was aware of the sign at Entrance D [**B303**], although there was a period over the last ten years when she believed that it had gone and then came back. Mrs Hicks agreed that there was nothing unclear about the sign, and said that she presumed it was okay to use the field because no-one had ever been prosecuted. Although she initially said that it was her belief that the sign connotes some sort of criminal damage, upon further questioning she agreed that the intention behind the sign was to prevent trespass.

5.79 In re-examination, Mrs Hicks was asked whether she would only read the line “Trespassers May Be Prosecuted” or whether she would read the whole sign. She said that she would read it from to the top to the bottom; she would therefore read the whole sign. Mr Wilmshurst asked Mrs Hicks whether the words above the line “Trespassers May Be Prosecuted” make it less or more clear. Mrs Hicks stated that they make the sign more clear.

5.80 In answer to my question, Mrs Hicks was unable to say how long the plate on the sign at Entrance D was missing for. She guessed that it would have been a matter of months.

5.81 Save for the slightly curious point regarding the temporarily missing sign at Entrance D, which I will return to below, I was impressed with Mrs Hicks’ evidence in general and considered that she was doing her best to assist the inquiry in an open and frank manner.

**(8) Mr Neville Burton**

5.82 Mr Burton provided a written statement dated 15th October 2017 [**D77**] and gave oral evidence. He had not completed an evidence questionnaire.

5.83 After confirming his statement in examination-in-chief, Mr Burton produced a map [**SB214**] which he believed was relevant to one of the issues that he had heard being discussed during the inquiry. This related to the route of the bridleway which runs along the edge of the field. Mr Burton advised the inquiry that he believes that this map shows the second deviation of the bridleway, and that the post in the middle of the field was actually a bridleway pointer.

5.84 Mr Burton informed me that he moved to his current property, 35 Fawsley Leys, Hillside, in June 2014 (having worked on it practically every day since its purchase in December 2013). Between 1985 and 2014, he lived around one mile away on Bilton Road, which is outside the Hillside area. From 1978 until 1985, he lived at 22 Drayton Leys, Hillside. Accordingly, his evidence of use is relevant to the last three years of the qualifying period.

5.85 With regard to his access to the land, Mr Burton stated that he largely used Entrance D, but had had also used Entrances A and B. Since December 2013, he has mainly used the land for walking. Mr Burton told me that he usually walks around the perimeter but sometimes walks across the middle. He does this up to three times per week, although his use in the summer has fallen off slightly as the grass has not been cut. His grandchildren use the field two or three times per year to exercise their neighbour's dog, a Cockapoo called Bella.

5.86 At paragraph 26 of his statement, Mr Button said: "*I do not recall that there were any signs around the field when we lived here between 1978 and 1985"* [**D80**], which I pause to note is consistent with the evidence of the Objectors that the first sign was not installed until 1989. Mr Burton then continues: "*I have paid no notice to the sign which now stands in the middle of the bridleway at entrance D as I recall that the field was always open for residents in the neighbourhood to use."* Mr Burton agreed with Mr Edwards QC when he suggested that this was consistent with what some of the other witnesses had said, namely that they were accustomed to using the land, and continued to do so regardless of the signs.

5.87 In re-examination, Mr Burton was asked whether there was any difference in the way that people used the land after the archaeological dig had taken place. Mr Burton said that people walk onto the field and walk at various different angles from Entrance D. I noted that Mr Burton did not appear to address the question asked but rather answered what he wanted to say. Overall, however, I considered that Mr Burton was doing his best to assist the inquiry.

**(9) Mr Charles Gay**

5.88 Mr Gay provided a written statement dated 21st October 2017 and gave oral evidence. He had also previously provided a long-form questionnaire dated 25th August 2016 [**D126**].

5.89 Mr Gay lives at 46 Long Furlong, Hillside. He has lived there since 1965, with the exception of four years between 1969 and 1973 when he worked in the United States of America. Mr Gay and his wife have three children, two of whom now live in America. His children were born in 1958, 1961 and 1964. They had all left home by 1996.

5.90 Mr Gay confirmed that most of the activities described at paragraph 9 to 11 of his statement would have been many years before 1996. As to his own use, Mr Gay said that it has become much more gentle and he now only uses the field for some exercise by walking around it. Until recently, this took place twice each week but he said that it is now less frequent. In his evidence questionnaire, Mr Gay indicated that his use of the field was daily [**D130**]. However, he said that this is no longer the case as his wife is unfortunately in poor health.

5.91 Mr Gay was asked about various photographs attached to his statement. He confirmed that the photograph referred to as 'Plate 1' [**D120**] was taken in the mid-sixties. In the centre left of the photograph, some bars can be seen on the fence adjoining Rokeby Playing Fields (which have been described as Entrance G on Map D). I should add that Mr Gay's rear garden adjoins the boundary with Rokeby Playing Fields in the vicinity of the oak tree. Mr Gay said that the bars have not been used for some time has they are overgrown by holly.

5.92 Mr Gay told me that he used to use Entrance B to leave the field but stopped doing this when the wooden gate was replaced with a metal gate (he was unsure when this occurred). He agreed that anyone using the steel gate would need to climb over it as it is always locked.

5.93 When asked about the football pitches on site, Mr Gay stated that football pitches and goalposts had come and gone over the years but he was unable to be precise about the dates. He said that there were previously more marked out pitches on the field than there are now.

5.94 In relation to the signs, Mr Gay told me that he could not recall any signs when he moved to Long Furlong. However, signs had appeared over the years but he said that "*they appear to have been ignored by the many users*" [**D118**]. To this extent, he accepted that the answer that he gave to question 23 on the long form questionnaire was incorrect. Question 23 asks: "*Has any attempt ever been made by notice or fencing or by any other means to prevent or discourage the use being made of the land by local people? Please provide dates and the wording of any notices and mark their position on Map A."* [**D128**]. Mr Gay said "NO".

5.95 In re-examination, Mr Gay was asked whether he knew anyone else who had seen the notices on the land. His answer without any hesitation was: "*Well you couldn't miss them. All my neighbours would say they have seen them. But by custom and practice for the first 20 years they would say it is acceptable to go in.*"

5.96 Given that Mr Gay was clearly aware that notices had appeared over the years and was aware of their contents, I find it difficult to understand why he would have answered negatively to

question 23 of the questionnaire. This suggests that he may not have answered it with such care as might be expected in relation to such an important document and inevitably casts some doubt in my mind as to his other answers. It also causes me to question whether the statement that he used to use land "daily" even in September 2016 was slightly exaggerated at that time given his comment in his statement that his use is "*much more gentle*" now.

**(10) Mr Les Whitta**

5.97 Mr Whitta provided a written statement dated 19th October 2017 [**D210**] and gave oral evidence. He had not previously completed an evidence questionnaire.

5.98 In 1982, Mr Whitta moved to his current address at 224 Norton Leys, Hillside. When he bought the property with his wife, the part of Norton Leys in which his house is situated was being developed and they found themselves in the middle of a large group of young families who, like themselves, had just arrived in Rugby. By 1996, his eldest daughter was 18 and his youngest daughter was 16. His eldest daughter moved away to university in 1999 when she was 21. His younger daughter moved away when she was about 25 (around 2005).

5.99 When he first moved to the area, Mr Whitta told me that he used to play football for a works team and sometimes played on Rokeby Playing Fields. He stopped playing football in 1986. More generally, Mr Whitta remembered formal football games being played on the field. When he stopped playing football due to a knee injury, Mr Whitta took up golf and started using the land to practice. He indicated that he plays golf quite often through the summer months, which gave the impression that it was less frequent during winter. In more recent years, Mr Whitta used to walk a neighbour's dog. This was between 2009 until 2016. When walking the dog, he would walk from Entrance C to D. As such he stayed on the bridleway.

5.100 Mr Whitta confirmed that he was aware of three signs before he prepared his statement. In particular, he was aware of the "Trespassers May Be Prosecuted" sign at Entrance D and the "Organised Sports" sign at Entrance C. He said that there was also another sign near to the Parish Boundary Hedge, but it is no longer there and he was not aware what it said. He did not remember seeing the "Trespassers May Be Prosecuted" sign at Entrance C. Somewhat surprisingly given that he was aware of the "Organised Sports" sign which is just above it, Mr Whitta said that he did not recall seeing the golf sign at Entrance C. However, he accepted that the intention of the golf sign is clear and obvious.

5.101 In re-examination, Mr Whitta clarified the chronology in relation to the football pitches. He was asked how many people would walk their dogs in the middle of the field as opposed to around the perimeter and surmised that the ratio was 2:1 in favour of the perimeter.

5.102 Overall, I considered that Mr Whitta gave his evidence in a straightforward manner with no apparent attempt to exaggerate his use of the land. I did have some reservation about his

inability to recall the golf sign given that this was one of his most frequent activities on the land of late. However, this may be explained by the fact that he usually uses Entrance D.

**(11) Mr Roland Barrie Jones**

5.103 Mr Jones provided a written statement dated 23rd October 2017 [**D154**] and gave oral evidence. He had not completed a questionnaire about his use of the land.

5.104 Mr Jones currently lives at 6 Orson Leys. He has also lived at 37 Sywell Leys (1980 – 1982) and 39 Fawsley Leys (1982 – 1987). Mr Jones advised that since he moved to his current address he has mainly used Entrance C. Mr Jones' main use of Rokeby Playing Fields has been to walk his dogs. However, he has not owned any dogs since 2010 and therefore now only uses the field two or three times each month for recreational walking.

5.105 Mr Jones recalled that there were previously two full-sized marked pitches on the field [**O257**]. He said that the goalposts were usually put up in the Autumn and taken down in Spring. Subsequently a third pitch was marked out closer to Rokeby Primary School. Mr Jones told me that football league games were held quite regularly at weekends for a number of years but these suddenly stopped. He was unsure why. Mr Jones also recalled cricket being played for a short period, but said that it was not maintained and fell into disuse.

5.106 At paragraph 9 of his statement, Mr Jones spoke of "the bolder spirits" going for a walk in the adjacent farmer's field by using gaps in the Ancient Hedge (Entrance M and N). During cross-examination, Mr Jones agreed that there was barbed wire present along this boundary, which he said had always been there, but said it was still possible to get through. However, they would not go in when cattle were in the field due to the presence of an electric fence.

5.107 At paragraph 17 of his statement, Mr Jones said that he could remember the dog walkers group discussing the "Trespassers May Be Prosecuted" signs after they went up. He went on to question the meaning of the notices, and suggested that they were negated by the dog bins. Under cross-examination, Mr Jones said that people did not know whether they could go onto the field. When it was put to them that the sentence "Exercising of Dogs Prohibited" was clear, Mr Jones agreed that it was but he said that people did not concentrate on that part of the sign as the "Trespassers May Be Prosecuted" drew their attention more. Upon further probing, Mr Jones was asked if was it was fair to say that people understood what the signs meant but took no notice. In response, he candidly said: "*That's fair to say.*"

5.108 With the exception of some of the somewhat partisan comments which appeared in his evidence about the notices, I considered that Mr Jones was trying to assist the inquiry and I accept his evidence about the frequency and nature of his use of the land.

**(12) Dr John Ham**

5.109 Dr Ham provided a written statement dated 28th August 2017 [**D139**] and gave evidence as the first witness on 13th November 2017. He had not completed a questionnaire.

5.110 Dr Ham is a retired general medical practitioner who has lived continuously at 31 Fawsley Leys since 1984 with his wife, Christina. They have two sons, James born in 1984 and Christopher born in 1986. Both of their sons left home at the age of 18 (2002 and 2004). 31 Fawsley Leys is situated at the junction of Fawsley Leys and Drayton Leys.

5.111 At the start of his evidence, Dr Ham made a small amendment to paragraph 3 of his statement to change the word "provide" in the second sentence to "facilitate" (social, recreational and educational facilities for the local community), which he said was a better explanation of what the Hillside and Rokeby Community Association ("HARCA") did. Dr Ham informed me in his statement that HARCA was established in the late 1970s. He served as the Chairman of HARCA from 1984 until 2009. Dr Ham was also the Chairman of the Hillside and Rokeby Neighbourhood Watch for four years between 2005 and 2009.

5.112 Dr Ham amplified his statement in answers to Mr Wilmshurst's questions by stating that:

(i) He would usually run around the perimeter of the field;
(ii) He would mostly walk around the perimeter, but occasionally across the field;
(iii) Informal games of football would take place at the football goalposts on the field;
(iv) His sons also used the cricket crease which was marked out to play cricket;
(v) At one time, there was a running track marked out for running competitions;
(vi) He found it difficult to say how many children would play at the same time as his children; it may have been half-a-dozen. He stressed that these were not formal matches. It was also difficult to say how often the matches occurred.
(vii) Similarly, it was difficult to say how often he had seen the other activities noted.

5.113 During cross-examination, Dr Ham confirmed that his sons would play sports on the field more frequently when they lived at home, but said that they still sometimes play when they came home during holidays from university. In relation to the horse riding which he had seen on the field, Dr Ham commented that it was difficult to say how frequently he saw horse riders, but the most common location for him to see them on would be the bridleway.

5.114 At paragraph 13 of his statement, Dr Ham stated that the most consistent and regular use of the field over the years has been by the dog exercisers. In cross-examination, Dr Ham confirmed that this was correct but said that it was not the only use of the field. As to which part of the field the dog walkers use, Dr Ham thought that around 2/3 of the dog walkers would use the field, although the most common entrance point to the field was the bridleway.

5.115 Dr Ham was questioned about his evidence as to who had been responsible for mowing the grass, and quite candidly accepted that he was reliant upon what other people had told him. With regard to the layout of the field, Dr Ham confirmed in cross-examination that there had previously been several football pitches and that he had witnessed organised matches

taking place. He described them as formal amateur football tournaments. However, he stated that the goalposts had also been used for informal football matches. Dr Ham informed me that he had not been involved with the organisation of any of the matches.

5.116 In relation to HARCA, Dr Ham explained that HARCA, as a committee, was generally not involved in organising matches. All residents in Hillside and Rokeby are automatically members of HARCA. There is no membership other than the fact that they live locally. As such, if you wanted to organise a match there was no need to go through HARCA. HARCA did not have a formal cricket team. All the matches that ever took place were informal.

5.117 As to his own use of the land, Dr Ham informed me that he mostly used Entrance D. He confirmed that he was familiar with the notice at Entrance D [**O303**], and that it had been there a long time. Dr Ham appreciated that the wording in red was to give that message a degree of prominence, but said that the use of the land before and after the signs were erected was as a community space and resource. Dr Ham was asked whether it was his evidence that people had been accustomed to using the land for many years, and continued to use the land irrespective of the signs. Dr Ham answered: "*Yes, and they always did.*" Finally, in reference to paragraph 16 of his statement, Dr Ham was asked whether his statement about a particular sign "forbidding non-formal sporting activity" was to the "Organised Sports Games" sign at Entrance C [**O301**]. He confirmed that it was.

5.118 In re-examination, Dr Ham stated that the track which is around the perimeter of the field is nowhere near as worn as the bridleway. He found it difficult to quantify the use by dog walkers of the perimeter of the field as distinct from the middle of the field.

5.119 As will be apparent from the above summary of his evidence, Dr Ham was particularly careful when giving evidence to ensure that he gave accurate answers as far as possible and was keen to ensure that he did not provide a misleading answer if he was unsure. I found Dr Ham to be a compelling witness and I have no hesitation in accepting his evidence.

**(13) Mrs Martina Duffy**

5.120 Mrs Duffy provided a written statement dated 29th October 2017 [**D94**], an evidence questionnaire dated 20th July 2016 [**D100**] and gave oral evidence to the inquiry.

5.121 Mrs Duffy has lived at 61 Long Furlong, Hillside (which is opposite Entrance B) since 1982. She was born in the Netherlands 78 years ago. She first came to this country in 1959. In 1967, she married her late husband, Peter, and they had two children, Ysolde born in 1969 and Martin born in 1972. Mrs Duffy's husband sadly passed away in 2010.

5.122 In examination-in-chief, Mrs Duffy produced two items which she wished the inquiry to see. The first was a framed photograph of the field which her late husband had taken

approximately 15 years ago [**SB78**]. The second was an envelope containing a key that her late husband had been given by an employee of Warwickshire County Council [**SB75**].

5.123Mrs Duffy told me that she started to use the field as soon as she moved to Hillside. She would be on the field at least once a week during term time and the children would play there more often after school. They would play Frisbee and ball games in the middle of the field whenever the weather was good enough. They would also pick blackberries from the hedge along Furlong Road when they were in season. Her children would ride bikes all around the field. In snow, they would sometimes play on a toboggan. Her son, Martin, would play with a model aeroplane in the middle of the field. This would take place at weekends, but only when the weather was suitable.

5.124Mrs Duffy's grandchildren were born in 2003 (Willem) and 2005 (Jocelyn). They live in Rugby but not in the immediate neighbourhood. Mrs Duffy looks after them regularly during term time. In fine weather, they will use the field at least once a week after school and sometimes at the weekend when they visit. They would play Frisbee and fly kites, and would sometimes use a piece of rope as a swing at the area known as Dead Pond.

5.125During cross-examination, Mrs Duffy confirmed that her daughter moved away in 1986 when she was 17. She now lives abroad but occasionally comes back for a holiday. By 1996, Mrs Duffy's son was 24. He moved away from the family home in 1998. He lives outside of the area known as Hillside and Rokeby. Accordingly, the use of the field by Mrs Duffy's children to play as described at paragraph 9 took place before the qualifying period.

