

**In the Matter of an Application to Register land known as the Branksome  
Recreation Ground, Branksome, Poole as a Town or Village Green**

**REPORT**

**of Mr. Martin Carter.**

**23<sup>rd</sup> December 2010.**

**Simon Terry**

**Solicitor**

**Borough of Poole Council**

**Civic Centre**

**Poole**

**Dorset**

**BH15 2RU**

**Ref: TVG/0001**

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN**  
**AS THE BRANKSOME RECREATION GROUND, BRANKSOME, POOLE**  
**AS A TOWN OR VILLAGE GREEN**

**REPORT**

**INTRODUCTION**

1. As explained below, this application to register land as a Town or Village Green (“TVG”) has to be dealt with in accordance with the law as set out in the Commons Act 2006.
  
2. I am asked to make a recommendation to the Borough of Poole Council, in its capacity as Registration Authority (“RA”), as to whether an application to register land at known as the Branksome Recreation Ground in Branksome, Poole, as a TVG should succeed.
  
3. Under the Commons Act 2006 (“CA 2006”) the Borough Council is the Registration Authority for the registration of land in the Register of Town and Village Greens. Neither the CA 2006 nor any Regulations made pursuant to the powers set out in that Act provide any mechanism for the RA to carry out any factual investigation which may be necessary to allow applicants and objectors to put their respective cases. In common with the practice in many other instances, the RA instructed me to hold a non-statutory public inquiry to consider the parties’ respective cases.

4. I held that informal inquiry over 3 days in October. The inquiry opened on Monday 11<sup>th</sup> October 2010 and sat on the following day, 12<sup>th</sup> October 2010. Closing submissions were delivered verbally, accompanied by written texts, on Thursday 14<sup>th</sup> October 2010. I held an evening session of the inquiry on Monday 11<sup>th</sup> October, to allow persons to attend who were not available during normal working hours.
5. Upon being instructed, I was invited to make informal directions as to the exchange of evidence and of skeleton arguments. I gave those informal directions in a Note dated 7<sup>th</sup> September 2010. I am grateful to the parties for co-operating with those directions.
6. It is important to state that this report can only be a set of recommendations to the RA – I have no power to determine anything. Provided it acted lawfully, the RA would be free to accept or reject my recommendations. It is also free to seek further Advice from another person as to the content of this report before deciding whether or not to accept its recommendation.

### **THE APPLICATION**

7. The application was made by Mrs. Jacqueline Wilson of 28 Kent Road, Poole (“the applicant”) and is dated 2<sup>nd</sup> January 2009. It was made by Mrs. Wilson for and on behalf of the Branksome Recreation Action Group. Part 4 of the application form states that section 15(2) of the Commons Act 2006 applies to the

application. In answer to Question 5 on the application form, the application site's particulars are given as:

“Branksome Recreation Ground, Poole, Dorset, formerly known as Bourne Moor Recreation Ground (circa 1930)”.

8. In answer to Question 6, the locality or neighbourhood within a locality in respect of which the application is made is given as “Branksome West Ward”.
9. The application was accompanied by map evidence, Land Registry Documents, Newspaper Articles and photographs of the application site.

#### **DOCUMENTS RECEIVED**

10. I have the following sets of documents:

- a. A bundle containing the application form and its supporting documents; bundles of the objector's material; and a bundle containing procedural documentation generated by the RA and including such documents as site notices, press notices and the like; [all received from the RA upon Instruction];
- b. Applicant's paginated volume A, containing the application form, supporting material, correspondence, proofs of evidence, User questionnaires and photographs;

c. Applicant's volume B: containing outline legal submissions and copies of case law and section 15 of the Commons Act 2006;

d. 4 bundles containing the objector's material, each divided by numbered tabs;

11. References in this report to material in the applicant's bundles will be given by volume letter and then page number, thus [A/123]. References to the objector's material will be given by bundle number, followed by tab number and, if necessary, page numbers within that tab, thus [1/tab 2/10].

12. I received other material during the course of the inquiry, which I refer to later in this report as appropriate.

### **REPRESENTATION AT THE INQUIRY AND PROCEDURAL MATTERS**

13. At the inquiry, the applicant was represented by Mr. Maile, who had been assisting Mrs. Wilson throughout the progress of the application. The Council, as objector, was represented by Mr. William Webster, of counsel. Wessex Water was represented by Mr. Rata, a solicitor.

14. At the opening of the inquiry, I clarified the extent of the application site. As made, the application site encompassed the whole of the recreation ground and included the buildings and structures within it and on its southern edge and north-

west corner. The application drew objections from the Borough of Poole as landowner, from Wessex Water and from others.

15. In response to objections, the applicant expressed her intention to proceed with an amended application area, which omitted those buildings and structures: see the letter of 21 June 2010 [A/37-38]. As a result, all of the objections save that of the Council and Wessex Water were withdrawn. The amended application area is shown on the map which appears at [A/10] and [4/tab 4]. There was no issue about that amendment. All of the evidence was heard on the basis that that was the application site and it is that application site which I am addressing in this report. The former application site needs no further consideration.

16. The role of Wessex Water was discussed at the commencement of the inquiry. The concern of Wessex Water was to protect its interests as statutory water and sewerage undertaker. There are a number of pieces of its infrastructure which are under the surface of the application site and to which it was understandably keen to ensure it could still have access. The issue was discussed at the inquiry and Wessex Water withdrew from the inquiry (but did not formally withdraw its objection) on the basis that there was a consensus at the inquiry that the decision of the Supreme Court in *R (Lewis) v Redcar and Cleveland District Council* [2010] 2 AC 70 meant that if the applicant showed that the land qualified for registration as a TVG, that would be on the basis that the right to registration and thus to TVG status had been brought about in circumstances where Wessex Water had had ongoing rights to access its equipment as and when necessary. In those

circumstances, the rights of Wessex Water would continue to exist alongside any rights that the applicant was able to demonstrate.

17. I also explained at the inquiry that my sole remit was to consider whether the application site and its user met the statutory requirements for registration as a TVG and that it was no part of my task to consider whether registration as a TVG would be advantageous or disadvantageous to anyone. Similarly, I explained that the merit or demerit of any development proposals for the application site were of no relevance to my task. I repeated that statement at the beginning of the evening session on day 1 of the inquiry.

#### **DESCRIPTION OF THE APPLICATION SITE AND THE AREA AROUND IT**

18. I made an unaccompanied visit to the application site starting at 1.50 pm on Sunday 10<sup>th</sup> October, the day before the inquiry opened. I walked around the perimeter of the recreation ground and also amongst and around the buildings in the central part of the site.

19. The amended application site is an irregularly shaped piece of land. It sits within a valley and is at the valley bottom. To its north, it adjoins Playfields Drive. To the east, is Alder Road. Much of its southern boundary runs along Recreation Road, but the application site is separated from Recreation Road in places by the buildings which were omitted from the application site on its amendment. To the west of the recreation ground are the rear of gardens on houses on Wharfedale Road and the curtilage of a care home called The Cedars.

20. The application site is largely down to grass. There are paths which cross the site.

One runs from the northern boundary, approximately at the point where Central Avenue meets Playfields Drive. That footpath runs south west to the pavilion which serves almost to separate the site into two parts. A second path runs from the car park next to the pavilion towards the western boundary, where it meets another path which runs from the south west corner of the site at Recreation Road, up to the North West corner of the site, where a flight of steps takes one up to Playfields Drive.