5.126In terms of her access to the field, Mrs Duffy stated that she would usually climb over the gate at Entrance B as this is the shortest way for her to reach the field. She said that the gate has always been locked. When she moved in, Mrs Duffy said that there were no notices at Entrance B. However, Mrs Duffy recalled at paragraph 27 of her statement that around the year 2000 there was a notice erected at Entrance B saying "No Golf". She explained that there was a metal plate attached to the top of the wooden pole at the time. On that plate, there was a note saying "No Golf". However, it was just a written note on paper and it disappeared very quickly because of the rain. At that time people were playing golf towards the houses and breaking windows. The police were called and told people not to play golf.

5.127As to the use of the field by others, Mrs Duffy confirmed that Bishop Wulstan School used the field but said that this was not on every school day. When asked where this was, Mrs Duffy said they were close to the gate, but were spread out. She didn't believe that they used the full field. When the school children were on the field, Mrs Duffy said that residents would confine themselves to using other parts of the field. Part of the field was marked out as football pitches, Mrs Duffy believed that this was done by RBC as her husband used to speak to the gentleman who was marking out the pitches. Mrs Duffy remembered that football games would take place on these pitches at weekends.

5.128 Mrs Duffy told me that about twenty years ago her husband was given a key to the gate at Entrance B by Richard Colley of Warwickshire County Council. This was the key that she produced at the start of her evidence. She had also retained the envelope, which stated: "*C/O MR DUFFY (MANY THANKS) RICHARD COLLEY WCC 07721-938073*" [**SB75**]. Mrs Duffy believed that the key had been given to her husband for emergency purposes to provide vehicular access when needed, for example by the police, fire brigade or ambulance. Under cross-examination, she said that "*they didn't always have the means the cut the chain; and if they did cut the chain they would have to replace it. It was a means to save money.*"

5.129 As to the notices at Entrance C and D, Mrs Duffy informed me that she did not usually use those access points but if the children were tired she would use Entrance C. In addition, if she went for a walk with her husband they would sometimes go to Entrance D. In respect of the "Trespassers May Be Prosecuted" Sign, Mrs Duffy said that she believed that the word "*may*" meant that you take your chances, and suggested that if it said "*will*" it would have been different. Mrs Duffy also thought that it only applied to people who were exercising dogs. I pause to note that despite confirming that she was aware of at least some of the notices, Mrs Duffy had answered "No" to question 23 on her evidence questionnaire [**D102**]. There was no explanation for this discrepancy.

5.130 Apart from that discrepancy in her questionnaire, I was impressed with the evidence given by Mrs Duffy and accept in broad terms her evidence in respect of her use of the land.

**(14) Mrs Michelle Lines**

5.131 Mrs Lines provided a written statement dated 23rd October 2017 [**D168**], an evidence questionnaire dated 25th August 2016 [**D181**] and gave oral evidence to the inquiry.

5.132 Mrs Lines was born on the Woodlands Estate where she lived with her mother and father and sisters. Whilst living on the Woodlands Estate, Mrs Lines frequently visited her aunt who lived at 2 Anderson Avenue, Rokeby. Mrs Lines attended Bishop Wulstan Secondary School. After leaving school, she set up home with her partner on South Street near the Railway Station, where she had her first son. In 1992, they purchased 190 Norton Leys, where she had her second and third son. Around 2003, their current property was purchased - 62 Long Furlong, Hillside. This shares a boundary with Rokeby Playing Fields.

5.133 Whilst she was at Bishop Wulstan Secondary School, Mrs Lines told me that during the summer she used to have games sessions on Rokeby Playing Fields. This would take place four times each year for her class. Based upon the number of classes and year groups, she calculates that the school would have held about 120 sessions on the field each year [**D170**].

5.134 Mrs Lines was asked about the gate which leads from her garden to the field (Entrance E) [**D179**] and said that this is the gate that she usually uses to access the field. In cross-examination, it was pointed out that in her questionnaire she had given the answer "Bridal

Path" to question 13, which asked "How do/did you gain access to the land?". Mrs Lines could not explain why she had not mentioned Entrance E in the questionnaire, but said she uses several entrances. Upon further probing, she accepted that the question in the questionnaire was not unclear but simply said that she was giving further information now.

5.135 Some time was spent questioning Mrs Lines about the photograph exhibited to her statement and marked "Plate 4" [**D178**] which the description said showed Entrance A (the gap in the fence on the corner of Anderson Avenue and Long Furlong). At first blush, this photograph did not look like Entrance A due to the angle at which the photograph was taken. However, when I returned to the site for the unaccompanied site view on 18th December 2017 I was able to satisfy myself that it was taken on the corner and showed Entrance A. Mrs Lines was unable to assist with how long the gap was present as she did not use it.

5.136 Mrs Lines informed me that Entrance J changed to a metal fence which was no longer accessible when she was a governor at Rokeby Primary School. She explained that this was in response to security concerns as dog walkers were walking across the school field.

5.137 As to the signs, Mrs Lines confirmed that she was aware of the sign at Entrance D. She said at paragraph 31 of her statement "I *did not think much about it. It never held any weight for me. There were always people using the field. I probably thought it just applied to dog walkers*" [**D172**]. Under cross-examination, Mrs Lines said that she did not think that it was a "strong enough sign", stating that it says people "may" be prosecuted not that they "will" be. I pause to note that this was a comment that witnesses started making as the inquiry progressed even though it did not appear within their statements. I formed the impression that this may be because they heard other witnesses saying something similar before and adopted it, either consciously or sub-consciously, when they came to give their evidence.

5.138 I also note, as was pointed out in cross-examination, that Mrs Lines answered "Nothing" to question 23 on her questionnaire [**D183**] despite the fact that she was aware of some of the notices and even on her own interpretation it prevented people from exercising dogs. When she was asked about this, she said that she was thinking of other measures but agreed that I should take that answer as being *"yes, there was an attempt to discourage by notice"*.

5.139 In re-examination, Mrs Lines informed me that council workers would be at the field mowing the grass all through the summer on a weekly basis.

5.140 I am bound to say that I had some reservations about Mrs Lines' evidence. In particular, I was concerned about the discrepancies between her questionnaire and her oral evidence. I also formed the impression that there may have been a tendency to exaggerate the extent to which the land had been used. For example, whilst Mrs Lines stated in cross-examination that she uses Entrance E (her private entrance) a number of the photographs showed that the area outside that gate was overgrown and did not appear to be consistent with regular use.

Whilst I accept that Mrs Lines and her family have undoubtedly used the field over the years, I am cautious about placing too much weight on her evidence as to frequency of use.

**(15) Mr John Manklow**

5.141 Mr Manklow provided a written statement dated 24th October 2017 [**D189**], a short form questionnaire dated 17th September 2016 [**D194**] and gave oral evidence.

5.142 Mr Manklow lives at 13 Anderson Avenue, Rokeby. He was born in Rugby in 1989 and lived at 44 Everest Road in Overslade. As a child, he attended Rokeby Primary School from 1964 until 1975 before attending Herbert Kay High & Lawrence Sherriff in Rugby. Whilst he was at Rokeby Primary School, Rokeby Playing Fields was used by the school for PE, sports days and nature visits. Mr Manklow also used to play football there after school.

5.143 Mr Manklow moved to 13 Anderson Avenue in 1992 where he has lived throughout the qualifying period. He has two children, a daughter Katherine born in 1989 and a son David born in 1993. His daughter has moved away but David still lives at home. At paragraph 11 of his statement, Mr Manklow stated that David uses the field for fitness training and socialising. When he was asked about this in examination-in-chief, Mr Manklow did not know exactly what David does on the field, and did not know how often he goes there.

5.144 Mr Manklow informed me that historically there were four or five football pitches on the field with goalposts. When he used to play football with his children, they would go to whichever pitch was free. Their favourite pitch was the one nearest to Entrance C. This continued until his children no longer wanted to play there, when his son was about 12. In cross-examination, he confirmed that this period was from the late 1990s to the early 2000s.

5.145 As to his access to the land, Mr Manklow informed me that he uses Entrance C and D. He confirmed that he was aware that there are signs at these entrances, but stated that they were not there when he was young. When asked about the notices, Mr Manklow commented: "*You notice the sign every time you go in and out of the field*". However, Mr Manklow disputed that the sign was clear, suggesting that there was no plan with the sign demarcating where you would be trespassing and where you would not. He also drew my attention to the fact that it is placed on the bridleway and said that it was not clear what part it relates to. When it was pointed out to Mr Manklow that it specifically referred to the "School Playing Fields" and therefore it was obvious that it applied to the fields rather than the bridleway itself, Mr Manklow became rather argumentative and quite evasive in his answers. Ultimately, he commented that: "*From my point of view having experienced that land all my life it occurs to me that it is just a generic sign planted there which bears no relevance.*"

5.146 Mr Manklow was asked to confirm the location of the dog bins and said that he did not know. He was therefore asked why he had said at paragraph 37 of his statement that the sign was contradicted by the inclusion of dog bins indicative of it being a public area. He

said that he knew there were dog bins there but he didn't know their exact location. Mr Edwards QC pressed the point further by exploring how often Mr Manklow actually uses the bridleway and the field now. Mr Manklow stated that he goes walking quite often on a circuit including the bridleway; he thought he had last used the bridleway two weeks ago. As to the field itself, Mr Manklow said that if he could not do his usual walk, he would walk around the field. However, he could not remember the last time that he had done that. He said it was probably in the winter of 2016. At this juncture, Mr Manklow was taken to his evidence questionnaire which stated: "*I walk most days using the foot path bridleway I walk the fields locally*" [**D194**]. He said that at that time he was rehabbing from a bad back.

5.147 I pause to note that Mr Manklow's evidence questionnaire does not distinguish how he personally uses the field as distinct from the bridleway. It does refer to the use of the field by his children but bearing in mind their ages this was before the qualifying period.

5.148 Having regard to his oral evidence, I formed the view that Mr Manklow's recent use of the field was primarily restricted to recreational walking along the bridleway, and that he would only use the field occasionally when - in his own words - he was unable to do his usual walk.

**(16) Mr Barrie Morgan**

5.149 Mr Morgan provided a written statement dated 23rd October 2017 [**D195**], a short form questionnaire dated 18th September 2016 [**D200**] and gave oral evidence.

5.150 Mr Morgan lives at 11 Rosewood Avenue, Rokeby, which he purchased in 2009 whilst still serving in the British Army. He described the property as a "bolt hole/second home" whilst he was serving in the army in Colchester. Mr Morgan came out of the army in 2012 and moved permanently to Rokeby. He has two sons, Zak born in 2003 and Bae born in 2012, who live in Colchester with their mother but spend weekends with him and his dog, Jett.

5.151 Mr Morgan informed me that Zak typically spends every other weekend with him, often taking Jett for walks on the field. Zak learned to ride his bike on the field. Bae spends one weekend a month with Mr Morgan, and typically a long weekend over the school holidays. He estimates that Bae has visited the field 20 to 30 times in his lifetime.

5.152 As to his own use, Mr Morgan said that there was no fixed pattern, but he would usually use the field two to three times each week. He uses Entrance C. He is aware of the gate at Entrance B (although he does not use it) and said that it is usually locked, although he had seen the gate open on one occasion when work was being completed on the field.

5.153 At paragraph 27 of his statement, Mr Morgan confirmed that he was aware of the signs at Entrance C that broadly prohibits access and dog walking and remembers thinking that he was not supposed be on there. In cross-examination, Mr Edwards QC put to Mr Morgan that he saw the signs and knew what they meant but he used the land regardless. Mr Morgan

candidly accepted that this was correct, stating: *"Yes. If everybody else had stuck to bridlepath I might have thought about not doing it. It didn't strike me as much of a risk."*

5.154Mr Morgan struck me as an honest and genuine witness and I accept his evidence.

**(17) Mr Anthony Charles Tayler**

5.155Mr Tayler gave evidence as a member of the public. Although he was not called as a witness of the Applicant, I have included his evidence within this section of my report as he gave evidence in support of the application. At the start of his evidence, he helpfully produced a written statement which he had prepared in advance and read to the inquiry.

5.156Mr Tayler lives at 29 Fawsley Leys. Mr Taylor and his wife moved to Fawsley Leys in 2001, when their son was 5 and their daughter was 7. In his statement, he confirmed that they have used the field since moving to Fawsley Leys for various purposes including teaching their son to ride a bike on the cricket pitch, playing ball games and weekend afternoon strolls. He remembers teaching his son to control a football initially but later when he was 10 or 11 they spent many hours getting him to kick a rugby ball over the football goal posts that were then quite close to the Ecton Leys entrance. His son had started playing for St Andrews Rugby club, which he continued with for about 5 years.

5.157Mr Tayler also has some recollections of other uses the field was put to. For example, the football pitches which were still being used for organised adult games up to around 2011/2 quite regularly on Saturday or Sunday mornings. There was and continues to be a group of young people who played on the pitch on the other side of the field from their house. About 10 years ago some cattle from a nearby field decided to enjoy the surroundings and broke through the fence. Over the years he has also seen horse riders, people camping, flying model aircraft and kites. People have also practiced golf and other ball games as well as playing with their dogs. Indeed, they have had several golf balls, some footballs and dog toys land in their garden over the last few years. Mr Taylor informed me that his impression was that the use by the school has been minimal throughout the time he had lived here. He thought that it has amounted to it being used for sports days and there has been a running track marked out in the part of the field that is close to the access gate for the primary school.

5.158In answer to my questions, Mr Tayler stated that sport days had taken place on the field annually. He noted that the field was being referred to as a sports field but it is referred to as open space on the RBC website, which he had looked at over the weekend. He recalled that the running track had been marked out every year for the past several years. He also stated that there were further football pitches orientated the other way around. As to the use of the field by teams, Mr Tayler clarified that this was use by formal teams. He said that when he moved to the area the pitches were quite extensively used by formal teams on a Saturday and Sunday but that this hasn't occurred in the last few years. As to his own use of pitches with his son, he said that this took place around 11 years ago.

5.159Arising out of my questions, Mr Edwards QC asked Mr Tayler whether he had seen the option for booking the pitch on the RBC website. He said that he had.

5.160As noted above, Mr Tayler gave evidence as a member of the public. He was a careful witness who spoke quietly but deliberately and struck me a genuine and sincere witness. I have no hesitation in accepting his evidence and am grateful to him for attending the inquiry.

**(18) Mr Owen Green**

5.161Mr Green provided a written statement dated 23rd October 2017 [**D134**] and gave oral evidence as the first witness of the evening session on 13th November 2017. He had not provided a questionnaire about his use of the land.

5.162Mr Green was the youngest witness from whom I heard. He was 25 when he gave evidence. Between 1992 and 2005 he lived with his parents at 15 Anderson Avenue. In 2005, they moved to 18 Rosewood Avenue, Rokeby. He has therefore lived in the area all his life.

5.163In examination-in-chief, Mr Green confirmed the veracity of a diagram that he had prepared to show the previous layout of the football pitches on the field [**D138**]. When he was asked how he put together his statement, he said that he filled in the questionnaire but then paused and questioned whether he had done this. He went onto say that he was asked to complete a statement by Julian Woolley and that he was given some criteria to make his statement.

5.164Mr Green informed me that he would play football and cricket on the field with friends as he was growing up. There would usually be six of them from his generation, but if they played with the younger generation then there would be a lot more of them. He also went for walks with his Dad and their dog, Scrappy, and described his usual route of walking. Mr Owen said that he would walk all over the field and there wasn't a part that he hadn't used.

5.165In cross-examination, Mr Green stated that he still plays football on the field now. This takes place once or twice a week. He last played on Friday after work. Before that, it was one or two weeks earlier. To access the field without a dog, he uses Entrance B. This was also the entrance that he used when he was a child (paragraph 29 of his statement [**D136**]). In order to access the field at this point he has to climb over the gate as it is generally locked.

5.166When he has his dog with him, Mr Green uses Entrance C. He was asked about the signs at that access point and said that he would not recognise any sort of sign that would affect him. He made a similar comment to some of the previous witnesses to the effect that he sees a sign saying trespassers "may" be prosecuted, not that they "will" be prosecuted. I note that this comment did not appear in his statement, nor did reference to the sign itself.

5.167In relation to the golf sign, he agreed this indicated that he should not do something but said: "*Yes. The thing is that I've seen other people playing golf, and if they get away with it then I'll get away with it. If I see somebody else getting away with it that makes it alright.*". Mr Edwards QC put it to him that he had thought the same about the other sign; he agreed.

5.168In re-examination, Mr Green clarified that although he had initially said he completed a questionnaire he does not think that he did, stating that he was confused by the question. However, he did complete the diagram and made a statement which was his own words.

5.169Mr Green was a straightforward witness who I felt was trying to assist the inquiry, although some of his evidence may have been influenced by hearing other witnesses or discussing the signs. In broad terms, however, I accept his evidence in relation to his use of the land.

**(19) Mrs Diana Wilcox**

5.170Mrs Wilcox provided a written statement dated 19th October 2017 [**D215**], a short form questionnaire dated 17th September 2016 [**D225**] and gave oral evidence to the inquiry.

5.171Mrs Wilcox lives at 33 Fawsley Leys, Hillside, where she has lived since 2004. Prior to that, she lived at 220 Norton Leys between 1985 and 2004 and 10 Brafield Leys between 1980 and 1985. It was at 10 Brafield Leys that her two children were born (1982 and 1984).

5.172In examination in chief, Mrs Wilcox stated that dog walkers walk all over the field but tend to avoid specific areas in use by the school. The part that Mrs Wilcox and her family would specifically avoid is adjacent to the school. To illustrate this, Mrs Wilcox traced a semi-circle from Entrance A to where the trees are towards the top of Map G [**G237**].

5.173Mrs Wilcox provided three photographs which she wished to draw to my attention. The first photograph dated 13th November 2017 was said to show a demarcation between well-maintained for school use and a height not suitable for a school playing field. Mrs Wilcox amplified this by noting that much had been made of the fact that this is a school playing field. However, in her opinion only one part of the field is suitable for use as a school playing field whilst the other part is not so well maintained and is unsuitable.