21. These paths are of some longstanding. There is also a newer path. The evidence is that this newer path was opened in August 2006. It runs from the eastern end of the car park adjoining Recreation Road, parallel to Recreation Road. It then leaves the site at a point immediately to the north of the junction of Recreation Road and Alder Road. The path then runs along the side of Alder Road, separated from the application site by a low wall which, I was told, is part of flood defence measures. The path then passes a pedestrian crossing at the junction of Alder Road and Yarmouth Road, before re-entering the application site just north of that crossing. The path lies parallel to Alder Road before turning to the north-west to run parallel to Playfields Drive. The path then continues until it reaches the foot of the flight of steps previously mentioned. All of the footpaths I have mentioned have a sealed tarmacadam type surface.

22. The application site is fenced, but there are a number of entrances to the site from the surrounding area. They are, running clockwise from the north-west part of the site:

- a. An entry via steps off Playfields Drive, near an electricity substation;
- b. An entry off Playfields Drive near Central Avenue;
- c. At the pedestrian crossing point at the Alder Road. Yarmouth Road junction;
- d. At the junction of Alder Road and Recreation Road;
- e. At the eastern end of the car park on Recreation Road;
- f. At the car park entrance to the east of the Lodge;
- g. Via steps to the west side of the Lodge;
- h. At the west side of the children's play area; and
- i. At the western end of the site, from Recreation Road next to The Cedars.

23. The application site has 5 football pitches on it:

- a. Pitch 1 is to the west of the pavilion, orientated north-east to south-west. A small number of teenagers were using one goal mouth for a kickabout when I was on the site;

- b. Pitch 2 is to the west of pitch 1 and orientated the same. Pitch 2 was in use for an organised game of football when I visited;
- c. Pitch 3 is next to Recreation Road, in the west part of the site and south of the path from the southern end of the pavilion to the western edge of the site. Pitch 3 is orientated north-west to south east and was in use for what appeared to be a football skills training session on my visit;
- d. Pitch 4 is to the east of the pavilion and oriented as pitch 3;
- e. Pitch 5 is to the east of pitch 4, and orientated the same. It was also in use for an organised game of football on my visit.

24. In the summer months a cricket pitch is used. I noticed no sign of it on my site visit, but it is agreed that it is located so as to overlap with football pitch 4: see the amended application plan [4/tab 4]. The pitch comprises a prepared cricket square plus outfield.

25. The buildings and other structures to the south of the application site, but north of Recreation Road comprise, from west to east:

- a. Wessex Water's sewerage and electric pumping station;
- b. Children's play area;

- c. Parkstone Sports and Arts Club;
- d. The Lodge;
- e. A car park containing a small electricity sub-station.

26. There are 13 benches placed around the site.

27. There are various signs on and around the application site. Copies of photographs of the signs and a plan showing their location is contained within the evidence [1/tab 19]. They include signs advertising the existence of byelaws, prohibiting dog fouling, the consumption of alcohol and the playing of golf.

28. The area around the application site is predominantly residential. The area comprises a mixture of ages, sizes and styles of dwelling. Street patterns are largely in a grid form.

**HISTORICAL EVIDENCE AS TO THE PHYSICAL NATURE OF THE APPLICATION SITE – MAPS AND AERIAL PHOTOGRAPHS.**

29. The map at [A/16] dates from 1890<sup>1</sup>. The application site is open land, as is the area around it. What would become Alder Road is shown, as are roads to the south of the site at Gwynne Road and from there southwards, but none of those latter

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<sup>1</sup> A similar map is at [A/124]

roads are shown with any development on them. Playfields Drive and Recreation Road did not then exist.

30. The next map is dated 1924 [A/125]. The 1:2500 OS edition of that year shows the application site was still open. Two watercourses cross the site from North West to South East. The road that would become Recreation Road is shown, but named Bourne Vale Road and Library Road has been constructed by then too. Playfields Drive still did not exist.

31. The map at [A/15] is the OS map revision of 1931. The application site is shown marked "Bourne Moor Recreation Ground" and there appears to be only one building in the southern part of the site, approximately where the Parkstone Sports and Arts Club is now. Playfields Drive and its dwellings did not then exist, nor did the development across Alder Road at Yarmouth Road.

32. There is an aerial photograph from 1946 [1/ tab 12] and a 1947 OS map [A/126]. Playfields Drive and the roads to its north are now in place, but the development of housing on those roads is not complete. The footpaths along the western side, across the centre of the site from north east to south west and the path connecting the two are shown, as are a pond, playground, pavilion and toilets. In the south west part of the site closest to Recreation Road, there appear to be a series of allotments. The Lodge can be seen, as can other development to its east.

33. The 1987/90 OS map base [A/127] shows the modern situation. The pavilion in the centre of the site had by then been constructed, as had the pumping station, and other development on the Recreation Road frontage.
34. There is an aerial photograph from 1987 [1/tab 12]. 7 football pitches can be seen and 2 cricket squares. By 1992, aerial photographs in the same place in the evidence show possibly 6 football pitches and 2 cricket squares. The children's play area had been equipped or re-equipped by that time. The colour tones of the 2005 aerial photograph [1/tab 12] make it difficult to discern individual football pitches, but a cricket square appears to be discernible in the western part of the site and the eastern cricket square shows signs of two prepared wickets.
35. The 2007 aerial photograph [1/tab 12] shows the arrangement of football pitches that I saw on my site visit. It is in this photograph that the perimeter path first appears.

**THE HISTORY OF THE ACQUISITION OF THE APPLICATION SITE BY THE LANDOWNER AND ITS DEALINGS WITH THE LAND SINCE ACQUISITION.**

36. The Borough of Poole owns the freehold of the application site. By the Great Canford and Poole Inclosure Award of 27<sup>th</sup> April 1822, the application site was awarded to the Poole Corporation as part of parcel 314 on map "A" of the Award. The land was allotted by the Commissioners to the Mayor, Bailiffs, Burgesses and Commonality of Poole. According to John Hillier's book "A Portfolio of Old

Poole” [1/tab 5], the award was in compensation for the loss of common rights over the rest of the wastes of the manor.

37. By an Indenture made on 15<sup>th</sup> December 1899 [1/tab 6] part of the application site was leased by the Corporation to the London Home Counties and South Coast Land Company for 99 years from 24<sup>th</sup> June 1866. That company took other leases of other land from the Corporation over time, so that the whole of the application site became the subject of leases to that company.

38. On 8<sup>th</sup> June 1926, an Assistant Secretary, Ministry of Health gave, under Seal, an “Approval of Leasing of Corporate Land”, by which the Minister gave approval to various surrenders of leases and the grant of a new lease in accordance with a draft annexed to the approval [1/tab 7]. The application site is shown as two parcels on the draft plan as being made up of one parcel of 2.784 acres and one of 15.276 acres. The effect of the transactions approved by the Minister, so far as the application site was concerned, was that leases over it in favour of the company were surrendered. The surrenders were put into place by the Deed of 15<sup>th</sup> June 1926 [1/tab 8].