5.174Under cross-examination, Mrs Wilcox confirmed that the activities described in paragraph 12 of her statement occurred before 1996. By 1996, her daughter was 14 and her son was 12. Since 1996, Mrs Wilcox has had two dogs. She described her usual dog walk at paragraph 17 of her statement. Where this route involved going into the adjacent farmer's fields, Mrs Wilcox agreed that it would involve going through a gap in the hedge. She said that a log was subsequently put in place which prevented access through Entrance M. Mrs Wilcox was unaware when barbed wire was put in place on the agricultural field side.

5.175In relation to the reference to "goalpost corner" in her statement, Mrs Wilcox stated that this was not a term that she had used before but was advised by one of the members of the SHARE committee to use that term for consistency. As to how the statement had been made, she said that a member of the SHARE committee had asked her a series of questions and then prepared a statement which she had checked several times and had then signed.

5.176With regard to the sign at Entrance D, Mrs Wilcox said that she could not remember when that was erected but thought it may have been there for as long as she had used the field. Under cross-examination, she accepted that the sign was in plain view but sought to suggest that it was negated by the dog bins. Upon further probing, she agreed that it was sensible for the council to have installed dog bins given the presence of the public bridleway.

5.177At paragraph 44 of her statement, Mrs Wilcox said that she had always regarded the threat to prosecute as an "empty threat". When questioned about this, she said: "*I think if the field had been maintained as a sports field then a number of us would have thought differently about using it, but it isn't. And so I have no qualms about going on the land.".* When Mrs Wilcox's attention was drawn to a photograph [**O257**] that suggested that the land had been laid out for formal play by virtue of the number of pitches as recently as 2013, she said that where there were pitches marked out she would walk around the pitches not across them.

5.178In answer to my questions, Mrs Wilcox agreed that her short form questionnaire [**D225**] lacked detail and said that in hindsight she would have made a larger statement at the time.

5.179Mrs Wilcox was a forthright witness and my overall impression was that she was trying her best to assist the inquiry. I accept Mrs Wilcox's evidence of her use of the land.

**(20) Mr Adrian John Cole**

5.180Mr Cole gave oral evidence as a member of the public but had previously provided two questionnaires in support of the application. This only came to light when he started giving oral evidence to the inquiry and Mr Edwards QC subsequently indicated that he would have objected to Mr Cole giving evidence as a member of the public if he had known that he had already supplied evidence in support of the application. In light of this issue, Mr Cole was advised after he had given his evidence that he may be required to return for further questioning after the four week adjournment. However, he was not ultimately required.

5.181Once again, I have included Mr Cole's evidence in this section of my report as he gave evidence in support of the application. However, I make it clear that this was in his capacity as a member of the public and that it was his wish to do so, not at the Applicant's request.

5.182Mr Cole lives at 42 Long Furlong, where he has lived since 2005. Between 1992 and 1996, he lived at 2 Anderson Avenue. Between 1996 and 2005, he lived at 26 Norton Leys.

5.183 Mr Cole produced a series of annotated photographs [**SB62 – SB74**] which he had taken the previous weekend in response to assertions during the first two days of the inquiry that certain signs are crystal clear. Mr Cole informed me that he was not aware of the sign at Entrance C, despite the fact that he has lived next door to that alleyway for years. He said he only became aware of that sign in the last 18 months. Mr Cole said that it looked like the sign was brand new, but it was not and simply all of the ivy had been cut away. He commented: "*If people can't see these signs how do they expect us to pay attention to them?*".

5.184 Mr Cole told me that he remembered that there was a sign between Entrance C and D some years ago, which was exactly the same design as the sign at Entrance D. He said that it originally had two posts in the ground but now there is only one. I pause to note that this accorded with my assessment of the post in the centre during the second site view as I noted that there was another post of the same construction which had been cut off at the ground. As to what the sign said, Mr Cole said that it was a carbon copy of the one in the photograph at [**B303**]. He said that the sign faced the house on Fawsley Leys away from the field. He last saw the sign around 23 years ago. Mr Cole did not know what happened to the sign.

5.185 As to his use of the land, Mr Cole said that he used the field an awful lot. His children would fly kites and they learned to ride a bike on there. Mr Cole told me that he would not go on the football pitches with the dog when they were marked out because it would not be very nice for the players. He recalled that there was some kind of argument between an adult football team and the council and then all of the formal football games stopped.

5.186 In response to my questions, Mr Cole confirmed that he had filled in a short-form questionnaire dated 18th September 2016 [**F185**] and that he and his family had completed a long-form questionnaire dated 26th August 2017 [**F186**]. He explained that the questionnaires had been given to them and they sat down and filled them out. Mr Cole confirmed that the contents of the questionnaires were true.

5.187 With regard to the photographs that he had produced, Mr Cole provided a commentary on what he said that they showed. In particular, Mr Cole suggested that the ivy was so thick at Entrance C until around 18 months ago that it must not have been possible to see the sign.

5.188 In any event, in response to Mr Edward's questions, Mr Coles confirmed that he was aware of the sign at Entrance D, although he believed that it may have been cleaned recently. In relation to Entrance C, Mr Coles was taken to photographs which had recently been provided by Councillor Lewis (who was not a witness but is a member of the SHARE committee) which appeared to show the silhouette of the "Organised Sports" sign on the fence [**SB223**], which was comparable to the photograph in the Objectors' Bundle [**O301**]. Mr Cole accepted that it was similar but said that you could not see any details and was still reluctant to agree that it would have been possible to see the sign at the top at that stage.

5.189I observe at this juncture that Mr Cole's evidence was out of line with other witnesses who had confirmed that they were aware of the signs but they may have been partly obscured at times. It was also out of kilter with the witness who said that the foliage was there in summer but was not in winter. I was therefore slightly sceptical about some of the evidence that Mr Cole gave. I formed the view that either Mr Coles did not use field as much as he indicated in his questionnaires, or he simply did not notice the sign even though it was there to be seen as he became so familiar with the land and accustomed to using it regardless.

**(21) Miss Diane Woods**

5.190Miss Woods provided a written statement dated 21st October 2017 [**D226**] and gave oral evidence as the final witness on the evening session on 13th November 2017. She had not completed a questionnaire in relation to her use of the land.

5.191Miss Woods has been a resident of the Hillside Estate for 19 years from 1985 to 1996, 2003 to 2009 and 2015 to present. She lives at 16 Holcot Leys with her parents. They have had a number of pets at that residence, Sam a Cocker Spaniel (1980 – 1990), Sadie a Collie Cross (1991 – 2000), Woody a Border Collie (2003 – 2010), Benny an English Springer Spaniel (2011 – 2016) and currently Poppy and Jerry who are both Springer Spaniels.

5.192Miss Woods informed me that she was born in 1976. She was therefore 19/20 in 1996 when she moved away to go to university. As such, Miss Woods' use of the land to play whilst she was a child all took place prior to the commencement of the qualifying period.

5.193As to her current use, Miss Woods said she uses the field to walk the dogs twice a week. Her father walks the dogs during the day. Miss Woods also runs around the field once a month with the family dog but said that this can be a bit difficult in winter. She principally uses Entrance D and confirmed that she had seen the sign at that access point. Occasionally she uses Entrance C or B and said that when Entrance A was filled in she had to use B. In relation to the sign at Entrance D, she agreed that she used the land regardless of the notice.

5.194I considered Miss Wood to be a frank and candid witness and I accept her evidence.

**(22) Mrs Anna Perry**

5.195Mrs Perry provided a written statement dated 2nd November 2017 [**D201**] and gave oral evidence on 14th November 2017. She had not completed an evidence questionnaire.

5.196Mrs Perry currently lives on the Dunchurch Road, which is slightly north of the Rokeby Estate. She moved there in 2011. Prior to that, Mrs Perry lived at her family home at 45 Long Furlong on the Hillside Estate until she moved away to university in 2005. She subsequently travelled overseas until 2008, and then returned for a period of six months to the family home. Between 2009 and 2011 she lived elsewhere in Rugby.

5.197In examination-in-chief, Mrs Perry informed me that she would more often walk around the field (once per week) than jog (once per month). She would usually stick to the perimeter. She confirmed that she quite often saw dog walkers walking from Entrance C to D, and sometimes around the whole perimeter as well. She didn't see them anywhere else.

5.198Under cross-examination, Mrs Perry confirmed she would have stopped using the field for play a short period after 1996. When she was a pupil at the Rokeby Infant and Middle School (1989 – 1996), Mrs Perry stated that the use of the field by the school was as follows:

(i) For cross-country, they would use the whole perimeter of the field.

(ii) For sports days, they used most of the field.

(iii) At lunchtimes, they would use about half of the field; the part closest to the school.

(iv) They would also have games lessons on the field. They would play rounders and would do athletics such as hurdles. That was more on the part closest to the school. There was a sprinting lane between point H and point J and stretching out to points E and B. From what she could remember there was also cricket in that area.

5.199Mrs Perry stated that she usually used Entrance C and D but did use Entrance B as a teenager and remembered climbing over the locked gate. In relation to the notices, Mrs Perry was aware of the sign at Entrance D. She believed that there was a time that the sign fell down and was reinstated. She thought this was in the last year but was unable to be precise. In relation to Entrance C, Mrs Perry vaguely remembered the sign at that entrance. She said that she had not really taken much notice of the sign as she had been using the land for a long period of time. In re-examination, Mrs Perry said that previously the sign may not have been very clear as she thought that it looked sort of rusty, green, dirty and brown.

5.200As Mrs Perry was the second witness to mention the sign at Entrance D disappearing and then reappearing, I asked whether there was anything in WCC's records in relation to this. Further inquiries were made thereafter but no information was available in the records.

5.201As none of the other witnesses had mentioned the sign at Entrance D disappearing and there is nothing in WCC's records to suggest that a new sign was erected at some point in the last year or so, it seems most likely that Mrs Perry and Mrs Hicks are mistaken about this point. That aside, I considered that Mrs Perry was a careful witness who provided detailed answers to the questions that she was asked and I broadly accept her evidence of her use of the land.

**(23) Mr Richard Allanach**

5.202Mr Allanach provided a statement dated 23rd October 2017 [**D1**], a further statement dated 14th November 2017 [**SB1**] and a supplementary statement dated 14th November 2017 [**SB3**]. He also gave oral evidence to the inquiry on 14th November 2017.

5.203 Mr Allanach lives at 27 Overslade Manor Drive in Rugby, where he has lived since 1996. 27 Overslade Manor Drive is not in either Hillside or Rokeby. As such, any use of Rokeby Playing Fields by Mr Allanach is not qualifying use for the purpose of the application. Mr Allanach is, however, a member of the SHARE committee and it was apparent during the inquiry that he had been heavily involved in gathering evidence in support of the application.

5.204 Before dealing with his oral evidence, I shall attempt to summarise Mr Allanach's three statements in order to distil the key points which arise out of those statements:

- **Statement dated 23rd October 2017 [D1]**: In this detailed statement, Mr Allanach sets out his extensive research into the history of the Hillside and Rokeby estates. I do not intend to repeat his findings in this part of the report but I record that I am indebted to Mr Allanach for the work that he has undertaken. From his research, I have formed the opinion that the Hillside Estate and Rokeby Estate are both qualifying neighbourhoods for the purpose of s.15 of the CA 2006. I will deal with this issue in more detail below.
- **Statement dated 14th November 2017 [SB1]**: In this statement, Mr Allanach corrected certain paragraphs in his first statement where matters had changed since his statement was made or he had realised that he needed to correct certain parts of his statement.
- **Supplementary Statement dated 14th November 2017 [SB3]:** In his supplementary statement, Mr Allanach sets out the findings of field research which he had undertaken in relation to the signs which were being discussed during the first part of the inquiry. In essence, Mr Allanach visited a number of different schools in the area and found five instances where the "Trespassers May Be Prosecuted Sign" was being displayed. He also undertook an analysis of how these signs were being displayed at other schools.

5.205 In his oral evidence, Mr Allanach confirmed that he lived outside the Rokeby and Hillside Estates. He said that his own use of the land was infrequent prior to 2016. However, he had visited the land far more frequently since February 2016 in connection with the planning application and more recently the TVG application. Mr Allanach confirmed that his wife had objected to the planning application and that he is a member of the SHARE committee.

5.206 Mr Allanach was asked about the lease which RBC entered into with WCC in 2000. Mr Allanach said that he understood the permitted user clause, which reads: "*For the purpose of playing fields for organised games by local sports clubs to be arranged through the Lessee*" [**O42**]. However, he asked rhetorically that if the head of Rugby Borough Council's sports and ground department responsible for this land was confused as to what was possible on the land, why was it unlikely that the people living around the land were also confused to the extent that they thought it was public open space? This was a reference to an email dated 6th January 2017 from Chris Worman to Richard Holt, both at RBC. The particular part that Mr Allanach was keen to focus on was the sentence which said: "*The land has been leased to Rugby Borough Council for a number of years as public open space and sports pitches and as such the local community have had free access to amenity green space*".

There was some debate between Mr Allanach and Mr Edwards QC as to the meaning of this email having regard to the Permitted User Clause in the lease.

5.207 Some time was spent examining the photographs recently provided by Councillor Lewis. The second photograph [**SB216**] was compared to the photograph annexed to Michelle Lines' statement [**D178**] and it was suggested to Mr Allanach that this showed a different part of the fence to Entrance A. Mr Allanach stood his ground on this point. As noted above, I have since satisfied myself that the photograph [**D178**] did show Entrance A.

5.208 In answer to my questions, Mr Allanach described his role on the SHARE committee. He told me that his role has been to gather evidence, pleading for photographs and videos, visiting people who indicated that they might give evidence to the inquiry and following leads to contact other people. He said that he had done most of the word-processing.

5.209 Mr Allanach informed me that the plea for photos/videos was by way of several leaflets to the neighbourhood. He said that the first leaflet was distributed in February/March 2016. There were perhaps six SHARE leaflets, although not all of them for the town green application. The second method was keeping people informed as to the progress of the planning application by email (which were subsequently disclosed by the Applicant together with the various leaflets [**SB89 – SB113**]). The third method was house-to-house visits. Mr Allanach said that Michelle Lines had done a lot of knocking on doors.

5.210 In relation to the questionnaires, Mr Allanach explained that they went to the Open Spaces Society, who have a standard questionnaire. A number were filled in by others who encouraged their neighbours. Mr Woolley and Mrs Lines distributed most of them. Mr Allanach informed me that just before submission of the TVG application they reviewed the documentation and discovered that there was a possibility for the CRA to turn them down without an inquiry. Essentially, the SHARE committee realised that there might be a question of whether there was a significant use of the land. They therefore went door-to-door with the short-form questionnaire the weekend before the application was submitted in order to obtain a quantity (as opposed to quality) of evidence to demonstrate significant use so that the CRA could not summarily turn them down. Mr Allanach explained that they looked at the streets closest to the application land and knocked on doors. Sometimes the forms were filled in on the door step; sometimes the forms were taken away.

5.211 In light of his involvement with the evidence gathering in support of the application, I asked Mr Allanach whether he was able to give any explanation as to why Mrs Walker did not recognise the handwriting on the questionnaire. He said that he could only give informed speculation. He said sometimes he wrote down the answers for the person providing the questionnaire and therefore he would not be surprised if you could find some questionnaires with him handwriting on them, but he did not think that questionnaire was his handwriting.