39. On 25<sup>th</sup> June 1926, very shortly after the execution of the Deed at [1/tab 8], the Corporation’s Estates and Railways Committee met and the Town Clerk reported the conclusion of the surrenders. Paragraph 5 of the minutes [1/tab 9] records:

“5. The Town Clerk reported that the Agreement with the London Home Counties & South Coast Land Company Ltd., relating to the leasing of the Upper Bourne

Estate has now been completed. Resolved that the land – about 18 acres in extent – which has been surrendered by the Company and intended to be used as a Recreation Ground, be handed over, for the purpose of administration, to the Parks Committee.”

40. On 6<sup>th</sup> July 1926 the full Council met and minute 9 records the adoption of a report of the Parks Committee of 24<sup>th</sup> June 1926. Minute 10 records the resolution to adopt the report of the Estates and Railways Committee dated 25<sup>th</sup> June 1926. Neither of these reports has been found.

41. The objector argues that the resolution of 25<sup>th</sup> June 1926 amounts to an appropriation of the application site to the purpose of being used as either a pleasure ground for the purposes of section 164 of the Public Health Act 1875 or as open space within the meaning of the Open Spaces Act 1906. There is no evidence that such an appropriation was approved by the Local Government Board. I deal with the implications of this below.

42. The Council’s Parks Committee met on 24<sup>th</sup> April 1930 and paragraph 9(o) noted a recommendation that the Borough Engineer submit plans and estimates for the erection of lodges for caretakers at “Bourne Valley”. The same Committee met on 25<sup>th</sup> September 1930. Minute 20 of that meeting records:

“20. The Borough Engineer submitted plans for the completion of the layout of the Recreation Ground on the Upper Bourne Estate, providing for the construction of four football pitches, three cricket pitches, bowling green,

tennis court, children's pond and playground, etc., at an estimated cost of £8,400. Resolved that the scheme be approved and that the Town Clerk be instructed to apply to the Unemployment Grants Committee for a grant towards the cost of the works.”

43. A minute of the Parks Committee meeting of 20<sup>th</sup> January 1932 [also within 1/tab 9] uses the first reference to the application site as the “Branksome Recreation Ground”. At that Committee's meeting of 13<sup>th</sup> July 1932, a complaint about the noise of children in Branksome Recreation Ground was read to the Committee. Finally, at its meeting of 22<sup>nd</sup> February 1933, that committee resolved to allow pupils at St. Joseph's School to use the Recreation Ground for organised games.

44. By a letter of 7<sup>th</sup> October 1959 [1/tab 10] the Minister of Housing and Local Government gave approval to the appropriation of 350 square yards of land on the site of what is now the Parkstone Sports and Arts Club and outside the amended application site.

45. By a letter dated 16<sup>th</sup> October 1968 [1/tab 11], the same Ministry gave approval to the appropriation of 1,378 square yards of land, again at what is now the Sports and Arts Club.

46. I shall deal with the implications of these events below.

## **THE EVIDENCE IN SUPPORT OF THE APPLICATION**

### **THE APPLICANT'S CASE.**

#### **LIVE EVIDENCE**

47. I heard from the following witnesses in support of the application. I report only the salient points of their evidence. Their full witness statements are in the bundles which the RA has.

#### ***Juanita Byrne-Quin [A/52-53]***

48. Ms Byrne-Quin has lived at 15 Glencoe Road, Poole since 1992 and in the locality since 1932, when her grandparents lived close by. She recalls being walked around “the Rec” when she was small. She remembers funfairs from when she was a small girl and from her teens and early twenties. Now her family and friends use the Rec when they visit. They walk, jog and run around the Rec with Ms Byrne-Quin’s dog. She goes to the Rec to watch sport and to chat to people.

49. She has used the land openly, without secrecy and without challenge. This was a theme of all of the user evidence I heard, and I will not repeat that point when reporting any of the other user evidence.

50. She sees activities take place on the grass and not just on the paths. Dog walkers go onto the grass to pick up after their dogs. People walk dogs on the land at all times of the day. People meet up and talk. This happens on the grass as well as on the paths. She likes to walk on the grass. People do not keep to the grass. Until

about three year ago, she spent most of her time on the site on the grass. Now she has to be more careful for health reasons and she uses the paths more.

51. In cross-examination, she was asked about the people who stayed with her. She has had a number of people who have visited her or lived with her for periods of time. Her niece lived with her from 1998 to 2001 and her two other nieces spent time with her. The people lived with her whilst they worked or were at College. They had homes elsewhere. She owned a dog between 1992 and 2008. She has not had a dog since 2008. She did not walk the dog around the perimeter of the site, but threw balls which the dog played with and fetched. She accepted that the Rec is in a valley and that it gets wet, particularly at the eastern end. She accepted that when organised games were being played on the football or cricket pitch, that she would not disturb them because "It's called sharing". Since 2008 her usage has been less. She described it as pottering and sitting.

***David Gilliver [A/70 to 78]***

52. Mr. Gilliver has lived at 7 Central Avenue since 2000. Prior to that he lived at 18 Cotes Avenue, Parkstone, which is outside the claimed locality and the alternative claimed neighbourhood. He has experience of using the Rec since 1978, when he took a team of boys for training from Sunnyhill Church. He formed "Friends of Branksome Recreation Ground" in 2003. There were Christmas events such as carol singing, visits by Father Christmas, Easter Parades and local children planted daffodil bulbs. The perimeter path was provided, lighting provided and an alcohol ban put in place. He has seen people from Branksome West using the

land. These have been people of all ages. He has seen dog walkers, runners, picnicking, games, walking, sitting on the benches and people chatting. His statement also explains the campaign to secure TVG status for the Rec. He said that he thought that the perimeter path was created in 2008.

53. In cross-examination, Mr. Gilliver was asked about the user form he had completed. He said that he had dogs throughout his life. He uses the site for dog walking 3 or 4 times per day. Between him and his wife, the dog is walked 5 times a day on the Rec. He does not follow a circuit. The dog roams and he follows it. Sometimes the dog is on a lead, sometimes he is not. If the dog is on a lead, then most of the time the walking will be on the perimeter path. If the dog is off the lead, then the walking is on and off the path, wherever the dog goes.

54. Mr. Gilliver was taken to paragraph 37 of the landowner's objection [1/second tab, page 11]. He accepted that the funfair in 2003 was cordoned off from its surroundings and that it took up a significant part of the eastern side of the application site. He confirmed the presence of the Jay Miller circus in 2004 and that the Rossmore Gospel Church, which used the site for a holiday club for 5 days from 23<sup>rd</sup> August 2004 is based outside Branksome West ward. He agreed that the Jay Miller circus visited again in 2005 and that St. Aldhelm's Church, which used the site for its fete on 2<sup>nd</sup> July 2005, was outside the ward. He accepted that the Chinese State circus had its equipment cordoned off when it visited in 2006. The Friends of Branksome Rec sought and were given permission by Pool BC to use the site for fetes. He said that consent was asked for out of courtesy, but agreed that if consent had not been forthcoming, then the fetes

would not have gone ahead. He agreed that the Moscow State circus visited with a big top in 2007.

***Pamela Sealey [A/110 to 118]***

55. Mrs. Sealey has lived at 8 Central Avenue since 2000 and previously lived at 45 Connaught Crescent between 1950 and 1966. She described her use of the Rec in her childhood years and the buildings which were present on the site in those early times. The Rec was also used as a shortcut when walking around the area. From 1966 she visited the area with her daughter, visiting her parents on Connaught Avenue. They would visit the Rec for walks and to play. When her granddaughter was born in 1987, the same visits to Mrs. Sealey's parents took place. After she moved back to Central Avenue in 2000, she has continued to use the Rec, describing it in her written statement as part of a route to get to local shops and facilities. In her oral evidence, she said that she had not just used the land as a shortcut, but did not elaborate. She had occasionally walked friends' dogs on the land. She had been on the land when funfairs were there. They did not have barriers and people were free to walk around the fairs.