**(24) Written Evidence**

5.212 In addition to the oral evidence referred to above, the Applicant submitted a large volume of written evidence in support of the application. I have summarised the written evidence in the table below. I will deal with my assessment of the written evidence later in this report.

| No. | Name | Address | User Period | Entrance | Reference |
|---|---|---|---|---|---|
| 1 | Michael S Adams | 5 Fawsley Leys, Hillside | 50 years | | Q [**F557**] |
| 2 | Michael S Adams | 5 Fawsley Leys, Hillside | 1964 - 2017 | C | Q [**F558**] |
| 3 | Jill Aldridge | 11 Anderson Avenue Rokeby | 1999 - 2017 | C & D | Q [**F444**] |
| 4 | S Anderson | 64 Anderson Avenue Rokeby | 1997 - 2017 | A, B, C, D | Q [**F706**] |
| 5 | Lisa Andrew | 198 Norton Leys, Hillside | 2004 - 2016 | Footpath | Q [**F490**] |
| 6 | Carol Arthurton | 200 Norton Leys, Hillside | 37 years | | Q [**F135A**] |
| 7 | Carol Arthurton | 200 Norton Leys, Hillside | 1979 - 2017 | C & D | Q [**F138**] |
| 8 | Cora Arthurton | 71 Charlesfield Road Rokeby | 11 years | | Q [**F147**] |
| 9 | George Baines | 7 Ecton Leys, Hillside | 1981 - 2017 | D | WS [**E1**] |
| 10 | Mary Barratt | 43 Long Furlong, Hillside | 1984 - 2016 | Bridleway | Q [**F523**] |
| 11 | B Bergin | 76 Charlesfield Road Rokeby | 3 years | | Q [**F79**] |
| 12 | Stuart Birch | 13 Long Furlong | 15 years | | Q [**F717**] |
| 13 | S & S Birch | 13 Long Furlong | 1998 - 2017 | C | Q [**F718**] |
| 14 | T Brady | 74 Charlesfield Road | 15 years | | Q [**F770**] |
| 15 | Tracy Brady | 74 Charlesfield Road | 2001 - 2017 | A, B, C, D | Q [**F771**] |
| 16 | Richard Brightman | 7 Fawsley Leys, Hillside | 1960 - 2017 | C & D | Q [**F684**] |
| 17 | Janet Browne | 9 Orson Leys, Hillside | 20 years + | | Q [**F377**] |
| 18 | Janet Browne | 9 Orson Leys, Hillside | 1981 - 2017 | C & D | Q [**F378**] |
| 19 | Greta Burditt | 11 Long Furlong, Hillside | 1966 - 2016 | Bridleway | Q [**F257**] |
| 20 | Ian Caye | 6 Long Furlong, Hillside | 15 years | | Q [**F347**] |
| 21 | L Chamberlain | 65 Long Furlong, Hillside | 6 months | | Q [**F498**] |
| 22 | Barrie Chessell | 31 Long Furlong, Hillside | 1983 - 2016 | Bridleway | Q [**F80**] |
| 23 | Jonathan Chetham | 9 Badby Leys, Hillside | 1985 - 2017 | C & D | Q [**F389**] |
| 24 | G & K Clark | 3 Fawsley Leys, Hillside | 1996 - 2016 | Footpath | Q [**F273**] |
| 25 | Kate Clark | 8 Ballantyne Road, Rushden | 1983 - 2017 | C & D | Q [**F455**] |
| 26 | Erica Clarke | 196 Norton Leys, Hillside | 30 years | | Q [**F240**] |
| 27 | Stephen Clarke | 20 Brayfield Leys, Hillside | 1976 - 2005 | D | WS [**E9**] |
| 28 | Chris Claydon | 10 Anderson Avenue Rokeby | 20 years | | Q [**F160**] |
| 29 | Chris Claydon | 10 Anderson Avenue Rokeby | 1996 - 2017 | B, C & D | Q [**F160**] |
| 30 | Mr&Mrs Coakley | 24 Long Furlong, Hillside | 5 years | | Q [**F124**] |
| 31 | Mr&Mrs Coakley | 24 Long Furlong, Hillside | 2011 - 2017 | C & D | Q [**F126**] |
| 32 | Sheila Cook | 67 Long Furlong, Hillside | 2008 - 2017 | B | WS [**E13**] |
| 33 | Sheila Cook | 67 Long Furlong, Hillside | 2008 - 2017 | B | Q [**E17**] |
| 34 | Sheila Cook | 67 Long Furlong, Hillside | 8 years | | WS [**E28**] |
| 35 | Paul Cooper | 59 Long Furlong, Hillside | 2 years | | Q [**F616**] |
| 36 | Paul Cooper | 59 Long Furlong, Hillside | 2014 - 2017 | A, B & C | Q [**F617**] |
| 37 | Margaret Cooter | 29 Overslade Manor Drive | N/A | N/A | WS [**E29**] |
| 38 | Robin Cooter | 29 Overslade Manor Drive | 2010 - 2015 | C | WS [**E31**] |

| 39 | L Costello | 19 Drayton Leys | 1979 - 2017 | D | Q [**F497A**] |
|---|---|---|---|---|---|
| 40 | Therea Cottingham | 47 Orson Leys | 1970 - 2016 | Bridleway | Q [**F784**] |
| 41 | Mr I S Coward | 19 Staverton Leys | 5 years | | Q [**F112**] |
| 42 | Mr&Mrs Coward | 19 Staverton Leys | 2011 - 2016 | C & D | Q [**F113**] |
| 43 | Cheryl Crouch | 46 Anderson Avenue | 9 years | | Q [**F148**] |
| 44 | Cheryl Crouch | 46 Anderson Avenue | 1997 – 2001<br>2007 - 2017 | A | Q [**F148**] |
| 45 | Conor Curran | 71 Lower Street, Hillmorton | N/A | N/A | WS [**E35**] |
| 46 | B & D Davies | 4 Orson Leys | 1987 - 2017 | C & D | Q [**F100**] |
| 47 | Alan Davis | 23 Fawsley Leys | Since 1992 | | Q [**F1**] |
| 48 | Alan Davis | 23 Fawsley Leys | 1988 - 2016 | C & D | Q [**F2**] |
| 49 | Joseph Deery | 42 Anderson Avenue | 45 years + | | Q [**F400**] |
| 50 | Joseph Deery | 42 Anderson Avenue | 1940 - 2017 | gate / fence /<br>hedge gap | Q [**F401**] |
| 51 | Charlotte Doughty | 53 Long Furlong | 9 years | | Q [**F172**] |
| 52 | Beryl Dumbleton | 198 Norton Leys | 1986 - 2016 | | Q [**F88**] |
| 53 | Beryl Dumbleton | 198 Norton Leys | 1986 - 2017 | D | Q [**F89**] |
| 54 | Miroslav Dzubak | 51 Charlesfield Road | 3 years | | Q [**F540**] |
| 55 | Julie Edwards | 4 Rosewood Avenue | 30 years | | Q [**F412**] |
| 56 | P, D & M Elias | 43 St Andrews Crescent | 4 years | | Q [**F628**] |
| 57 | Hazel Evans | 26 Fawsley Leys | 1971 - 2016 | Footpath | Q [**F308**] |
| 58 | Kelly Fletcher | 16 Brodie Close, Rugby | N/A | N/A | WS [**E36**] |
| 59 | Gareth Fox | 1 Long Furlong | 5 years | | Q [**F264**] |
| 60 | Fulcher | 8 Thackery Close | 10 years | | Q [**F255**] |
| 61 | Daniel Furness | 54 St Andrews Crescent | 1997 - 2017 | C | Q [**F219A**] |
| 62 | T Gardner | 69 Charlesfield Road | 10 years | | Q [**F782**] |
| 63 | Olive Garrington | 28 Fawsley Leys | 1972 - 2016 | | Q [**F604**] |
| 64 | Olive Garrington | 28 Fawsley Leys | 1972 - 2017 | D | Q [**F605**] |
| 65 | Ian Gay | 60 Long Furlong | 1966 - 2016 | Bridleway | Q [**F348**] |
| 66 | Annabel Genn | 17 Badby Leys, Hillside | 1993 - 2012 | C & D | WS [**E37**] |
| 67 | Sally Goodman | 69 Long Furlong | 8 years | | Q [**F729**] |
| 68 | Sally Goodman | 69 Long Furlong | 2007 - 2017 | C | Q [**F730**] |
| 69 | Amy Gravell | 21 Montrose Road | 10 years | | Q [**F13**] |
| 70 | Amy Gravell | 21 Montrose Road | 2006 - 2017 | A, B & C | Q [**F14**] |
| 71 | S & R Gunter | 41 Fawsley Leys | 35 years | | Q [**F757**] |
| 72 | G & T Hall | 58 Long Furlong | 10 years | | Q [**F295**] |
| 73 | G & T Hall | 58 Long Furlong | 2006 - 2016 | A, B, C, D | Q [**F296**] |
| 74 | Michael Hall | 55 Charlesfield Road Rokeby | 23 years | | Q [**F541**] |
| 75 | Michael Hall | 55 Charlesfield Road Rokeby | 1992 - 2016 | Bridleway | Q [**F542**] |
| 76 | Linda Hanson | 29 Long Furlong, Hillside | 2008 - 2017 | A & C | WS [**E42**] |
| 77 | Pam Hawkins | 55 Charlesfield Road Rokeby | 5 years | | Q [**F629**] |
| 78 | Pamela Hawkins | 55 Charlesfield Road Rokeby | 2010 - 2017 | A & B | Q [**F630**] |
| 79 | Duane Hayle | 188 Norton Leys | Too many years | Bridleway | Q [**F220**] |
| 80 | Ralph Haywood | 21 Staverton Leys, Hillside | 2013 - 2017 | C & D | WS [**E43**] |
| 81 | Ralph Haywood | 21 Staverton Leys, Hillside | 2013 - 2016 | Bridleway | Q [**E47**] |
| 82 | Liese Healing | 8 Anderson Avenue | 2007 - 2017 | A, B, C, D | Q [**F498B**] |

| | | | | | |
|---|---|---|---|---|---|
| 83 | K Hetherington | 18 Long Furlong | 20 years | | Q [**F466**] |
| 84 | K Hetherington | 18 Long Furlong | 1996 - 2017 | C & D | Q [**F466**] |
| 85 | Mr+MrsHiddleston | 7 Staverton Leys, Hillside | 12 years | | Q [**F315**] |
| 86 | Pete Hiddleston | 7 Staverton Leys, Hillside | 2001 - 2017 | C & D | Q [**F316**] |
| 87 | J Higgs | 18 Drayton Leys | 20 years | | Q [**F413**] |
| 88 | M & J Higgs | 18 Drayton Leys | 1994 - 2017 | C & D | Q [**F414**] |
| 89 | Ian Hitchcock | 11 Jasmine Way, Bilton | N/A | N/A | WS [**E56**] |
| 90 | S & P Holland | 8 Long Furlong | 11 years | | Q [**F769**] |
| 91 | Kirstie Jenkins | 2 Charlesford Road | 10 years | | Q [**F478**] |
| 92 | Caroline Jones | 52 Long Furlong, Hillside | 27 years | | Q [**F197**] |
| 93 | Caroline Jones | 52 Long Furlong, Hillside | 1989 - 2017 | C & D | Q [**F198**] |
| 94 | Jacqui Jones | 8 Anderson Avenue, Rokeby | 1979 - 2016 | Pedestrian | Q [**F425**] |
| 95 | R & C Jones | 8 Orson Leys, Hillside | 1979 - 2017 | C | Q [**F695**] |
| 96 | Helen Kaplowitch | Bainwater Cottage, Ludford | 1965 - 2017 | C | Q [**F327**] |
| 97 | Mrs & Mrs Leach | 14 Fawsley Leys | 1975 - 2016 | Bridleway | Q [**F338**] |
| 98 | Bill Lewis | 9 Long Furlong, Hillside | 1977 - 2017 | A, B, C, D, M & N | WS [**E57A**] |
| 99 | William Lewis | 9 Long Furlong, Hillside | 1977 - 2016 | Bridleway | Q [**F812**] |
| 100 | Ian Liddle | 18 Fawsley Leys | 1975 - 2016 | Footpath | Q [**F356**] |
| 101 | Brian Lindley | 38 Anderson Avenue | 30 years | | Q [**F111**] |
| 102 | C Lines | 206 Norton Leys | 20 years + | | Q [**F489**] |
| 103 | Thomas Lyttle | 44 Long Furlong | 1969 - 2016 | Bridleway | Q [**F791**] |
| 104 | Ann MacDonald | 52 Anderson Avenue | 25 years | | Q [**F33**] |
| 105 | Ann MacDonald | 52 Anderson Avenue | 1991 – 2017 | C & D | Q [**F34**] |
| 106 | Dr+Mrs Mageed | 25 Fawsley Leys | 1990 – 2016 | Bridleway | Q [**F25**] |
| 107 | Aaron Mander | 60 St Andrews Crescent | 1992 - 2016 | Bridleway | Q [**F45**] |
| 108 | S Marriott | 17 Badby Leys | 2004 - 2016 | | Q [**F754**] |
| 109 | G Martindale | 27 Fawsley Leys | 1986 - 2017 | C & D | Q [**F282**] |
| 110 | G Martindale | 27 Fawsley Leys | 30 years | | Q [**F293**] |
| 111 | Mr McAlinden | 35 Belmont Road | 1978 - 2017 | C | Q [**F512**] |
| 112 | T McCormack | 5 Ecton Leys, Hillside | 1994 - 2017 | C & D | Q [**F500**] |
| 113 | G & I McShane | 19 Long Furlong | 1987 - 2016 | Bridleway | Q [**F265**] |
| 114 | Paul Menary | 33 Chaucer Road | Since 1986 | | Q [**F650**] |
| 115 | Paul Menary | 33 Chaucer Road | 1986 - 2017 | B & D | Q [**F650**] |
| 116 | Margaret Miller | 16 Badby Leys, Hillside | 1978 - 2016 | Bridleway | Q [**F550**] |
| 117 | Joan Mistry | 5 Rosewood Avenue | 12 years | | Q [**F433**] |
| 118 | Vijay Mistry | 3 Rosewood Avenue | 2004 - 2017 | C | Q [**F810A**] |
| 119 | I Moxon | 3 Ecton Leys | 18 years | | Q [**F365**] |
| 120 | I Moxon | 3 Ecton Leys | 1998 - 2017 | C & D | Q [**F366**] |
| 121 | P Murray | 77 Charlesfield | 27 years | | Q [**F662**] |
| 122 | Peter Murray | 77 Charlesfield Road | 1990 - 2016 | Bridleway | Q [**F663**] |
| 123 | Bill Nolan | 29 Long Furlong, Hillside | 1987 - 2017 | C, D & B | WS [**E58**] |
| 124 | Bill Nolan | 29 Long Furlong, Hillside | N/A | N/A | WS [**E66**] |
| 125 | William Nolan | 29 Long Furlong, Hillside | 1987 - 2016 | Bridleway | Q [**E72**] |
| 126 | Kathryn Norris | 26 Long Furlong, Hillside | 1982 - 2016 | Bridleway | Q [**F479**] |
| 127 | Ivan Norris | 26 Long Furlong, Hillside | 1982 - 2017 | C & D | WS [**E81**] |

| 128 | Ivan Norris | 26 Long Furlong, Hillside | 1982 - 2016 | Bridleway | Q [**E85**] |
|---|---|---|---|---|---|
| 129 | Mrs A O'Neil | 25 Anderson Avenue Rokeby | 50 years | | Q [**F53**] |
| 130 | Audrey O'Neil | 25 Anderson Avenue Rokeby | 1966 - 2017 | Bridleway | Q [**F56**] |
| 131 | Dennis Perry | 45 Long Furlong, Rokeby | 38 years | | Q [**F228**] |
| 132 | Dennis Perry | 45 Long Furlong, Rokeby | 1979 - 2017 | C & D | Q [**F230**] |
| 133 | S & G Petkova | 71 Long Furlong, Rokeby | 3 months | | Q [**F741**] |
| 134 | S & G Petkova | 71 Long Furlong, Rokeby | 2016 - 2017 | A, B, C, D | Q [**F741**] |
| 135 | Patricia Petrie | 24 Drayton Leys | 1977 - 2017 | D | Q [**F670B**] |
| 136 | P & K Rhoades | 17 Fawsley Leys | 2004 - 2016 | Bridleway | Q [**F641**] |
| 137 | J & P Richard | 57 Long Furlong, Rokeby | 1999 - 2016 | Footpath | Q [**F435**] |
| 138 | John Robson | 4 Anderson Avenue, Rokeby | 12 years | | Q [**F442**] |
| 139 | Elizabeth Rogers | 24 Badby Leys | Since 1972 | | Q [**F241**] |
| 140 | Elizabeth Rogers | 24 Badby Leys | 1972 - 2017 | C | Q [**F241**] |
| 141 | Sylwester Rupar | 65 Charslefield Road Rokeby | 5 years | | Q [**F755**] |
| 142 | Nicola Sanghez | 6 Anderson Avenue, Rokeby | 1972 - 2017 | C | Q [**F582**] |
| 143 | Anne Scott | 48 Long Furlong, Rokeby | 2005 - 2017 | C & D | Q [**F68**] |
| 144 | Phil Scott | 48 Long Furlong, Rokeby | 2000 - 2017 | C & D | Q [**F671**] |
| 145 | Kieran Squire | 34 Anderson Avenue Rokeby | 1 year | | Q [**F488**] |
| 146 | Gary Strain | 41 Orson Leys | 6 years | | Q [**F294**] |
| 147 | Chirstopher Surey | 132 Norton Leys, Hillside | 2000 - 2017 | C & D | Q [**F209**] |
| 148 | Amy Swinbourne | 29 Sywell Leys | 2014 - 2017 | D | Q [**F67A**] |
| 149 | Susan Swinbourne | 19 Anderson Avenue Rokeby | 2 years | | Q [**F758**] |
| 150 | Sue Sinbourne | 19 Anderson Avenue Rokeby | 2014 - 2017 | A, B, C, D | |
| 151 | A C Tayler | 29 Fawsley Leys | 2001 - 2017 | B, C & D | Q [**F78B**] |
| 152 | C,D,S&W Thomas | 14 Anderson Avenue Rokeby | 6 years | | Q [**F173**] |
| 153 | C & D Thomas | 14 Anderson Avenue | 2010 - 2017 | C & D | Q [**F174**] |
| 154 | Nigel Thompson | 5 Staverton Leys, Hillside | 1974 - 2017 | B, C & D | Q [**F593**] |
| 155 | Paul Tyce | 231 Norton Leys | 30 years + | | Q [**F682**] |
| 156 | Scott Walker | 6 Saddleback Crescent | N/A | C & I | WS [**E94**] |
| 157 | Michelle Wardle | 32 Long Furlong, Hillside | 11 years | | Q [**F569**] |
| 158 | Michelle Wardle | 32 Long Furlong, Hillside | 1997 – 2017 | C & D | Q [**F570**] |
| 159 | Mr & Mrs Watson | 18 Staverton Leys | 1969 - 2017 | C & D | Q [**F799**] |
| 160 | John Watts | 30 Long Furlong, Hillside | N/A | N/A | WS [**E96**] |
| 161 | John Watts | 30 Long Furlong, Hillside | 1988 - 2016 | Bridleway | Q [**E104**] |
| 162 | M & C Whittaker | 11 Ecton Leys, Hillside | 1982 - 2016 | Footpath | Q [**F533**] |
| 163 | Ben Wilcox | 8 Buringdon Terrace, Devon | 1984 - 2017 | C & D | Q [**F111B**] |
| 164 | Roy Wilson | 20 Belmont Road, Rokeby | 1972 - 2017 | B & H | WS [**E113**] |
| 165 | Tim Wood | 4 Fawsley Leys | 2012 - 2016 | | Q [**F810**] |
| 166 | Mr Yapp | 55 Long Furlong | 40 years | | Q [**F824**] |

**(25) Video Clip of Regulatory Committee Meetings**

5.213 Finally, a video clip was disclosed by the Applicant during the inquiry in relation to WCC Regulatory Committee meetings on 11th July 2017 and 8th August 2017. In particular, my attention was drawn to an extract of the meeting on 8th August 2017 when Mr Neil Ian Grace,

WCC's Principal Planner / Planning Team Leader, made comments about the land. I have reviewed this extract and have taken it into account in forming my recommendation.

## F. OBJECTORS' EVIDENCE

### (1) Miss Clare Lucey

6.1 Miss Lucey made two Statutory Declarations on behalf of the Objectors. The first was declared on 23rd October 2017 [**O289**]; the second was declared on 13th November 2017 [**SB133**]. Miss Lucy gave oral evidence on 14th November 2017. She also provided a Note to Inquiry [**SB142**] on a matter which arose during the course of cross-examination.

6.2 Miss Lucey is employed by Cushman & Wakefield ("C&W") where she currently holds the post of Associate in the Development and Planning team based in Birmingham. Miss Lucey holds a BSc Land Management (2006) and MSc Urban Development and Planning (2007) and has been qualified as a member of the Royal Town Planning Institute since 2010.

6.3 In examination-chief, Miss Lucey confirmed that C&W were instructed to prepare an outline planning application for redevelopment of the land. It was in this capacity that Miss Lucey became familiar with the application land for the first time. She informed me that she became professionally involved with the land just before C&W were formally instructed in June 2016. Between then and September 2016, she said that she would have visited the site eight or nine times. All of the visits would have been weekdays, but at various times of the day. During that period, Miss Lucey said that she only ever saw people walking or walking dogs on the field. She witnessed this predominately around the perimeter of the field.

6.4 In relation to her second Statutory Declaration, Miss Lucey advised that she had undertaken a further site visit following the first day of the inquiry and had taken photographs. Those are the photographs which are exhibited to her second Statutory Declaration [**SB137 - 141**]. Miss Lucey explained the photographs, in particular the presence of wire and fence repairs.

6.5 Under cross-examination, Miss Lucey quite fairly agreed that she was unable to contradict the evidence of witnesses over a number of decades, and said that the only use that she could attest to was during her own visits. Miss Lucey was asked a number of questions about her instructions regarding the planning application and the contact that she had had the council. She confirmed that she had never discussed the TVG application with Mr Marriott, only the planning application. Miss Lucey had never spoken to, or even heard of, Mrs Duxbury.

6.6 Miss Lucey was asked about the process which had been undertaken to identify the route of the bridleway which runs along the edge of the field. She explained that this was based upon the definitive map which would have been considered when preparing the application. Miss Lucey indicated that the bridleway had been excluded from the planning application. In relation to paragraph 14 of her first Statutory Declaration, Miss Lucey was asked whether she could provide the census records. As noted above, she later provided a Note to Inquiry.

6.7 Miss Lucey was taken to the photographs exhibited to her first Statutory Declaration which showed the various notices at Entrance C and D and the post which exists at Entrance B. Upon questioning, Miss Lucey agreed that she was not able to say what sign was previously in existence at Entrance B, simply that it appeared that there had been a sign at some point. As to the notices at Entrance C, it was suggested to Miss Lucey that the ivy had been cut back prior to her photograph being taken [**B301**] such that the sign could now be seen. Miss Lucey said that she had no idea whether the ivy had ever been cut back but was quite clear that she had been able to read the words on the notices on her very first visit. She said that she took an interest in the signs when she first visited as she was familiarising herself with the land. At that stage, she said that she was not aware of the risk of a TVG application.

6.8 It was put to Miss Lucey that her memory may be playing tricks on her and that the sign at Entrance C may have been more covered when she visited in June 2016. Without hesitation, Miss Lucey said: "*In terms of clarity I was always able to read the words. I don't recall at any stage visiting the site and thinking that the sign looked greener the last time I saw it… I recall reading the words the first time*." When it was suggested that the sign would not have been important to her and she was unlikely to have taken much notice, Miss Lucey said: *"I read the signs in the way that any new person would naturally read a sign in front of you. I recall reading the sign at that point, I didn't have to clear anything away."*

6.9 In answer to my questions, Miss Lucey explained that the reason that the oak tree of the field and the surrounding area is not included in the planning application [**O293**] is because it is not proposed for development. In this respect, she informed me that there is a draft condition attached requiring this particular piece of land to be designated as public open space. This draft condition was subsequently provided for background purposes [**SB143**].

6.10 Miss Lucey was a clear and careful witness who I formed the view was doing her best to assist the inquiry. She was quick to make concessions where appropriate but remained firm in relation to her ability to see and read the notices at the site on her first visit. I found Miss Lucey to be an impressive witness and I have no hesitation in accepting her evidence.

**(2) Mr Peter Endall**

6.11 Mr Endall made three Statutory Declarations in support of the Objectors: (a) Statutory Declaration dated 23rd October 2017 [**O16**]; (b) Second Statutory Declaration dated 14th December 2017 [**SB157**]; and (c) Third Statutory Declaration dated 14th December 2017 [**SB170**]. Mr Endall gave oral evidence on 18th December 2017.

6.12 Mr Endall has been employed by WCC as a Solicitor since 1993 and currently holds the post of Senior Solicitor. Mr Endall confirmed that a large part of his work for WCC has involved dealings with the Council's property holdings, and in that capacity he has become familiar with the Council's property deeds and records. Mr Endall is also responsible for the upkeep of the Council's webpage regarding common land and village green matters.

6.13 In his first Statutory Declaration, Mr Endall provided the following history of the land:

(a) WCC acquired the land by a conveyance dated 23rd January 1962 [**O29**].

(b) WCC's original purpose in acquiring the land was for (a) the construction of a new school and (b) provision of additional playing fields for Bishop Wulstan School [**O35**].

(c) When first registered, WCC's title to the land recorded the statutory purpose of the acquisition as education and imposed a restriction to that effect [**O39**].

(d) The proposed new school was never built, but the land was laid out as playing pitches by WCC and used by pupils attending Bishop Wulstan School and other WCC schools.

(e) On 8th September 1976, the County Secretary wrote to the County Architect regarding the issue of trespass on the land, and suggested that notices might assist [**O197**].

(f) In 1982, HARCA were granted a licence to use a temporary classroom at Rokeby First School [**O264**]. This licence was renewed in similar terms in 1986 [**O268**].

(g) On 7th January 1988, Rokeby School wrote to express concerns about stray dogs getting into the school and people exercising dogs on the school playing fields [**O224**].

(h) On 30th June 1989, a quotation was provided for four signs to be provided with the exact wording referred to under the heading 'Sign 1' at paragraph 4.4 above [**O228**]. The said signs were ordered and, it is understood, were duly installed in 1989.

(i) By 1992, Bishop Wulstan School were making relatively little use of the land. Discussions therefore took place in relation to the potential development of the site.

(j) In 1993, WCC entered into an agreement [**O52**] with East Warwickshire College to make good the loss of community access to a playing pitch that the College was selling. This provided for WCC to receive a payment in return for making the land available, while seeking alternative playing field provision elsewhere. This never occurred and the Borough Council eventually accepted the land as fulfilment of the condition.

(k) On 16th March 2000, WCC granted a lease of part of the land to RBC [**O42**]. This permitted RBC to use the land edged red on the lease plan for the purpose of playing fields for organised games by local sports clubs [**O45**]. The right of Bishop Wulstan School to use the land was preserved by clause 4.20. WCC retained direct control of the part of the land edged blue on the lease plan.

(l) On 27th February 2001, WCC wrote to RBC regarding a complaint received about an incident involving a model aircraft [**O237**]. RBC was reminded of its obligations under the 2000 lease and asked to confirm what action it intended to take.

(m) On 8th March 2001, RBC wrote to WCC stating that it would arrange for signs to be erected advising that the land is for the playing of organised sports games only [**O241**]. On 9th April 2001, a fax was sent indicating that two signs had been erected [**O242**].

(n) In 2001, HARCA were granted a lease [**O272**] along similar lines to the licence referred to at sub-paragraph (v). This was surrendered in 2007 and HARCA vacated.

(o) On 31st August 2007, the Bishop Wulstan School closed.

(p) On 1st September 2007, the current Rokeby Primary School came into existence as a result of the closure of the previous Rokeby Infant and Junior Schools.

(q) In 2009, new "palisade" fencing was erected around the Primary School for security.

(r) Over the years, the use of the land for organised sports games dwindled and by November 2015 a Playing Pitch Strategy report indicated that it was no longer used.

(s) On 17th May 2017, RBC vacated the part of the land subject to the 2000 lease.

(t) As at October 2017, WCC's Central Property Register still continued to record the application land as being held for the purposes of school playing fields [**O212**].

6.14 In his second Statutory Declaration dated 14th December 2017 [**SB157**], Mr Endall produced an extract from WCC's records in relation to works of repair or maintenance which had been completed in relation to the boundary fence or gate at the land. This indicated that repairs had been carried out to the fence and gate on a number of occasions over the years. I note that this is consistent with the photographs which Councillor Lewis produced which showed that various repairs had been carried out at different times as the broken panels and gaps changed. There was also some evidence in the records to suggest vandalism.

6.15 In his final Statutory Declaration dated 14th December 2017 [**SB170**], Mr Endall referred to records which indicated that there had been some cutting back of foliage on 17th March 2015. However, very little detail was available as to the extent of the work undertaken. He was unable to find any evidence of the sign at Entrance D being removed and/or reinstated.

6.16 During cross-examination, Mr Endall confirmed that the first time that he became aware of the TVG application was when Mr Woolley emailed him on 28th June 2016. At that stage, he had already been working on the property related matter for some time. It was suggested to Mr Endall that he could have used this email to his advantage by bringing about a trigger event. Mr Endall seemed surprised by such a suggestion and stated that that would only be the case if he was willing to act in a professionally unconscionable way, which he was not.

6.17 Mr Endall was asked a number of questions about his involvement thereafter. He indicated that he had had no substantive involvement with the TVG application and had immediately advised Mr Marriott that he would not be able to deal with an application if it were made. His only role was advising Miss Martin about procedural matters if Mr Goucher was unavailable. He also collected the application when it was hand delivered by Mr Woolley, although he had been unaware it would be the TVG for Rokeby Playing Fields at the time. Some time was spent exploring the internal arrangements in place at the Council's offices, which I do not consider to be relevant to the matters which I am required to determine.

6.18 Mr Endall was cross-examined about the difference between paragraph 14 of his first Statutory Declaration and paragraph 2 of the Statutory Declaration of Julia Garrigan, which suggested that the lease granted to RBC was a lease at nil consideration and there was accordingly no requirement for RBC to use a specific statutory power to take such a lease.

Mr Endall disagreed with this statement, highlighting that Ms Garrigan is not a lawyer. Mr Endall said there must have been a statutory power as a local authority is a creature of statute. However, he accepted that there was no documentary evidence as RBC had destroyed the file and he had been unable to obtain any further documentation despite extensive inquiries.

6.19 In relation to his Second Statutory Declaration, Mr Endall confirmed that the repairs records were extracted from a much larger list of repairs. Of those 1573 items, Mr Wilmshurst pointed out that only 41 entries had been extracted over a period of 24 financial years. After taking Mr Endall to various entries in the schedule, Mr Wilmshurst asked whether he wished to retract his statement to the effect that the gate was being repeatedly broken in light of the entries he had taken him to. Mr Endall declined to do so and stood by his statement, referring me to the totality of the evidence which indicated that vandalism and damage had occurred.

6.20 I considered that Mr Endall was an impressive and compelling witness. It was clear from his Statutory Declarations and his oral evidence that he had carefully researched the history of the land and had scrutinised all of the available documents to piece together what had happened in the past. It was further clear that Mr Endall took his professional obligations extremely seriously and I formed the view that he was doing his best to assist the inquiry.

**(3) Written Evidence**

6.21 In addition to the evidence of Miss Lucey and Mr Endall, the Objectors produced the following Statutory Declarations from witnesses whom they did not call to give oral evidence:

(i) Statutory Declaration of Robert Black [**O311**];

(ii) Statutory Declaration of Julia Garrigan [**O322**];

(iii) Statutory Declaration of Neil Ian Grace [**SB176**].

6.22 All of the above individuals were professional witnesses who largely based their Statutory Declarations on written records. Although I am cautious about placing too much weight upon their evidence in circumstances when they did not attend for cross-examination, where their evidence is supported by contemporaneous records I place some weight upon it. I have been careful to scrutinise any points which Mr Wilmshurst may disagree with in their Statutory Declarations, for example the discrepancy between Ms Garrigan and Mr Endall.

6.23 Finally, one member of the public, Ms Abigail Dickie, indicated that she wished to provide evidence in opposition to the TVG application - although she was unable to attend to give oral evidence to the inquiry. I should note that this was not at the request of the Objectors but as she wished to provide evidence in opposition to the application, I have included it in this section for convenience. She provided an email dated 12th November 2017 which reads:

> *"I would like to make a written statement with regards to Rokeby Playing Fields. I moved into St Andrews Crescent in April 1991. Over my 26 years of living on this estate I have never used this field for recreational purposes as a resident. It is well known that the field is private*

*property and therefore not for public use. There is also clear signage that backs this up. The field is not a desirable recreational area to use even due to the large amount of dog fouling and dogs running loose off leads. For these reasons I would not allow my children on there for their own safety if it was awarded this status. I have attached a few photographs which indicates the field is not used for anything apart from dog walking and I have not personally witnessed any activity which would indicate this field is widely used by residents. I have used this field myself to attend my children's sports days which were held near the fence by Rokeby Primary School and beforehand for sports day when the old Rokeby Junior held there's."* [**SB238**]

6.24 As Miss Dickie did not attend the inquiry for her evidence to be tested by Mr Wilmshurst, and it was out of kilter with a number of the witnesses who did attend to give oral evidence, I am unable to place any real weight on the contents of this email.

## G. APPLYING THE LAW TO THE FACTS

7.1 I now turn to apply the law to the facts of this case. As outlined above, all of the ingredients in s.15(2) of the CA 2006 have to be met before the application land can be registered. In forming my conclusions set out below, I have read and had regard to both parties' Skeleton Arguments, their very helpful written Closing Submissions and the 45 authorities which were produced to me by Counsel in a composite bundle which ran to three lever arch files.

***The land…***

7.2 There is no dispute in the present case that the application land is sufficient to meet the statutory requirements. This includes the area called the Dead Pond in the corner of the field even when it is covered by water at certain times of the year (section 61(1) of the CA 2006).

7.3 There was some question mark over whether the TVG application extended to the entirety of the Dead Pond given that the application itself referred to the land as "Rokeby Playing Fields – Land Registry Reference, WK11231", of which WCC is the registered proprietor.

7.4 However, upon a careful inspection of the plan which accompanied the application [**A10**] as compared to WCC's registered title plan [**O28**], it became apparent during the course of the inquiry that part of the Dead Pond is actually excluded from WCC's registered title.

7.5 Enquiries which have been undertaken indicate that this part of the land remains unregistered at present. As noted at paragraph 2.5 above, Rugby School has recently been contacted about this area of land and have confirmed that it was not registered as part of their title when they came to register the adjoining agricultural land in 2007 as they were unable to prove sufficient title. However, it is still possible that Rugby School own the land given that it adjoins the remainder of their registered title and is excluded from WCC's title.

7.6 Notwithstanding the fact that the application described the application land with reference to WCC's registered title number, it is the plan accompanying the application that provides the dominant description. Accordingly, I have considered the TVG application on the basis that it also includes that part of the land which falls outside of WCC's registered title.

***…has been used for lawful sports and pastimes…***

7.7 As confirmed in *Sunningwell,* the expression "lawful sports and pastimes" forms a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided that those activities are not too trivial or intermittent.

7.8 In the present case, I have been provided with a significant body of evidence which, if accepted, indicates that various sports and pastimes have taken place on the application land. The most frequent activities can be summarised as follows (in no particular order):
(a) Dog walking;
(b) Recreational walking;
(c) Children's play;
(d) Riding bikes;
(e) Football;
(f) Cricket;
(g) Rounders;
(h) Jogging;
(i) Picnics;
(j) Practising golf;
(k) Flying kites;
(l) Flying model aircraft.

7.9 I say "if accepted" in the preceding paragraph because Mr Edwards QC submitted that the Applicant's written evidence had been revealed to be seriously unreliable during the course of the inquiry with the result that the Applicant's written evidence (which forms the bulk of its case) should be treated with a considerable degree of doubt, and largely if not wholly discounted. Without this evidence, Mr Edwards QC submits that the Applicant cannot possibly meet the qualifying requirements and that the application falls at the first hurdle.

7.10 The key deficiency which Mr Edwards QC highlighted was what came to light when Mrs Walker gave her evidence on the second day of the inquiry. I have already dealt with her evidence in detail above and highlighted my reservations about the discrepancies between her questionnaire, her husband's statement (which she adopted) and her oral evidence. As Mr Edwards QC submitted, Mrs Walker's Statutory Declaration did not explain the material errors in the short form questionnaire and it was difficult to reconcile this with her evidence.

7.11 I consider that some light may have been shed on how such errors occurred when Mr Allanach gave evidence on 14th November 2017 and explained the evidence gathering process that had been undertaken leading up to the submission of the TVG application. In particular, Mr Allanach drew my attention to the fact that it had occurred to SHARE shortly prior to the submission of the application that they may not be able to satisfy the significant use element of the test based upon the evidence that they had gathered by that stage. Members of the SHARE committee therefore went to various properties over the weekend

prior to submitting the application to gather, in Mr Allanach's words, "a quantity" of evidence questionnaires, rather than "quality". I formed the impression from his evidence that this was a hurried process and that the SHARE committee were under time constraints.

7.12 Accordingly, whilst I do not consider that there was any improper completion of evidence questionnaires (in the sense that they were concocted by a member of the SHARE committee), I am concerned that the short-form questionnaires were completed in something of a hurry and that errors may have crept into the contents of the questionnaires. I am also concerned that some of the residents may have adopted a rather cavalier attitude towards the questionnaires, as indicated by the fact that Mrs Walker signed a form that she did not agree with. This inevitably means that I am cautious about placing weight on those questionnaires.