56. In cross-examination, Mrs. Sealey said she had never owned her own dog, but walked a dog about twice a week, using the Rec with her granddaughter's friend's child and their dog. They dog walk around the year. The Rec gets wet in winter, but she has boots. She said that the Rec gets slightly muddy, but that one can still walk across the grass. She does not keep to the periphery, because she likes walking on the grass. If a game is in progress, then she does not interfere and the

dogs do not interfere with games. The New Star pub referred to in her written evidence is just outside the Branksome West ward, as are the Church of the Good Shepherd, the Alder Road shops. She agreed that within the Ward were 4 churches, shops on the north side of Ashley Road, a library and no public houses.

***Iris Coe [A/62 to 64]***

57. Iris Coe has lived at 9 Central Avenue since 1964. During that time, she has used the Rec to walk her dogs daily. She has developed friendships through her use of the Rec. She has seen and been part of acts of Christian Worship, including meetings by the Salvation Army, local churches and also use by Youth Clubs, involving people from within the locality. Both Heatherlands School and Martin Road School used to hold sports days on the Rec. There have been annual visits by fairs and circuses. She has also seen the organised games of cricket and football. The Rec was given to the people of Poole and access has always been freely available. Many years ago there was a park keeper.

58. She walks her own dog on the Rec every day. She walks across the whole of the application site. She also trains other people's dogs on the application site. The Salvation Army Band took part in the Fun Day in 2008. Not all Members of the Band live within Branksome West Ward. In the 1960s and 1970s, the Band contained people who lived within the vicinity. The School sports days were held on the site into the 1980s, but she could not remember precisely when they stopped. She denied sticking to the path when she used the Rec. She explained that there are people who stick to the paths, such as the residents of The Cedars,

when they use the application site with their carers. She would not interrupt a football game, but she has seen dogs run into games of football.

***Colin Jones [A/81 to 82]***

59. Mr. Jones has lived at 31 Cromer Road since September 2004. Prior to that, he lived at 16 Library Road between 1951 and 1978. The majority of Mr. Jones' written statement deals with his childhood use of the Rec, prior to the 20 year period with which I am concerned. His wife walks their dog on the Rec. She makes and meets friends on the Rec.

60. There are sometimes up to 5 football matches played at one time. The games are on Saturdays and Sundays. He did not recall midweek matches. Between 1978 and 2004 he lived in Canford Cliffs, outside the claimed locality and neighbourhood. Since 2004 he has walked dogs on the application site. That is the only activity he has undertaken. Between 2004 and 2008 he walked his dog on the Rec twice daily. His dog likes joggers, so he walks his dog away from the path on the perimeter of the site. He once walked across a football game without his dog and got no great reaction.

***Kenneth Meekin[A/86 to 93]***

61. Mr. Meekin has lived at 8 Binnie Road, off Recreation Road, since 1984. He too asserts in his written evidence that the application site was donated to the people of Branksome by Lord Wimborne at the turn of the twentieth century. He has

enjoyed watching the various factory football teams play each other on the Rec on Saturdays and Sundays, and also the cricket in the summer. He recalls the benches being erected when those in Poole Park were replaced. He walks around the Rec, sits on the benches and makes a fuss of the local dogs.

62. In cross-examination, he recalled that in the last 20 years there have been up to 7 football pitches. He watched games in the 1980s and 1990s too. He does not walk only on the perimeter path, but crosses the grass to get to Alder Road and the bus stop there.

***Leslie Hiscock [A/79 to 80, joint statement with his wife]***

63. Mr. and Mrs. Hiscock have lived at 31 Kent Road since 1964. Prior to that they lived at Rossmore Road. Mrs. Hiscock walked to school across the Rec during the Second World War. When they had young children, Mrs. Hiscock met other mothers and children at the Rec. The children played ball games and they had picnics on children's birthdays. The Hiscocks have had several dogs over the years and have walked their dogs on the Rec, and seen others doing so. Mr. Hiscock has also enjoyed watching football matches. He has seen and enjoyed the funfairs and circuses. The Rec has been improved over the years by the addition of lighting and land drainage.

64. In his oral examination-in-chief, Mr. Hiscock said that the Rec was laid out in the 1920s. The land used to flood and so two sets of drainage works were carried out. Perforated pipes were placed under the surface of the land and a bank was created

to drain flood water away from Alder Road. The first set of works was carried out approximately 30 years ago. The second set came later, but Mr. Hiscock did not give a date. The retaining wall at the Alder Road end was put in place at the same time as the perimeter path in 2006.

65. He also said that the circuses were not fenced off. The fairs are now smaller than they were in previous years. The larger fairs took up perhaps one sixth of the application site. The picnics he referred to took place on the western part of the site, away from Alder Road.

66. In cross-examination, Mr. Hiscock agreed that the fairs and circuses take place in the area marked as number 11 on the amended application site plan [4/tab 4]. The site can get wet in winter and boots can be needed. In such cases the driest part is on the north side, near the perimeter path. He denied that most people use the application site by using the perimeter path, saying “No, people are all over it”. In the last 20 years, his use has been to watch his grandson, who lives in Ferndown, playing football matches. He uses the Rec as a transit route to get to the shops on Ashley Road or to the corner shop at the Alder Road / Recreation Road junction. He last had a dog in 2000 and walked dogs on the Rec.

67. In Re-examination, Mr. Hiscock marked up a copy of the application site plan to show the areas where the worst waterlogging occurs. He marked up a crescent shape in the north east corner of the site and also an area at the western edge of the site.

***Lavinia Miller [A/94 to 100]***

68. Ms Miller has lived at 17 Gloucester Road since 1971. Prior to that she lived in Hamworthy. She sees and meets all sorts of people walking, running and exercising dogs on the Rec. Her daughter carried out running training on the Rec. She enjoys seeing the cricket and football games, which have taken place on the Rec for as long as she can remember.

69. In cross-examination, she said that the Rec was used for school sports days in the mid 1970s and early 1980s. Her user form, at Q19 [A/98] refers to dog walking. She has never been without a dog and walks in on the Rec “every single day”. Her husband walks the dog in the morning and she goes with him every ten days or so. Her grandchildren who use the application site live on Guest Avenue, within Branksome West Ward. She has picked blackberries on the west side of the site, near Wharfedale Avenue. She denied that dog walkers stick to the perimeter path when the weather is wet.

***Katie Bundy [A/50 to 51]***

70. Miss Bundy has lived at 58 Alder Road since her birth in 1994. She learned to ride her bike on the Rec. She first visited the Rec without her parents when she was about 9 or 10 years old. She visited the pavilion for the Christmas events. She would play rounders, football and Frisbee on the grass and has met her friends for picnics on the Rec. For the last 8 years, she has walked the family dog on the Rec. She has used the Rec a lot during her childhood. She and her friends used to play

in the bushes. She has used differing parts of the Rec for different purposes and for different times. The football matches do not prevent use of the Rec around the paths or in the spaces between the matches. She has visited the circuses in the past 4 years. They occupy about one half of the eastern side of the Rec.

71. In cross-examination, she confirmed that she used the Rec with her parents before the age of 9 or 10. When she walks the dog, she described her route as entering the Rec through the Alder Road entrance and then walking to the car park, cutting across to the Pavilion, then across the "back field" diagonally and then she walks along the trees and back to Alder Road. If it is wet, she walks along Recreation Road to the car park and then to the rear part of the site, which she says does not get boggy.

***Roland Clark [A61A to 61G]***

72. Mr. Clark has lived at 61 Library Road since 1961. He lived elsewhere on Library Road between 1931 and 1961. His written evidence sets out some interesting history of the Rec in the period since before the Second World War. Prior to 1939, the only structures on the Rec were corrugated tin huts incorporating changing rooms and toilets. The Lodge was built in 1935. A paddling pool and playground were next to it. There were football and cricket pitches. The cricket pitches were fenced off in winter and roped off in summer. He described the precautions which were taken to prevent the Rec being used as a landing point for the enemy in the War and also the allotments which were created there during that period. In 1940 the members of the British Expeditionary Force, rescued from Dunkirk, were

camped on the Rec. Brass band concerts and church services took place in 1942. In the run up to D-Day, the Rec was used to store vehicles and equipment and to billet US soldiers.

73. After the war, the Rec was used for football, strolling and as a children's playground. The fairs and circuses started, and introduced noise. The Boy's Club opened in 1962 and was another source of noise. Much of the rest of his evidence amounts to a complaint about the appearance and noise impacts of the pavilion or development omitted from the application site when the application was amended.

74. In cross-examination, Mr. Clark said he uses the Rec nearly every day for walking, as part of his route to buy his newspaper and for visiting with his grandson to use the swings. He walks along the paths and across the grass. If it is wet, he said that he did not stick to the paths. He wends his way around the wet areas, on the grass. He has no dog. He walks between the football games when matches are in progress.

75. After his oral evidence, copies of a A3 size photograph album of Mr. Clark's were submitted to the inquiry. It is a very interesting collection of photographs, with captions, showing the application site from 1942 onwards. It illustrates the effects of flooding at various times. It also shows how the application site can be affected by standing water – see the series of photographs captioned “Six photos of the proposed siting of the Poole Town Football Stadium Showing normal winter flooding that occurs in this flood plain” and the photographs on the following 4 pages.

***Sandra Morgan [A/101 to 109]***

76. Ms Morgan has lived at 5 Binnie Road since 2000. Prior to that, between 1961 and 1966 she lived at 97 Sheringham Road and then 12 Playfields Drive. In 1966 she left the area. She used the Rec as a child for playing with her cousins. She now uses the Rec to play with her grandchildren. Her first son was born whilst she lived at Playfields Drive. She used the Rec to walk her son with friends who also had babies. They later flew kites on the Rec. In the 1960s her husband played cricket on the Rec for the Marley Company. She has always owned a dog and walked them on the Rec. Most mornings 5 or more dog walkers can be seen walking together, chatting. She does not interfere with organised games of football. When the fairs and circuses are on the site, it can still be used. There are no restrictions where people can go.

77. In cross-examination, Ms Morgan thought that the circuses and fairs used an area further to the north than was shown by the dotted black line on the amended site plan [4/ tab 4]. She uses the application site at least 3 times per week for exercise. She visits with her grandchildren too. She sees other people, but she does not know where they all live. Prior to 2008 she walked her dog on the site twice a day, using the part of the site near to Recreation Road and east of the pavilion.

***Jillian Coombes [A/65 to 67]***

78. She has lived at 12 Connaught Crescent since May 1986. She has seen many events on the Rec, the most popular of which are the games of football. The

children's play area (outside the application site) is always busy. When her daughter was small, she used to combine a visit to the play area with a trip to the corner shop to buy sweets. She sees parents and children meeting up on the Rec to chat. The use has improved since the tarmac path was laid. Walking is easier and safer. The Rec has long been used by joggers and runners. At Christmas 1990/1991 the Red Devils parachute team landed on the Rec. There are very few times when the Rec is empty of people. When there are areas of flooding, she walks around them.

79. In cross-examination, Mrs. Coombes said that people do use the Rec to cross from the North West to the corner shop and the Rec can be a place of transit. She agreed that Mr. Clark's album showed that the Rec could flood and that it can be an exceptionally wet place. The dogs go through the water and the water disappears within a day. People "are everywhere." They do not stick to the paths.

***Jacqueline Wilson[A/119 to 123]***

80. Mrs. Wilson, the applicant, has lived at 28 Kent Road since 2007. Prior to that she lived at 28 Connaught Crescent from 1998. Her use of the Rec started in 1998 when she uses it with a friend's children who came to visit. Her father lives on Yarmouth Road and she walks her dog on the Rec and across the Rec when going to visit her father. When she moved to Kent Road a neighbour suggested walking their dogs together, she walked her dog for 30 minutes each morning and afternoon and soon got to know at least 20 people who used the Rec for walking their dogs. She sees joggers, mothers with small children. Since the Poole Town

Football Club proposals became known, she has organised a sponsored dog walk which attracted about 30 people, a teddy bear's picnic which attracted about 50 people and 2 Fun Days which each attracted over 150 people. The Sunnyhill Community Church has used the Rec for a summer event, which attracts 50 or 60 children. Children fly kites on the Rec. She asked for permission for the events which she organised, "out of courtesy". Her sister learned to use her mobility scooter on the Rec and Mrs. Wilson talks with residents and carers from The Cedars. She has picked blackberries and children have planted spring bulbs.

81. Mrs. Wilson referred to the documents in the applicant's bundle A, including the map evidence I set out above [A/124 to 127]. She referred to her research notes on the history of the land [A/146 to 148]. She said that she believed that Lady Wimborne had left the application site to the people of Poole, but she frankly accepted that she could not prove it. She referred to the population statistics for Branksome West Ward drawn from the 2001 census [A/164 to 165]. The total ward population on census day 2001 is given as 7,035. She referred to the user forms which appear from [A/231]. She explained how the application site area came to be amended by the exclusion of areas which had been included in the original application. She referred to the colour photographs of the application site which are at the end of bundle A, taken in April, May, August and November 2008 showing the application site in use.

82. When the football pitches are all in use, about 150 players, officials and spectators will be present. The paths are a great asset, but people do not use solely the paths. When the site is wet, she still uses it, and avoids the worst areas.

83. She explained that she is a dog walker and uses the Rec every day. Her husband uses it as part of his training for the London Marathon. She sees children playing, groups of joggers.
84. The circuses and fairs take up a part of the site for their 10 day stays. The circuses involve a circle of caravans with the big top in the middle. She avoids the fairs and circuses when they are on site. They take place when there is no football or cricket to be played.
85. In cross-examination, she was asked about the location of local churches. She identified the locations of the Gateway Community Church, the Salvation Army building on Douglas Road, another church across the road from the Salvation Army and other community facilities in the area. She accepted that one could walk to the Rec from 5 or 6 different electoral wards, but that it would take some time to walk there from some of those wards. She denied making the football pitches on the amended site plan smaller so as to increase the impression of space around them. She said that she could name lots of people who walked dogs and who lived in Branksome West Ward. Challenged to name 20, she did so and could say that some of them had lived in the ward for over 20 years. I need not list them in this report. She explained the low ratio of the compilers of user forms to witnesses by her inability to compel people to attend the inquiry.