7.13 As to whether I am able to take account of the long form questionnaires, I have to say that I am surprised that so few of the live witnesses who were called on behalf of the Applicant had previously completed an evidence questionnaire about their use of the land. I say this because I would have expected that this was the most common way that the SHARE committee could identify who satisfied the criteria and were willing to provide evidence.

7.14 That point aside, this made it difficult for me to assess whether the majority of the witnesses were saying something that was consistent with an earlier questionnaire, or whether had they completed such a form they would have done so accurately and carefully at the time.

7.15 Of the twenty witnesses who gave live evidence in support of the application, I observe that the following had previously provided a short or long form questionnaire:

(a) Pauline Walker [**F683**]
(b) Martina Duffy [**D100**]
(c) Charles Gay [**D114**]
(d) Michelle Lines [**D181**]
(e) John Manklow [**D189**]
(f) Barrie Morgan [**D200**]
(g) Julian Woolley [**D250**]

7.16 In assessing the evidence, I note that in addition to the issues raised regarding Mrs Walker's questionnaire, there were a number of inconsistences between the questionnaires completed by some of the above witnesses and their statement or oral evidence. For example:

- In her questionnaire, Mrs Duffy answered "No" to the question which asked whether there had been any attempt to discourage use of the land by notice or fencing [**D102**]. However, she accepted in oral evidence that she was aware of the sign at Entrance D.
- Similarly, Mr Gay had to accept that his questionnaire was inaccurate when he said that there were no notices. In his oral evidence, Mr Gay said "*you couldn't miss them*".
- In her questionnaire, Mrs Lines said that she used the "*Bridal Path*" to access the land [**D182**] but contradicted this in her oral evidence by saying that she usually used

Entrance E. She also answered "nothing" to question 23 [**D183**] but was plainly aware of the sign at Entrance D, as she said that "*It never held any weight for me*" [**D172**].

7.17 I found it difficult to reconcile the answers that the above witnesses had given in their questionnaires when it was compared to their more detailed statements or oral evidence. This puts a further element of doubt in my mind about the veracity of the questionnaires, or at the very least whether they were completed with all due care and attention at the time.

7.18 By way of further cross-check, I have analysed the various statements and questionnaires summarised in the table at paragraph 5.212 above and have noted some further anomalies where a particular resident has provided two different documents. By way of example only:

- On 19th September 2016, Janet Browne of 9 Orson Leys completed a short form questionnaire [**F377**] stating that she had used the land for over 20 years and that she uses it every day for general walking. On 2nd August 2017, Ms Brown completed a long form questionnaire [**F378**] stating she has used the land from 1984 until 2017 (33 years) and that she goes onto the land for walking, dog exercising and children's games most days.
- On 17th September 2016, Cheryl Crouch of 46 Anderson Avenue completed a short form questionnaire [**F148**] stating that she had used the land for the past nine years and that her children play there all the time. On 22nd August 2017, Ms Crouch completed a long form questionnaire [**F149**] stating she has used the land from 1997 – 2001 and 2007 - 2017 and that she uses it to walk the dog and takes her children to play and watch football.
- On 17th September 2016, Alan Davis of 23 Fawsley Leys completed a short form questionnaire [**F1**] stating that he had used the land since 1992 and that he uses it most days for exercise and leisure. On 29th August 2017, Mr Davis completed a long form questionnaire [**F2**] stating he has used the land from 1988 – 2017 (initially as a visitor) and that he uses it once or twice a week for walking, jogging and cricket (in the past).
- On 18th September 2016, Kevin Hetherington of 19 Long Furlong completed a short form questionnaire [**F466**] stating that he had used the land for 20 years and that he had "played football few years ago but [did] not use it often now". In contrast, in his long form questionnaire dated 25th August 2017 [**F467**] he stated that he had only used the land between 1984 – 1986 and 1996 – 2001 [**F471**]. His answers were impossible to reconcile.

7.19 There are also some questionnaires which have been provided by people who no longer live in the area but fail to distinguish between their period of use (for example, Kate Clark [**F455**]). Other questionnaires were completed in a vague way (for example Daune Hayle [**F220**] who said he used the land for "*to many years*") and provided me with no assistance.

7.20 In any event, I remind myself that the makers of the evidence questionnaires have not been subject to cross-examination and their evidence has not therefore been tested. The short form (and to a lesser extent the long form) questionnaires are unfortunately prone to be *"vaguely expressed and… unclear what period it covered or to what land it related"*: *McAlpine Homes* per Sullivan J. This is especially true where (as in this case) there are

issues as to whether all or some of the activities were confined to particular routes such as the public bridleway. The written evidence, particularly the evidence questionnaires, is of limited assistance on those issues and I am of the view that if I were to simply take what has been written at face value, there is a significant danger that it may be misleading.

7.21 In this respect, I accept the submission made by Mr Edwards QC that any use of the public bridleway which runs along the boundary of the land must be excluded from qualifying LSP. The use of this route for dog walking, recreational walking, cycling or horse riding is plainly attributable to its status as a public right of way and accordingly does not amount to qualifying LSP for the purpose of the TVG application.

7.22 However, it was clear from the evidence that I heard at the inquiry that the users of the land have not restricted themselves to the bridleway and have used a significant part of the field. Initially, it appeared that majority of users had restricted themselves to the perimeter of the field (where there is a worn track) but as more witnesses gave evidence I formed the impression that a number of the local inhabitants had used the majority of the field.

7.23 Despite my reservations about the written evidence, I am unable to dismiss it entirely and do take it into account insofar as I can be satisfied that it accords with the oral evidence which I have heard and accepted from the live witnesses. However, I have been particularly careful to scrutinise the written evidence and to reject it where, for example, it is vaguely expressed or where there is a risk that the claimed use was of the bridleway. To this end, I am bound to say that I found that the short form questionnaires were not helpful and I have been cautious to rely upon the long form questionnaires where there are any inconsistencies with a short form questionnaire or the oral evidence of witnesses which I have accepted.

7.24 Standing back and looking at all of the evidence in the round, I am just persuaded that the Applicant has produced sufficient evidence to satisfy me on the balance of probabilities that a significant proportion of the application land has been used for qualifying LSP within the meaning envisaged in *Sunningwell*, even when one excludes the use of the public bridleway.

7.25 However, there is extremely limited evidence that the area in the corner known as Dead Pond has been used for LSP by a significant number of local inhabitants of Hillside or Rokeby throughout the qualifying period. This area can be distinguished quite clearly from the rest of the field by virtue of the fact that it is a wooded area rather than grassland and seasonally fills up with water. Having regard to the totality of the evidence produced by the Applicant, oral and written, I am not satisfied that this part of the land has been used for qualifying LSP of a sufficient nature and quantity so as to be more than trivial or intermittent irrespective of the conclusions that I have reached on the other issues outlined below.

***…by a significant number…***

7.26 I remind myself of the guidance set out in *McAlpine Homes*, where Sullivan J observed that what is important in assessing whether the application land has been used for qualifying LSP by a significant number of people: "*is that the number of people using the land in question*

*has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.*"

7.27 As explained above, I have carefully scrutinised the evidence which has been adduced by the Applicant to satisfy the requirement that the land has been used by a significant number of local inhabitants and, whilst I have reservations about the quality of the written evidence, the overall impression that I formed during the inquiry is that the number of people who were using the application land has been sufficient to indicate that their use of the majority of the land (save for the part of the land referred to as Dead Pond) constituted general use by the local community for informal recreation, rather than occasional use by individuals.

7.28 I am reinforced in this conclusion by the report produced by the Applicant which was described in the bundle as the 'WCC Regulatory Committee meeting of 8 August 2017' [**G119 – G227**], which indicates at paragraph 4.4: "*Although leased to the Borough Council for team sports the land seems to have been used by the local community as public open space*" [**G187**]. This report further states at paragraph 5.42: *"Approximately 6.3 hectares of the application site is used by local residents as informal recreation space. It is a large attractive area of land which is actively used by the community as public open space. The land is valued by many members of the local community who have strongly objected to proposals to develop it."* [**G196**]. It therefore appears to be common knowledge that the field is generally used by the local community.

7.29 Consequently, I conclude that the Applicant has made out this limb of the test in relation to the majority of the land, save for the area in the corner of the field known as Dead Pond.

***…of the inhabitants of any locality…***

7.30 The Applicant does not contend that the land has been used by the inhabitants of any locality and therefore I do not need to trouble myself with this element.

***…or of any neighbourhood within a locality...***

7.31 The Applicant does contend that the land has been used by the inhabitants of two neighbourhoods within a locality, namely the Hillside Estate and the Rokeby Estate.

7.32 I have already recorded above the exemplary research which was undertaken by Mr Allanach which formed part of his statement dated 23rd October 2017 [**D1**]. Insofar as this element of the test is concerned, the key points of Mr Allanach's research are as follows:

- Hillside and Rokeby have clear boundaries to the North, East and South [**D2**].
- References to the Rokeby and Hillside estates can be found in the December 2010 evidence to the Local Government Boundary Commission [**D2**]. As such, the names are not invented for the purpose of the TVG application but have existed for some time.
- The relevant locality is the Rokeby & Overslade Ward of Rugby Borough Council. This is divided into eight polling districts, as detailed at paragraph 12 of his statement [**D3**].

- A 1937 concept plan for the Rokeby Estate has been provided by Mr Woolley [**D5**]. Although the plan was not fully implemented, it shows a coherent plan for Rokeby.
- In recent planning documents, RBC refers to "Rokeby" and "Hillside" [**D6**].
- WCC's report for its regulatory committee meeting on 8th August 2017 also contains several references to "Rokeby" and "Hillside" [**D7**].
- Google searches using the terms Rokeby and Hillside produce documented entries [**D8**].
- Hillside also occurs in estate agent advertising [**D8**].
- As noted during my second site visit, there are shops which refer to "Rokeby" and "Hillside" within the vicinity of the neighbourhoods which the Applicant relies on [**D8**].
- There is of course also the Rokeby Primary School which is adjacent to the land [**D8**].
- The two neighbourhoods share the community association called HARCA [**D9**].
- Hillside and Rokeby also share a neighbourhood watch.

7.33 In light of the various matters identified by Mr Allanach, I am of the opinion that both Hillside and Rokeby display a sufficient degree of pre-existing cohesiveness and are both capable of being described in a meaningful way. I note that whilst the Objectors initially took issue with whether any locality or neighbourhood had been sufficiently defined, Mr Edwards QC confirmed in opening that they did not advance a positive case on this point. However, I am still required to form a view on this matter notwithstanding the Objectors' decision not to advance a positive case. For the reasons set out above, I conclude that the Applicant has satisfied me that Hillside and Rokeby are both qualifying neighbourhoods.

***…for a period of not less than 20 years ending on the date of the application…***

7.34 It is common ground that the relevant period in this case was between September 1996 and September 2016. There was some issue during the inquiry as to the precise date when the application was submitted to the CRA. However, this only made a difference of a matter of days and I do not consider that anything turns upon the point in this particular case.

7.35 For the sake of clarity, I will adopt the qualifying period set out at paragraph 122 of the Applicant's Closing Submissions, namely between 23rd September 1996 and 23rd September 2016. However, I make it clear that my decision would be no different if I were to restrict my consideration to the slightly earlier period between 15th September 1996 and 15th September 2016 as set out in paragraph 1 of the Objectors' Skeleton Argument, or between 14th September 1996 and 14th September 2016 having regard to the first rejected application.

7.36 With regard to the dicta in *Hollins v. Verney* (1884) 13 QBD 304, to the effect that the use has to be continuous throughout the 20 year period in order to satisfy the requirements of a prescriptive claim, the Objectors originally submitted that any trespassory use of the land for LSP was interrupted when authorised use of the land for organised games took place and thus the use of the whole of the land for LSP for the whole of the qualifying period had not

been shown (see paragraph 25 of the Objectors' Skeleton Argument). However, in light of the evidence adduced during the course of the inquiry both by the Applicant and the Objectors, Mr Edwards QC conceded in closing that this was not a case where there had been a prolonged interruption but rather it was a case of peaceful co-existence: *Redcar*. I consider that this concession was sensibly made and I agree with the Objectors' analysis.

7.37 Accordingly, save for the area known as Dead Pond, I am of the opinion that the Applicant has met the first three qualifying requirements as identified at paragraph 3.2 above. In reaching this conclusion, I have applied the balance of probabilities to each limb of the criteria whilst keeping in mind the guidance of Lord Bingham in *Beresford* throughout.

***…as of right…***

7.38 In reality, the real battle ground at the inquiry concerned the requirement that the use of the land for qualifying LSP by the inhabitants of Hillside or Rokeby was "as of right".

7.39 The Objectors put their case on the basis that any LSP which has taken place on the land was either: (a) by permission; or (b) by force. I will deal with each of these in turn.

*Permission*

7.40 The Objectors' primary case on this aspect is that the lease dated 26 March 2000 meant that the public thereafter enjoyed a right to use the land for organised sports through local sports clubs and such use is to be regarded as "by right". In summary, Mr Edwards QC submitted:

(a) The correspondence leading to the entry into the lease dated 26 March 2000 ("the Lease") demonstrates that the land was taken by RBC for use as playing pitches.

(b) The permitted user clause within the Lease restricts the use of that part of the land to use "for the purpose of playing fields for organised games by local sports clubs to be arranged through the Lessee", with a reservation for the school to still use the land.

(c) RBC is a "creature of statute" and must therefore have acted upon some express statutory authority to take the Lease, despite it not being identified in the documents.

(d) The obvious statutory power is s.19(1)(b) of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act"), the power to provide "pitches for team games".

(e) The erection of the notices in 2001 that the land was for the "playing of organised sports games only" is consistent with it being held pursuant to this statutory function.

(f) In light of the Lease and the correspondence, there is no need to rely on evidential presumptions, such as that engaged in *R (Naylor) v. Essex CC* (2015) JPL 218.

(g) If recourse needs to be had to a presumption it must be presumed that RBC was acting lawfully in taking a lease for playing fields, which leads to the same conclusion.

(h) The issue which arose in *R (Malpass) Durham County Council* [2012] EWHC 1934 *("Malpass")* and in *R (Goodman) v. Environment Secretary* [2015] EWHC 2576

*("Goodman")* does not arise here as they concerned whether the "appropriation" of land by a local authority from one statutory purpose to another can be inferred from the manner in which the land is managed and used. The cases are thus distinguishable.

(i) The conclusion which follows from the above analysis is that the land that was leased to RBC in 2000 was: (a) taken by RBC for use as playing fields; and (b) was, on the balance of probabilities, taken pursuant to s.19 of the 1976 Act. Following *Barkas*, the public thereafter enjoyed a right to use the land for organised sports through local sports clubs. Such use is therefore to be regarded as "by right" not "as of right".

7.41 On behalf of the Applicant, Mr Wilmshurst took issue with the above argument. He submitted that there was a dearth of material available to support it and drew my attention in particular to the Statutory Declaration of Julia Garrigan of RBC who said at paragraph 2:: *"This was a lease at nil consideration and there is accordingly no requirement for RBC to use a specific statutory power to take such a lease. It is likely that the Scheme of Delegation to officers would have been applied when RBC entered into the lease."* [**O322**]

7.42 Mr Wilmshurst therefore submitted that the evidence provided by RBC disproves or was not consistent with the assertion that any particular statutory power was invoked. As such, he contended that there is no room for the presumption of regularity to operate. It appears from paragraph 97 of Mr Wilmshurst's Closing Submissions that he was under the impression that it was being argued by the Objectors that the power contained in the 1976 Act was broad enough to envisage general permissive informal recreational activity. However, as I understand paragraph 27 and 28 of Mr Edward's Closing Submissions, their argument is that the right which the public enjoyed was to use the land for organised sport through local sports clubs, as well as using the bridleway across the land.

7.43 Insofar as this point takes the Objectors any further, I am persuaded by the argument set out at paragraph 21 to 27 of Mr Edward's Closing Submissions to the effect that following the entry into the Lease the public enjoyed a right to use the red part of the land for organised sport for the reasons summarised at paragraph 7.40 above. This was underlined by the erection of the notice by RBC in 2001 which confirmed that the field was for the "playing of organised sports games only" and made it clear that the playing of organised sports games was permitted. Insofar as Ms Garrigan suggested that no statutory power was invoked to take the Lease, I agree with Mr Endall's analysis that she is not a lawyer and is unlikely to have considered the entry into the Lease with the rigour which Mr Edwards QC subjected it to. I therefore find on the balance of probabilities that use of the part of the field to which the Lease related for the purpose of playing organised sports games was by right: *Barkas.*

7.44 However, I do not consider that this point takes the Objectors much further because, as Mr Edwards QC concedes at paragraph 28 of his Closing Submissions, the majority of the use of the land relied upon by the Applicant was for informal recreational use rather than use for organised sports. The crucial issue, in my view, is whether such use was "by force".