## **APPLICANT'S CASE – WRITTEN EVIDENCE.**

86. There are a number of written witness statements from people who did not give evidence. That evidence is from:

- a. *Ann Bryan [A/42 to 49]*, resident at 26 Playfields Drive since 1991 and of Branksome since 1990. She and her family have used the Rec for play, cricket, football, cycling and to visit the fairs and circuses. Her user forms refers to use since 1984, but that is not clear from her witness statement;
- b. *Patricia Campbell [A/54 to 61]*, resident of 31 Playfields Drive since 1971. She and her family have used the Rec for the sorts of activities described by others since 1971. Her witness statement was written on a Saturday morning when she observed 68 people using the Rec.
- c. *Dorothy Cornish [A/68 to 69]*, who has lived at 32 Playfields Drive since February 1967 and within Parkstone since 1942. She used the Rec as a child and her son, born in 1974, played on their as a child too. Now her grandchildren play there.
- d. *Edith McCullough [A/83 to 85]*, resident at 197 Rossmore Road since 1998. Since 1998 she has used the Rec for dog walking and has attended events organised by the Friends of Branksome Rec. She has

watched football and cricket, seen children playing and flying kites.

She describes the changes which have taken place in the local area.

### **APPLICANT'S EVIDENCE – USER FORMS**

87. There are a large number of user forms. I intend only to briefly summarise them in order to give a flavour of the impression they create. Two aspects of the user forms need noting:

- a. They all relate to the unamended version of the application site, and
- b. They all refer to an attached Map “A” as setting out the neighbourhood/locality, when that map actually shows the boundary of the unamended application site.

88. I shall omit from this summary those forms from people who gave live evidence at the inquiry or whose written statements I have summarised above. That leaves 43 other user forms, some of which relate to two persons' use of the land. I set them out by giving name, address, (Y) if that is within Branksome West Ward as shown at [4/tab 2], period of use of the site, the activities they undertook and whether they have seen others on the land and if so, what they were doing. The summary is as follows.

89. Peggy Bales, 37 Playfields Drive, (Y), 1968 onwards, picnics/dog walking/going to shops.

90. Frances Barrett, 11 Central Avenue (Y), 1937 onwards, children's play/running/sitting and resting/crossing to shops.
91. Lena Bedell, 93 Library Road (Y), 1926 onwards, visiting relations several times per year.
92. Mrs Billinge, 26 Binnie Road (Y), 1946 onwards, regular dog walking and meeting people.
93. Jenny Bundock, 10 Central Avenue (Y), 1978 onwards, weekly use for taking part in organised activities, walking and general recreation.
94. Mrs and Mrs. G Cabell, 75 Alder Road (Y), 1965 onwards, walking, cycling, dog walking daily.
95. J R Cattermole, 13 Chatsworth Road, 1973 to 1978 and 1986 onwards, sports, dog walking, cricket and football.
96. Bernard Clark, 3 Rossmore Road (Y), 1935 to 1945, page 2 of user form missing, but refers elsewhere to child's play.
97. Michelle Cunningham, 62 Connaught Crescent (Y), 1958 onwards, walking, taking children to play.

98. Brian Davies, 76 Alder Road (Y), 1930 onwards, running and football in early days, dog walking, watching sports.
99. Winifred Dawson, 10 Binnie Road (Y), a 15 year period sometime after 1987 (form unclear), monthly walks and recreation.
100. Mr G Dickinson and Mrs C Wellington, 16 Playfields Drive (Y), 1970 to 1985 and 2000 onwards, recreation, running, playing with children.
101. Christina Ferns, 9 Binnie Road (Y), 1945 onwards, now 3 or 4 visits per week for walking and relaxing, daily play as a child.
102. Mrs M Gibbons, 11A Binnie Road (Y), 1994 onwards, daily dog walking.
103. R Godwin, 98 Recreation Road (Y), 1976 onwards, walking 6 or 7 days per week.
104. Mr and Mrs Haywood, 15 Recreation Road (Y), 1942 onwards, daily dog walking, walking grandchildren and walking for exercise.
105. Mr Hopkins, 100 Recreation Road (Y), 1978 onwards, dog walking, children's play, picnics, football, games, jogging, circus/fairs, walking baby to sleep.
106. Jack Jupp, 35 Playfields Road [sic] (Y), 1972 onwards, football, walking, dog walking.

107. Mrs. Claire Leck, 113 Library Road, (Y), 1986 onwards, dog walking taking daughter for bike rides, scooter rides, playing with friends.
108. T R Lelliott, 11 Connaught Crescent (Y), 1974 to 1984 and 1987 onwards, playing and watching sports, visiting fair and circuses.
109. Joan Lockyer, 24 Kent Road (Y), 1937 onwards, daily walks.
110. Frederick Long, 19 Binnie Road (Y), 1978 onwards, cycling and recreation twice per week.
111. Mr and Mrs Loosemore, 102 Recreation Road (Y), 1957 onwards, recreation and exercise initially daily, weekly after 1970.
112. Jon Lowe, 20 Fortescue Road, 1986 onwards, kite flying, remote control planes, football, playing with his children.
113. Mrs Patricia Moors, 5 Douglas Road (Y), 1927 onwards, weekly walking.
114. D Mullins, 12 Playfields Drive (Y), 1983 onwards, crossing the site daily.
115. Sylvia Nevett, 89 Library Road (Y), 1933 onwards, daily use "for pleasure".
116. Mrs. Sue Nippard, 35 Wharfedale Road (Y), 1984 onwards, dog walking, playing with son when he was younger.

117. Mrs. O'Shaughnessy, 19 Playfields Drive (Y), 1979 onwards (although moved into her house in 1997, residence before unclear), walking daughter to school, daughter played on the Rec, dog walking.
118. Mrs Doreen Percy, 91 Library Road (Y), 1933 onwards, daily walking to visit daughter.
119. Mr and Mrs Pitman, 28 Playfields Drive (Y), 1984 onwards, walking and "access".
120. Mr. J Rattew [sp?], 19 Shelley Road (Y), 1955 to 1975 and 1990s onwards, "play/exercise".
121. Mrs. J Rood, 26 Granville Road, dates of use unclear, but has known the land since 1947 and use refers to "play" and school games.
122. Mr and Mrs D Shepherd, 24 Playfields Drive (Y), 1950 onwards, walking with and without dogs, watching football and cricket matches.
123. Mrs L Shiner, 3 Binnie Road (Y), 1984 onwards, walking and using swings and playground.
124. Barbara Smale, 29 Kent Road (Y), 1983 onwards, walking, playing games, dog walking, watching cricket, play friendly football, jogging, use the children's play area, picnics.

125. Suzanne Snell, 36 Springdale Road [but also used site whilst resident at 89 Library Road (Y)], 1964 onwards, for leisure, walking and playing games.
126. Garry Spencer, 38 Playfields Drive (Y), 2002 onwards, football, cricket, dog walking, riding bikes, basketball.
127. John Tucker, 27 Playfields Drive (Y), 1982 onwards, exercise, children's games, dog walking, watching sports.
128. Graham and Susan Vatcher, 1 Binnie Road (Y), 1949 onwards, walking, watching cricket, dog walking playing with grandchildren.
129. Mr A Walsh, 29 Playfields Drive (Y), 1988 onwards, using for pleasure, ball games, activity area.
130. Mr and Mrs Watts, 37 Connaught Crescent, 1935 onwards, dog walking, walking with children, football in earlier years.
131. D Worboys, 4 Ponsonby Road [although also used the land when living at 5 Douglas Road (Y), dates of residence not clear], 1952 onwards, dog walking, taking children to play, "recreational activities".