*Force*

7.45 I have set out the relevant law in relation to the question of whether use is by force at paragraph 3.22 to 3.25. From those authorities, I discern the following key principles:

(a) Forcible use does not require the use of physical force: *Redcar* per Lord Rodger at [88];

(b) Use of land in the face of protest or resistance by the owner is by force: *Redcar* at [89];

(c) If a landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is seen by the local inhabitants then their subsequent use of the land will not be peaceable but will be by force: *Betterment* per Patten LJ at [38];

(d) Assuming that the notice is in terms sufficiently clear to convey to the average reader that their use of the land will be treated as trespass it will be irrelevant if the individual users either misunderstood the notice or did not bother to read it: *Betterment* at [41];

(e) Where a user accesses land by means of gaps in fences or hedges which have been broken down or cut, this will generally render the user by force: *Betterment* at [45];

(f) The question of whether use of land is forcible should be addressed by reference to asking "*whether a reasonable person knowing the relevant circumstances would conclude that the landowner was objecting to his use of the land*": *Betterment* at [58];

(g) Where signs are removed or fences broken by some local inhabitants, it is not possible for the CRA to shut its eyes to what some residents have done in considering whether the owner had acquiesced. The evidence must be taken as a whole: *Betterment* at [62];

(h) In light of the development of the authorities, it cannot now be said that to avoid acquiescence, the landowner must take additional steps through physical means or legal proceedings to actually prevent the wrongful user in circumstances where notices have been erected which are sufficient to render the use contentious: *Winterburn* at [21]-[23];

(i) The erection of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and is not to be used by others. Those who choose to ignore such signs should not be entitled to obtain legal rights over the land: *Winterburn* at [41];

(j) When interpreting a sign, it should be read in a common sense, not legalistic, way and should be construed in its factual context. The key issue is what the sign would mean to a reasonable reader of the sign. The effect that the sign had may assist on this issue. The intention of the landowner will not usually be relevant: *Warneford Meadow* at [22].

7.46 In order to analyse whether any of the use relied upon by the Applicant was by force, it is necessary to deal with the individual access points which people have used to enter the land.

Entrance A

7.47 The access point which has been referred to during the inquiry as Entrance A is, or rather was, situated on the corner of Anderson Avenue and Long Furlong [**G234**]. This was described as a "*gap in the fence*" at paragraph 5.3 of Mr Woolley's statement [**D237**].

Reference to the photograph which is incorporated within Mr Woolley's statement shows a partly broken fence with some of the pales missing [**D237**]. The bottom rail of the fence still appears to be intact and part of the middle rail is protruding halfway across the gap. The top rail is missing entirely and it is unclear where the missing pales have gone.

7.48 When I attended the site on 9th November 2017, the fence in this section had been replaced. I specifically noted that there was wire affixed to the original fence and, by way of contrast, new wire had been installed across the gap where Entrance A had previously existed and then threaded through the pales which had been newly installed. This is evident in the photographs which were exhibited to Miss Lucey's second Statutory Declaration [**SB138**].

7.49 Part way through the inquiry, the Applicant produced a series of photographs which I was informed Councillor Lewis had obtained. These photographs provide a very helpful snap shot of how the fence in the locality of Entrance A has appeared previously. For example:

- The google street view photograph dated June 2009 [**SB215**] demonstrated that the gap in the corner of the fence as shown at [**D237**] did not exist at that time. Instead, the fence pales and rails in the corner appeared to be intact and in reasonable order and condition. However, there was a different gap further along the fence when three or four pales were missing but the top, middle and bottom rail were still in place. There was no obvious explanation in the photograph as to how these pales would have disappeared naturally.

- A further google street view photograph also dated June 2009 [**SB216**] taken from a slightly different angle showed a further gap in the fence along Long Furlong. Again, three or four pales appear to be missing and part of the pales may have been broken off. However, the top, middle and bottom rail remained in place. I observe that this and the previous photograph were identified as "Entrance A" and "Entrance A2" respectively.

- The google street view photograph dated October 2012 [**SB217**] indicates that some repairs had been undertaken to the fence as there were three lighter pales installed. However, another gap had appeared in the fence to the left of the repaired area. I note that this is in a different place to that shown in June 2009 [**SB215**] as it is further along.

- The google street view photograph dated May 2014 [**SB218**] demonstrates that the gap which was present in October 2012 had been repaired as it was no longer evident. However, there are some broken pales in the corner of the fence just at the bottom. I deduce that this is likely to be the start of Entrance A being created as shown at [**D237**].

7.50 As such, it is apparent from the photographic evidence produced by Councillor Lewis that a number of repairs have been completed to mend gaps which have appeared in the fence in the vicinity of Entrance A and to secure the boundary around that corner of the field. This is consistent with the repairs records which Mr Endall produced and exhibited to his second Statutory Declaration dated 14th December 2017. I note, in particular, the following entries:

- **25/11/1993**: Renew section of paled boundary fence to match in with existing. All new timber to be preservative treated: £533.54

- **24/07/1995**: Playing field boundary fence - repair section of paled boundary fence leaving in a safe secure condition on completion: £499.09
- **20/10/1995**: Boundary fence – replace missing and defective pales to fence leaving in good order on completion: £104.05
- **22/03/1996**: Boundary fence to houses – repair section of paled boundary fence leaving in a safe secure condition on completion: £209.22
- **10/02/1999**: Replace all missing and damaged fence pales leaving in good order on completion: £78.18
- **12/05/1999**: Part renewal of boundary fence – carry out the installation of four rail post and rail fence in sections: £1,893.00
- **12/06/2000**: Repair damaged post and rail fence leaving in a safe secure condition on completion: £277.70
- **14/08/2000**: Repair sections of damaged timber panel fence leaving in a safe secure condition on completion: £362.64
- **25/09/2000**: Boundary fence vandalism – carry out necessary repairs to vandalised timber paled fence leaving in a safe secure condition on completion: £79.90
- **21/10/2000**: Further vandalism – carry out repairs to post and rail boundary fence leaving in good order on completion: £225.57
- **04/09/2002**: Anderson Avenue area – repair damage to fencing: £215.56
- **11/08/2003**: Execute repairs to boundary fencing: £133.70
- **20/03/2006**: Playing Field – rectify fencing and rehang metal gate: £397.55
- **12/05/2011**: Please make appointment to attend site to carry out: sports field boundary fence-investigate/rectify at least 3 wooden slats missing from boundary fence: £201.39
- **02/06/2011**: Please make appointment to attend to carry out: 1) repair/replace missing timber pales using anti-theft screws / one way screws or annular ring nails; 2) run 2 rows of staining wire along fence and staple to every pale; 3) repair damaged rail: £795.00
- **12/07/2012**: Rehang gate and replace 1 no. pale missing on fence: £71.01
- **23/10/2012**: Please make appointment to attend site to carry out: perimeter fence – supply and fit 3 no. new timber slates to timber beam post. Also replace 2 no. damaged beams. Secure using anti-theft nails & wire to perimeter fence: £264.68
- **27/02/2013**: Please make appointment to attend site to carry out: by sportsfield – Mrs Davis reporting big hole in perimeter fencing. Repair hole in boundary fence to playing field in Long Furlong, opposite No. 65. Health and safety issue: £ 74.38
- **29/09/2016**: Please make appointment to attend to carry out: corner of playing fields – please repair as necessary at least 2m of boundary fence that has come down: £28.51

7.51 Based upon my assessment of the written evidence noted above, and the oral evidence of witnesses who described their use of Entrance A (in particular, Mr Woolley, Mr Fisher and Mrs Walker), I make the following findings of fact on the balance of probabilities:

(a) The wooden boundary fence which runs along Long Furlong and Anderson Avenue has been subjected to damage on a number of occasions over the qualifying period. Given the frequency at which this has occurred and the nature of damage shown in the photographs, I consider it more likely than not that at least some of this damage was caused deliberately rather than simply as a result of general wear and tear to the fence.

(b) WCC has completed repairs to the boundary fence on various occasions over the qualifying period in order to make safe and secure the perimeter fence when gaps have appeared, or have been created. This has including the taking of additional steps to prevent further damage or vandalism i.e. the addition of anti-theft nails and wiring.

(c) The gap at Entrance A only began to be apparent in May 2014 [**SB218**] but had become significantly larger by August 2015 [**D237**] with a number of pales removed. On the balance of probabilities, I find that this damage was caused by local inhabitants, most likely as a means of creating a short cut in order for them to gain access to the field.

(d) It would have been clear to those using Entrance A that they were using a gap which had been created in a boundary fence in order to secure access onto the land. This is evidenced by the protruding rail on Mr Woolley's photograph [**D237**] and the fact that it was necessary to step over the bottom rail in order to gain access. According to Mr Fisher's evidence, it had also been necessary to step over the middle rail previously. If people have used the gaps shown in [**SB215-217**] they must have climbed over the fence.

(e) It would further have been apparent to those using Entrance A in one of its former guises (e.g. [**SB215**] or [**SB216**]) that the landowner was objecting to them gaining access through the fence as the landowner kept completing repairs in order to secure the fence.

7.52 In *Betterment* the Court of Appeal upheld Morgan J's decision to rectify the register so as to remove land which had been incorrectly registered as a TVG on the basis that the landowner had done all that was required to render the use contentious. At paragraph 122 of Morgan J's judgment, he said: *"I find that a reasonable user of the land would have known that the fences and hedges had been broken down or cut. Many users of the land came on to the land by means of gaps in the fences and hedges. It would have been clear enough to such a reasonable user of the land that one of the purposes of the fences and the hedges being there was to prevent the public access the land at those points…".* For the reasons set out at paragraph 7.51, I am of the opinion that this applies with equal force to the present case.

7.53 In the circumstances, I conclude that access to the application land by any of the local inhabitants through any of the gaps in the fence at or in the vicinity of Entrance A was forcible. Accordingly, I consider that any such use of the land for LSP must be discounted.

<u>Entrance B</u>

7.54 The access point which has been referred to as Entrance B during the inquiry is currently a seven bar metal gate situated on the boundary of the field with Long Furlong [**D238**]. This gate has, on the evidence, remained locked at all material times during the qualifying period.

7.55 Some of the witnesses for the Applicant referred to this gate having originally been wooden. The evidence suggests that it has been replaced on more than one occasion by WCC. Once again, Councillor Lewis' photographs are helpful in this respect. In particular, the google street view photograph of the gateway dated June 2009 [**SB219**] shows an earlier metal gate which is different in construction to the one which is currently present. This photograph also shows that the top bar of the gate is bowed and appears to be detached from the main frame. The bottom rails of the gate appear to be bent out of shape slightly. The appearance of the gate is consistent, in my opinion, with it having been climbed over on a regular basis.

7.56 This assessment is supported by Mr Endall's list of repairs which indicate that it has been necessary to undertake various repairs to the gate over the qualifying period. In particular:

- **25/11/1997**: Please replace five barred gate. All new timber to be preserved: £350.00
- **27/02/1998**: Carry out necessary repairs to timber gate: £352.00
- **18/08/2000**: Gate to boundary fence. Replace timber field gate with metal gate: £388.91
- **18/05/2001**: Repair playing field 5 bar gate – Long Furlong: £397.48
- **03/05/2001**: Playing field overlooking Long Furlong – Rectify 1 no. broken gate post
- **09/05/2001**: Attend and repair field gate: £300.00
- **18/11/2002**: Playing field gate – refix gate to hinges: £39.41
- **25/10/2004**: Repair / replace as necessary field gate on Long Furlong: £54.83
- **31/01/2005**: Field gate – refix gate after vandals removed: £54.88
- **20/03/2006**: Playing Field – rectify fencing and rehang metal gate: £397.55
- **25/04/2007**: Execute repairs to field gate: £25.00
- **18/08/2009**: Repair 2 no metal cross members and damaged top bar to field gate, ensuring it is made secure: £245.92

7.57 I observe that the final entry referred to in the preceding paragraph is consistent with the condition of the gate shown in Councillor Lewis' fifth photograph [**SB219**]. It also shows that the landowner was raising repairs to ensure that the gate was "made secure".

7.58 In any event, the evidence adduced by the Applicant established that where residents had gained access to the land via Entrance B, this was by climbing over the gate. For example:

(a) **Martina Duffy**: During cross-examination, Mrs Duffy informed me that she would usually climb over the gate at Entrance B as this is the shortest way for her to reach the field. She said that the gate has always been locked.

(b) **Paul Fisher**: In his statement, Mr Fisher stated that Entrance B was one of the entrances that he used depending on where he was coming from and what he was doing [**D109**]. Mr Fisher did not distinguish between his use for each access point.

(c) **Owen Green**: During cross-examination, Mr Green stated that he climbs over the gate at Entrance B whenever he does not have his dog with him. He also did this as a child.

(d) **Judith Hicks**: In Mrs Hicks' statement, she stated that she has used Entrance B when she has been walking back from town and wanted to take a short-cut [**D144**]. Under cross-examination Mrs Hicks stated that she would usually have to climb over the gate although she did recall that it was unlocked once.

(e) **Anna Perry**: Mrs Perry told me that she occasionally climbs over the gate or fence at Entrance B in order to access the land; as a teenager, she used to "jump" the gate [**D201**].

(f) **Pauline Walker**: During cross-examination, Mrs Walker said that she had occasionally used Entrance B, which she would have to climb over as the gate was locked. As with the other witnesses who used multiple access points, Mrs Walker did not distinguish between the entrances when describing how the application land had been used.

(g) **Les Whitta**: In his statement, Mr Whitta described how his children used Entrance B.

(h) **Diana Wilcox**: In her statement, Mrs Wilcox referred to possibly using Entrance B.

(i) **Julian Woolley**: In his statement, Mr Woolley confirmed that he had never seen the gate at Entrance B unlocked although he had climbed over it on several occasions as a shortcut into the field [**D238**].

7.59 Accordingly, of the 19 local inhabitants of Hillside and Rokeby who gave evidence in support of the application, nine of those residents had - to a greater or lesser extent - climbed over the gate at Entrance B in order to gain access to the land. As I have identified above, none of the witnesses gave a breakdown of how often they had used the land by this means.

7.60 The problem is exemplified when one turns to the questionnaires in support of the application and tries to distinguish between a particular use via a certain access point. I note in passing that a number of the people who provided questionnaires or written statements but were not called to give evidence confirmed that they had used Entrance B (e.g. [**E58**], [**E113**], [**F14**], [**F78B**], [**F160**], [**F296**], [**F401**], [**F498B**], [**F593**], [**F617**], [**F630**], [**F706**], [**F741**], [**F771**]). To compound matters further, those who had only completed short form questionnaires did not indicate what access they used as they were not asked the question. Accordingly, I am unable to ascertain whether that use was by force or potentially as of right. By my calculation, there are 62 short form questionnaires which fall into this category, which amounts to over one third of the written evidence relied upon by the Applicant.

7.61 As to the effect of climbing over a locked gate, I am of the opinion on the basis of the authorities that a reasonable user of the land would realise that the landowner was objecting to them gaining access by that means by locking the gate, and any such use was thus by

force. I am reinforced in this view by the Inspector's Reports of Mr Vivian Chapman QC and Mr William Webster which were included in the Bundle of Authorities, who both opine:

- **Mr Vivian Chapman QC**: "“Force” does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates…" [280]
- **Mr William Webster**: "'Force' does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates…" [17]

7.62 I also consider the Planning Inspectorate Appeal Decision of Mr Barney Grimshaw dated 19th September 2017 to be persuasive on this issue. Although this was an appeal under the Wildlife and Countryside Act 1981, it involved the issue of whether certain use of land was as of right for the purpose of registering a footpath. At paragraph 41-42, the inspector said:

> *"It is not disputed that both claimed footpaths have been used by the public for more than 20 years and in my view the amount of use could be sufficient to raise a presumption that the routes had been dedicated as public footpaths. However, it is also clear that use of both routes before around 1993 or 1994 involved passing through forcibly made holes in a gate or fence which the landowner repeatedly sought to repair and thereby prevent access. This action in my view continually brought public use into question and any such use cannot be regarded as having been 'as of right'. From 1994 to the present day public use of Footpath 1 has involved climbing over a locked 5-bar gate. Despite the evidence of Mr Belman, it is my view that no reasonable person would conclude that by placing a locked gate across a route the landowner was displaying an intention to dedicate it as a public right of way, unless there was also a sign or some other indication that they were invited to climb the gate, which there was not. I must therefore conclude that the maintenance of the locked gate continually brought public use of Footpath 1 into question, indicated a lack of intention to dedicate a public right of way and that any use made of it was not 'as of right."*

7.63 Accordingly, I conclude that the use of the application land for LSP by local inhabitants after climbing over the gate at Entrance B was forcible and therefore not qualifying use. As such, this means that a further raft of the Applicants' evidence of use must be discounted.

7.64 I made it clear above that I was only just persuaded that the Applicant had met the test to establish qualifying LSP by a significant number of the local inhabitants of Hillside and Rokeby. When one discounts the use of the land for LSP when access has been gained by local inhabitants via Entrance A and B, I am unable to conclude that the test is still met.

7.65 In those circumstances, it is strictly unnecessary for me to go on to consider the other accesses which have been used but I shall do so in case I am wrong about Entrance A or B.

*Entrance C*

7.66 Entrance C represents the access to the public bridleway when walking in the direction of Fawsley Leys from Long Furlong. As highlighted at paragraph 4.4 above, there are three signs present at this access point. Based upon the available evidence, I make the following findings of fact on the balance of probabilities as to when these signs were erected:

(a) The contemporaneous written evidence of the Objectors, which was not seriously disputed by the Applicant, indicates that the "Trespassers May Be Prosecuted" [**O301**] sign was erected at Entrance C in 1989. This is supported by the following:

i. The correspondence exchanged in January and February 1988 [**O223 - O227**];

ii. The quotation from the Royal Label Factory dated 30th June 1989 [**O228**];

iii. The Contract Works Order dated 19th July 1989 [**O229a**];

iv. The evidence of various witnesses who recalled the sign being installed.

(b) The contemporaneous written evidence further indicates that the "Organised Sports" sign was installed by RBC in 2001. This is corroborated by:

i. The correspondence exchanged in February and March 2001 [**O237 - O241**];

ii. The fax dated 9th April 2001 confirming that two signs were erected informing people that the field is for the playing of organising sports games only [**O242**].

(c) Although there is no contemporaneous evidence available to establish when the "golf" sign was installed at Entrance C, I agree with the submission made by Mr Edwards QC that the photograph produced by Councillor Lewis which shows that an identical sign had been installed by the gate at Entrance B by June 2009 [**SB217**] strongly suggests that the golf notice would also have been installed at Entrance C by this date.