## **OTHER EVIDENCE IN SUPPORT OF THE APPLICATION**

### ***Cllr Eades***

132. Cllr Eades gave evidence on his own behalf at the evening session. He explained that in 1930 Branksome had its own Council, with a town hall on Shillito Road. He also explained that the former Bourne Valley Ward was split into two after the Boundary Commission investigation in the lead up to the Borough of Poole becoming a Unitary Authority. He explained that there were other areas of Poole and Bournemouth with Branksome in their names, but which are not within the Branksome West Ward. Cllr Eades was not cross-examined.

### ***Lynne Drewett***

133. Ms Drewett also gave evidence on her own behalf at the evening session. She has lived at 38 Recreation Road for all of her 52 years. She said that the Rec “was her life” when she was a child. She played football, games in the bushes, right across the Rec. She still uses it now. Lots of cricket is played there. Heatherlands School had no playing fields, so the school used the Rec. She has seen kite flying, picnics and model cars on the Rec. People use the paths and the grass. Her brother played football on the Rec, where he once broke his leg. In winter, people skate on the puddles. St. John’s Church, which is on Ashley Road, at the south west tip of the Branksome West Ward, used the Rec.

134. In cross-examination, Ms Drewett said that she uses the application site when the site is wet and muddy and uses the grass, even in wet weather. She agreed that the perimeter path was created in 2006, because it was needed. She agreed that most people use the paths, but the field is still used when it is wet. She agreed that the pitches take “quite a beating” in the football season, and that grass seed is put on them in the summer. She has no dog, but uses the Rec because she needs to walk for health reasons. When the fairs and circuses are on site, she said that they can take up an area from Alder Road up to the car park, depending on the size of the fair or circus. She said that Heatherlands School used the Rec until it closed in the early 1980s.

***Terry Stewart***

135. Mr. Stewart also gave evidence on his own behalf at the evening session. He is the Chairman of the Dorset CPRE and is involved with the Branksome West Residents’ Committee. Despite my repeated warning about the limited nature of my role, Mr. Stewart’s evidence related to the amount of public open space in Branksome West Ward and its alleged deficiency, the alleged inadequacy of funds spent on the Rec and the Council’s lack of protection for open spaces. His evidence was irrelevant to the issues with which I am concerned.

***Rita Battern***

136. Ms Battern gave evidence on her own behalf at the conclusion of the objector’s case. She lives at 22 Playfields Drive. A lot of the use of the Rec is by

young children from 5 years old upwards. They take part in football training, very little of which takes place in normal working hours. People do not book the pitches for those purposes. People do use the paths, but others use the grass. Mums and children play all over the Rec. She was not cross-examined.

## **THE CASE FOR THE BOROUGH OF POOLE, AS OBJECTOR.**

### **LIVE EVIDENCE**

*Clive Smith [1/ tab 2CS]*

137. Mr. Smith has been Head of Leisure Service at Poole Borough since 2001, having joined Poole Borough in 1989 and holding various positions between 1992 and 2001. The application site has been used for organised sports since the 1930s, subject to regulation by bye-laws. In 1987 there were 7 football pitches, and 4 by 2007. The application site floods and he considers that the site would be unlikely to be used for informal recreation to any great extent at wet times of year. He refers to the list of organised football and cricket matches between 2003 and 2009 at [1/14] and to other activities listed at [1/17].

138. Maintenance of the application site has been outsourced since 1990, first to Brophy PLC between 1990 and 1994, then in-house until 1999. Since 1999, maintenance has been carried out by Continental Landscapes Limited (“CLL”). Vehicular access onto the car park is regulated by a barrier which can be and is closed in accordance with published opening times [1/tab 13]. The barrier does not affect pedestrian access. CLL staff visit the site every day. The new perimeter

path was constructed in August 2006 and it was provided because local people asked for it. Works have taken place, some of which would have necessitated cordoning off parts of the application site. The circus is secured and cordoned off from its surroundings. Mr. Smith is of the view that recreation is predominantly on the paths.

139. In his oral evidence, he produced a bundle of documents containing:

- a. A report dated 20<sup>th</sup> June 2005, of which he was the named officer, seeking approval from the Council's Planning Obligations Fund (Recreational Contributions) Sub Group for the construction of the perimeter path which, it was noted, would require planning permission;
- b. A minute of the resolution agreeing to that proposal;
- c. A copy of an extract from the August 2006 blog of Cllr Judy Butt which reported the opening of the perimeter path on 14<sup>th</sup> August 2006;  
and
- d. An extract from the Poole News of October / November 2006 again containing an article about the opening of the perimeter path.

140. He also explained that the Council has a clear policy for community events on Council land. There is a document which explains safety and insurance issues and the policy on the use of infrastructure or vehicles. The Council needs to see proof

of insurance and a site layout plan for the event. There is often a fee, depending upon the nature of the event.

141. In cross-examination, Mr. Smith said that he did not go on the application site very often, but had been there a few times since the Poole Town Football Club planning application and the TVG application had been submitted. His visits would be primarily in working hours, although he “cannot help” looking when he drives past. He had no detailed knowledge of the land drainage works carried out on the application site. The application site sees more cancelled matches than he would like, because of wet weather, but he had no detail to give on the prevalence of cancelled organised sports matches. Dog bins are on site and they are a common feature on open spaces owned by the Council. He agreed that the presence of the dog waste bins shows that there was use made of the site, because the Council would not make such an investment on a small or lightly used site. The cricket nets were constructed in 2008 or 2009.

***Peter Kimber [1/tab 3PK]***

142. Mr. Kimber has been a Grounds Maintenance Supervisor employed by CLL since 1999. Prior to that he was employed by the Borough of Poole. He started working for Poole Council in 1970 as a trainee in the plant nursery before moving on to work in a team responsible for general maintenance in Poole Park. In 1973 or 1974 he moved on to work in the landscaping team and became familiar with the application site from this time. Save for the brief period when Brophy undertook maintenance of the application site, he has been responsible for

managing the maintenance of the application site. CLL is given instructions from the Council's Leisure Services Department to prepare the ground for a match and the grass is cut and pitches marked out as necessary. The goal posts stay in place all year round. Prior to cricket matches, the wicket is prepared and the boundary marked. An employee of CLL is on-site throughout a match and CLL employees visit the site every day. He has never been told of any incident where local people have interrupted pre-booked games. Football matches take place at the weekends and there are a few evening matches in late April and May. The eastern cricket pitch is used most often. The pitches become waterlogged and muddy and are a far from ideal place for recreation to take place. The perimeter path is most convenient and he believes that this is where most of the casual usage takes place.

143. In oral evidence, he said that the circuses take up about the length of a football pitch. The fairs are slightly smaller. Sometimes some parts of the fairs and circuses are fenced off when not in use. Circuses bring 10 to 15 vehicles with them and the fairs about 10. He said that he does see people on the grass, but the greater number are on the path. He is on site 2 or 3 times per week. He has been on the site when it is wet. He said that the water lies in places, but the rest is dry enough to walk on 2 or 3 hours after rainfall.