7.67 The key issue in the present case is what the above signs would have conveyed to the reasonable user applying the guidance given by His Honour Judge Waksman at paragraph 22 of *Warneford Meadow* (as set out in full at paragraph 3.25) as far as it remains applicable. On this particular point, Mr Edwards QC submitted that the fifth principle enunciated by His Honour Judge Waksman cannot stand in light of *Winterburn*. In his oral submissions, Mr Edwards QC amplified this point by arguing that there is no longer any need for a landowner to put up what has been described as a "proportionate protest". Mr Wilmshurst disagreed and argued that the test of proportionality is still alive and well in the authorities.

7.68 By way of reminder, at paragraph 22(5) of *Warneford Meadow*, His Honour Judge Waksman held, *inter alia*, that: "*If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question.*"

7.69 In *Winterburn*, the Court of Appeal took the view that the erection of two signs in the car park was sufficient to render the use contentious and therefore no prescriptive right had arisen. I note that at paragraph 37, David Richards LJ held:

> *"I agree that the circumstances must indicate to persons using the land that the owner objects and continues to object to the parking. As Patten LJ put in Betterment at [30] the issue is whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in. On the facts of the present case, the presence of the signs in my judgment clearly indicated the owner's continuing objection to unauthorised parking. Mr Gaunt submitted that the protest needs to be proportionate to the user. Again I would accept that but in my view the continuous presence*

*of the signs asserting that it was private property for the use of the Club's patrols only was a proportionate protest."*

7.70 More recently, in *T W Logistics v. Essex County Council* [2017] EWHC 185 *("T W Logistics")* the High Court found that a landowner's conduct was insufficient to render use contentious so as to bring user as of right to an end. In that case, the landowner relied, *inter alia,* upon certain signs which the court found had not been erected in such a way to show that they applied to the land at issue. At paragraph 101, Barling J concluded that at no time during the qualifying period had the owners of Allen's Quay done what was "*reasonable and proportionate*" to bring to the attention of persons using the land that they objected and would continue to object to the user in question and would endeavour to interrupt it.

7.71 Accordingly, in both *Winterburn* and *T W Logistics* the court considered the question of whether certain signs or conduct was sufficient to render use by force with reference to whether the landowner had done what was "proportionate". I am therefore of the opinion that Mr Wilmshurst was correct when he submitted that I should consider whether the notices and any conduct of the landowner was a proportionate protest in the circumstances.

7.72 With this in mind, I turn to the issue of what the notices would have conveyed to the reasonable user of the land. I will deal with each notice in turn.

"Trespassers May Be Prosecuted"

7.73 As set out at paragraph 4.4, this sign reads as follows:

7.74 The fundamental question is what the above sign would convey to the reasonable user of the land when examined in context and read in a common-sense and not legalistic way.

7.75 In my view, the meaning of the above notice is clear when the sign is read as a whole. It tells the user that it concerns school playing fields owned by Warwickshire County Council. It makes it clear that the exercising of dogs is prohibited on those school playing fields. It also states, in red for prominence, that trespassers may be prosecuted and thus trespass is objected to. I pause to record that some of the Applicant's witnesses sought to read the notice in a legalistic way by debating the difference between "may" and "will" or suggesting that trespass is a tort, not a criminal offence, and thus the sign is meaningless. Such an approach is deprecated by what His Honour Judge Waksman said in *Warneford Meadow* and is not, in my opinion, what the sign is likely to convey to a reasonable user of the land.

7.76 The same conclusion is reached when one examines the sign in its context. It is placed at one of two open entrances to the field and it is obvious upon reaching Entrance C what the sign relates to. This is reinforced by the fact that there is an identical notice at the other open entrance to the field at Entrance D, both of which are necessarily open by virtue of the fact that it is a bridleway. The land is also marked out with a football pitch and has previously had a number of marked football pitches, a cricket square and a running track indicative of formal sports use. Those using the land regularly would also know that the field is used by local schools, albeit less frequently in more recent years. As noted above, a number of the Applicant's witnesses recalled use of the field by Bishop Wulstan School or Rokeby Primary School of varying degrees. One of Councillor Lewis' photographs also showed what appear to be school children in PE uniform on the field in June 2009 [**SB215**].

7.77 Accordingly, when construed in accordance with guidance set out in *Warneford Meadow*, I conclude that it is more likely than not that a reasonable user of the land reading the sign would consider that the owner of the land was objecting to and contesting their use of the land. As such, I consider that the sign at Entrance C rendered use via that access forcible.

7.78 Even if I am wrong in my conclusion that a reasonable user of the land would construe the sign as objecting to trespass *per se*, I am of the view that there can be no doubt that it prohibited the exercising of dogs on the field and therefore rendered that use contentious at least. As to the meaning of exercising, I do not agree with Dr Joshi's interpretation but consider that this clearly includes walking dogs, as indeed did a number of the witnesses.

7.79 At the inquiry, the impression that I formed was that the most common use of the field was for the exercising of dogs. This is supported by: (i) the early correspondence which predated the erection of the "Trespassers May Be Prosecuted" sign complaining about dog walkers; (ii) the fact that Rokeby Primary School considered it necessary to erect palisade fencing as dog walkers were walking across the field; and (iii) the evidence of numerous witnesses.

7.80 In this respect, I recall with particular clarity the impressive evidence of Dr Ham who gave evidence on the second day of the inquiry. Unlike the majority of the witnesses who gave evidence for the Applicant, Dr Ham appeared to have prepared his own statement as evident from the different typeface, format and content. At paragraph 13, Dr Ham stated: *"Over the years the most consistent and regular use has been by the dog exercisers. They can be seen several times every day with use and length of use very variable depending on the weather and season."*

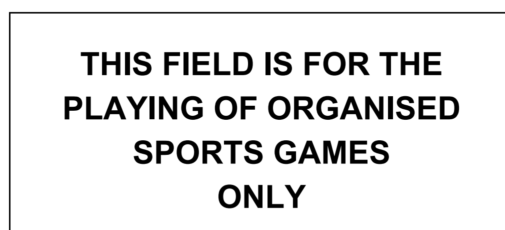
7.81 Although I accept that there have been other uses of the land, Dr Ham's assessment at paragraph 13 of his statement accorded entirely with my impression. As such, even if the sign at Entrance C is construed as only prohibiting the exercising of dogs on the field it would be necessary to discount what has been the most consistent and regular use of the land. On either construction, therefore, the Applicant could not meet the requirement of use of the land by a significant number of the local inhabitants throughout the qualifying period.

7.82 As to whether the WCC sign was negated by the presence of dog bins, as was argued by the Applicant, I am not persuaded that it was. As a number of the witnesses for the Applicant

accepted, the installation of dog bins on or near the route of a public bridleway is a perfectly sensible step for a responsible land owner to take to ensure that the footpath is cleared of dog excrement. Had WCC installed dog bins on other parts of the field away from the bridleway, then there *may* have been more force in the Applicant's argument that the land owner was encouraging use of the field itself for the exercising of dogs. Clearly it did not.

"Organised Sports Games Only"

7.83 This sign reads:




7.84 The evidence indicates that this sign was erected in 2001 following complaints about use of the land for flying a remote-controlled model aircraft which had lost control and hit a resident's window, shattering it [**O237**]. This sign was therefore erected at Entrance C (and a similar sign was also most likely erected at Entrance B although nothing turns on that).

7.85 When construed in a common sense way and viewed in its context, I am of the opinion that the meaning of this sign is clear. Again, it is apparent from the placement of the notice that it relates to the field. The notice makes it plain that that field is for the playing of organised sports only and therefore is conveying the message that other uses are being objected to.

7.86 During the inquiry, an analogy was drawn with the sign on one of the doors in the room at the Venue which read: "STAFF ONLY". It was argued by Mr Edwards QC, and I agree, that the only sensible construction of that sign is that only staff are permitted to enter that room. If a member of the public were to do so, they would be acting in breach of the sign.

7.87 Similarly, in *Winterburn* the sign in issue read: "Private car park. For the use of Club patrons only. By order of the Committee." That was found to be sufficiently clear to render any use of the car park by persons other than Club patrons contentious and thus not as of right.

7.88 In the present case, I am of the opinion that the reasonable user of the land would construe the "Organised Sports" sign as prohibiting informal sporting or recreational activity and that the owner objected to use of the field other than for organised sports games. Indeed, I note that Dr Ham, whose factual evidence I have accepted in its entirety and who I found to be a compelling witness, interpreted this sign as "*forbidding non-formal sporting activity*".

7.89 The erection of this sign in 2001 would further have reinforced to the reasonable user that the owner was objecting to their use of the field by virtue of the addition of another sign. Accordingly, if people had started to ignore the "Trespassers May Be Prosecuted" sign by

2001, the erection of the RBC sign would have given them clear notice that the field was not being made available for use by the public at large but was for organised sport only.

The Golf Sign

7.90 The final notice could not be seriously argued to be anything other than clearly prohibiting the playing of golf, despite Mr Woolley's inventive suggestion in evidence that it depicted someone driving a golf ball and therefore it was only that activity that was prohibited.

7.91 Accordingly, any use of the field to play golf after using Entrance C would, in my opinion, be by force and therefore any such use claimed as LSP must be discounted in any event.

7.92 However, the above conclusion only follows having regard to *Betterment* if the signs were actually visible to local inhabitants. This was matter of contention between the parties. Having carefully considered the evidence, I conclude on the balance of probabilities that the signs were visible for a significant part of the qualifying period for the following reasons:

- Various witnesses confirmed in their statements and under cross-examination that they were aware of the signs. Mr Gay said in re-examination that "you couldn't miss" them.
- Although some witnesses suggested that the WCC sign at Entrance C had been partly or wholly obscured by ivy at times, Mr Craig told me that this usually clears in winter.
- Even if the WCC sign at Entrance C did become obscured by vegetation at times, the sign at Entrance D was in identical terms and apparent to anyone using that entrance.
- The photographs produced by Councillor Lewis suggest that even during summer in June 2009, the silhouette of the RBC sign can be seen against the wooden fence [**SB213**].
- Miss Lucey informed me that she had been able to see and read all three signs when she attended the land for the first time in June 2016 and did not have to clear anything back. She had absolutely no reason to make this up, and I accept her account of what she saw.

7.93 In the alternative, the Applicant contends that the signs were placed directly on the public bridleway crossing the land which it is suggested constitutes an offence under s. 137 of the Highway Act 1980. Accordingly, Mr Wilmshurst submits at paragraph 26 of his Closing Submissions that this case presents an opportunity to apply the principle that a party cannot, as a matter of law (and/or public policy) rely on illegal acts. He therefore invites me to hold that the signs should be deemed not to have been seen by the reasonable user. I consider this to be a creative argument, but I am unable to accept it for the following reasons:

(a) Mr Wilmshurst has not directed my attention to any authority when the principle which he is inviting me to apply has led to the result for which he contends in a TVG case.

(b) There is no evidence that there has ever been a physical obstruction of the bridleway and no resident has ever complained about the location of the signs prior to this application.

(c) Even if the position of the signs did constitute a criminal offence, a party is not automatically precluded from relying upon illegality: *Patel v. Mirza* [2016] UKSC 42.

(d) Applying the latest formulation of the test in *Patel v. Mirza* [2016] UKSC 42, I would not consider it proportionate to debar the Objectors from relying upon the signs. On the contrary, I am of the view that it would be disproportionate to treat the signs as though they did not exist when a land owner was operating a peaceful protest to demonstrate that use was being objected to but this was, as noted below, simply ignored by residents.

7.94 I therefore reject Mr Wilmshurst's argument as set out at paragraph 26 of his Closing Submissions and find, on the balance of probabilities, that one or more of the signs were visible to local inhabitants and that the reasonable user would understand that, by the notices individually or collectively, the landowner was objecting to and contesting use of the land.

7.95 I remind myself that in *Winterburn*, David Richards LJ concluded by saying that: "*The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over land*".

7.96 In the present case, the evidence was overwhelming, in my view, that this is precisely what many of the local inhabitants of Hillside and Rokeby have done. By way of example:

- Mrs Den Hann told me that she had "*decided to disregard*" the sign at Entrance D;
- Mr Gay informed me that the signs "*appear to have been ignored by the many users*";
- Mr Green said he had "*seen other people playing golf, and if they get away with it then I'll get away with it. If I see somebody else getting away with it that makes it alright.*".
- Mr Fisher told me that he did not think the notices were "*meant to be taken seriously*".
- Mrs Walker stated that she was aware of the signs but "*because I have walked past them so often I stopped taking notice of them*".
- Carol Arthurton declared in a questionnaire: "*I am aware there is a sign on the left hand side but have not really taken notice of it because I have always used the field"* [**F138**].

<u>Entrance D</u>

7.97 The same analysis applies to the "Trespassers May Be Prohibited" sign at Entrance D as to the identical sign at Entrance C, and I repeat paragraphs 7.73 to 7.84 and 7.92 to 7.96 above.

<u>Entrance E - J</u>

7.98 In respect of Entrances H, K, L, M and N, these access points were no longer available at the time of my site visit but it was reasonably clear from the evidence that I heard that access gained via any of these points was through a gap in the fence or hedge. Accordingly, I consider that the use was as force for the reasons set out at paragraphs 7.52, 7.61 and 7.62.

7.99 With regard to Entrances I, G, E and F, these appear to be privately created accesses from properties adjoining the land. Again, I am of the view that such access was created forcibly

as it must be have been apparent to a reasonable user that they did not have a right to make a hole in their fence or create a ladder to climb over into the field. In any event, this suggests sporadic incursions to the land by trespassers rather than by the community as a whole.

7.100 With the above findings in mind, I take a step back to consider the manner in which the land has been used by local inhabitants and treated by the land owner and I ask myself whether the steps taken to render the use of the land contentious have been proportionate, assuming I am correct that there is still a need for there to be a proportionate protest. I unhesitantly find this was a proportionate protest by the land owner in the circumstances. As highlighted above, WCC and RBC have erected a minimum of five signs at different parts of the land over the qualifying period to demonstrate that the use is contentious. WCC has further repeatedly repaired gaps which have been created (on my findings forcibly) in the fence. WCC has also repaired and replaced the gate to the field to make it safe and secure. Any reasonable users of the land would therefore have been aware that the land owner was taking steps to secure the boundary and prevent access save for via the public bridleway. Accordingly, insofar as there remains a need for a landowner to demonstrate that steps taken to render user contentious are proportionate, I find that this test is met.

7.101 Finally, I should deal for completeness with the Objectors' alternative argument at paragraph 22 of their Skeleton Argument to the effect that if their primary case on the construction of the notices does not prevail and I conclude that they restrict only certain types of recreational use then it follows that other recreational uses would by implication be with permission. I am not persuaded by this argument. A similar argument was put forward in *T W Logistics*, as to which Barling J said at paragraph 108: *"…this point was really only actively argued in respect of the "No fishing" sign on the TQW wall. The argument is that the prohibition of fishing carried with it implied permission to carry out other forms of recreational activity. I do not consider that the notice would or could reasonably be interpreted or understood in that way. It is very different from Lord Neuberger's "dogs must be kept on a lead in the park" example. There the very nature of the requirement clearly spells out what is permitted – "dogs on a lead" – there is hardly a need for any implication. Here, by contrast, the ban on fishing says absolutely nothing about what other activities may or may not be permitted – the sign is purely concerned with fishing."*

7.102 Similarly in the present case, the signs do not explain what is permitted so as to enable the reasonable user to understand what the land owner is impliedly permitting them to do. I thus do not consider that the signs have the alternative effect contended by the Objectors. However, nothing turns on this point in light of my conclusions on their primary case.

7.103 In summary, I find that the Applicant has failed to establish that the application land has been used by a significant number of the local inhabitants for LSP throughout the qualifying period as most, if not all, of the use relied upon was by force and therefore not as of right.

## H. STATUTORY INCOMPATIBILITY

8.1 As will be apparent from the matters recited at paragraph 6.13 above, it is the Objectors' case that the land was acquired by WCC for education purposes. Whether or not land held

for education purposes can as a matter of principle be registered as a TVG is presently being considered by the Court of Appeal in the appeal against the decision of Ouseley J in *Lancashire County Council v. Secretary of State of the Environment* [2016] EWHC 1238 ("*Lancashire")*. The appeal was heard in October 2017 and judgment was reserved.

8.2 At paragraph 35 of their Skeleton Argument, the Objectors invited me to postpone finalising my report until the outcome of the *Lancashire* litigation is known as the outcome of the appeal may be decisive, in particular if the appeal is allowed on the statutory incompatibility ground. At the outset of the inquiry, Mr Wilmshurst confirmed that the Applicant had no objection to awaiting the outcome of the *Lanchashire* litigation.

8.3 When the inquiry was adjourned for four weeks on 14th November 2017, it was hoped by all parties that the *Lancashire* judgment would be available when we reconvened. However, judgment was still awaited and both parties agreed that it would not be proportionate for me to indefinitely delay the preparation of my report whilst waiting for the Court of Appeal to hand down judgment. It was therefore agreed that I should proceed.

8.4 The CRA has contacted the parties by email prior to this report being finalising to enquire whether any update is available in this respect but no date is yet available. If the judgment is handed down after the provision of my report but prior to the CRA making its decision, no doubt the parties will urgently draw any relevant developments to the CRA's attention.

## I. CONCLUSION

9.1 I conclude that the Applicant has failed to establish that the application land or any part thereof qualifies for registration as a new town or village green under s. 15 of the CA 2006. I therefore recommend that the application is rejected.

9.2 Pursuant to regulation 9(2) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, the CRA is required to give written reasons for rejecting the application. I recommend that the reasons are stated to be "the reasons set out in the Inspector's Report of 19th January 2018".


**MICHELLE CANEY**

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**Whittall Street**

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**19th January 2018**