144. In cross-examination, he confirmed that his visits were ordinarily in working hours and he visits outside such hours perhaps twice a year. The circuses take place when sports are not played. There was one occasion of a circus and a cricket match taking place at the same time. He said "there is always someone on Branksome Rec. Even when it is raining there is always someone somewhere."

145. In re-examination, he said that last season the second cricket pitch saw very little use. He said that the booking information in [1/tab 14] was for matches. He did not think that clubs booked the pitches for training sessions. People do play in the goal mouths and he guessed that it would probably be taking place on site as he was giving his evidence. The cricket squares are, he said, cordoned off between October and March. The wickets, when prepared, are not cordoned off.

*Simon Legg [1/tab 4SL]*

146. Simon Legg is a Greenspace Maintenance Team Leader and his task since 2005 has been to co-ordinate works on greenspaces and this includes administering the Borough's contract with CLL. Between 1994 and 1997, when he was a Parks Officer, he was responsible for site supervision at the application site and visited weekly in the season. Between 1997 and 2005 he visited the site every 6 to 8 weeks. He expanded upon the electronic booking system for football pitches. The record of matches per team at the Rec for years since 2003 is at [1/tab 14]. He said that the cricket nets were erected in 2008. He too was of the view that most of the casual usage takes place on the periphery of the site on the path.

147. In cross-examination, he said that room "is tight" when the cricket squares are fenced off and football is also played.

*Helen Garrett [1/tab 1HG]*

148. Helen Garrett is a solicitor employed by the Borough of Poole. Her evidence deals with the history of acquisition of the application site and with the Council's appropriations relating to the application site, which I have set out above, because the facts are not controversial. She also sets out some factual material on the Branksome West Ward. It became a ward less than 20 years prior to the date of the TVG application. Prior to that ward's existence, the area fell within the former Bourne Valley Ward. That ward was split into Branksome West Ward and Branksome East Ward, which came into being in 2003, consequent upon the Borough of Poole (Electoral Changes) Order 2002. Plans showing the extent of the Bourne Valley ward in 1997 and the boundaries of Branksome West Ward are at [2/tab 6].

149. Ms. Garrett's evidence also refers to a helpful plan at [2/tab 7] which plots the makers of user forms at their addresses and also a map at [2/tab 8] which shows the community facilities within the objector's understanding of the extent of the claimed locality or neighbourhood.

150. Ms. Garrett was briefly cross-examined. It was put to her that the documents she produced may not be all of those which are relevant, but merely comprise all that she had found. Her response was that she had undertaken a search at the Poole local history centre. When she found references to the use of the application site as a recreation ground, she stopped looking for further information.

## **OBJECTOR'S CASE, WRITTEN MATERIAL.**

151. I summarise some of the other material produced by the objector. The application site is subject to 3 sets of byelaws [1/18]:

- a. The first are entitled “Borough and County of the Town of Poole – Pleasure Grounds’ Byelaws”. They were made pursuant to the power contained in section 164 of the Public Health Act 1875 and came into force on the confirmation by the Secretary of State on 1<sup>st</sup> May 1968. They apply to pleasure grounds, one of which listed in them is “Branksome Recreation Ground”. They sets out controls and restrictions upon the use of the affected pleasure grounds by visitors to them.
- b. The second set of byelaws has a similar title but were made under the powers given by sections 12 and 15 of the Open Spaces Act 1906. Again, “Branksome Recreation Ground” is covered by the byelaws. They operate so as to prohibit, in short, the playing of golf. The byelaws came into effect on 13<sup>th</sup> April 1993. They do not repeal the 1968 byelaws.
- c. The third set of byelaws are entitled “Byelaws for the regulation of dogs in parks and recreations grounds” and came into force on 1<sup>st</sup> December 1993. They were made pursuant to the powers in section 164 of the 1875 Act and section 12 and 15 of the 1906 Act. Their

effect, in short, is to prohibit dogs from the children's play area at the Branksome Recreation Ground (which is outside the amended application site) and to provide that the whole of the Branksome Recreation Ground is a "Canine Faeces Removal Area" such that failure to remove dog faeces is an offence contrary to byelaw 4. Again, these byelaws supplement the controls of the previous two sets of byelaws.

### **THE LAW.**

152. I received detailed legal submissions from both parties, together with closing submissions. I shall not set out those submissions in full in this report, but shall deal with the parties' principal points when explaining the conclusions which I have reached.

153. The application is made in reliance upon section 15(2) of the Commons Act 2006 ("the 2006 Act") which provides:

**"(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."**

154. I will refer to use which meets this definition as "qualifying use".

***Burden and Standard of Proof.***

155. The burden of proof lies on the applicant to show that the land meets the criteria for registration as a TVG. *R v Suffolk County Council ex parte Steed* (1996) 75 P&CR 102 is authority for the proposition that all of the elements required to establish that land has become a town or village green must be “properly and strictly proved” [at page 111 per Pill LJ].

156. However, the standard of proof is still the civil standard of proof on the balance of probabilities. That is the approach I have used.

***The Relevant Area of Land***

157. The application does not have to stand or fall on the basis of the original area of land specified in the application. Provided that the procedure adopted is fair, a smaller area can be address and, if appropriate, registered. Here, there is no dispute that I can and should consider the application site as amended by the applicant after the application was submitted.

***The Correct Twenty Year Period***

158. It must be shown that the local inhabitants have used the land as of right for lawful sports and pastimes for not less than twenty years, and the use must continue to the date of the application. It was agreed by the parties at the inquiry that as the application was made on 2<sup>nd</sup> January 2009, in order to satisfy the

requirements that the application site qualifies for registration as a TVG, the applicant must show that use which meets the statutory criteria began no later than 2<sup>nd</sup> January 1989 and persisted throughout the twenty year period to 2<sup>nd</sup> January 2009. If qualifying use began prior to 2<sup>nd</sup> January 1989, it still had to continue until the date of the application.

### ***The Use of the Land***

159. In the case of *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 the House of Lords held that “lawful sports and pastimes” is a single composite class which includes modern activities such as dog-walking and playing with children, provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user as of right.

### ***The Users of the Land.***

160. The persons who use the land must be a significant number of the inhabitants of either a locality or of a neighbourhood within a locality. It is now generally accepted that a “locality” has to be some geographical unit whose existence is recognised by the law, such as a borough, ecclesiastical parish or manor: *MoD v Wiltshire CC* [1995] 4 All ER 931 [2/tab 11]; *R (on the application of Cheltenham Builders Limited) v South Gloucestershire DC* [2003] EWHC 2803 at paragraphs 72 to 84 and *R (Laing Homes Limited) v Buckinghamshire CC* [2003] EWHC 1578 Admin [2/tab 13] at paragraph 133.

161. In this case, there was some discussion at the very beginning of the inquiry as to how the applicant was putting her case on the issue of locality and neighbourhood. Mr. Maile clarified that the applicant's case was that:

- a. The primary case was that use had been by a significant number of the inhabitants of Branksome West Ward; but
- b. If that case failed, the secondary case was that Bourne Valley Ward was the locality and Branksome West Ward was the neighbourhood within it.

162. Mr. Webster submitted to me that an electoral ward could not be a locality for the purposes of the Commons Act 2006. In support of that proposition he drew my attention to paragraph 138 of *Laing Homes* [2/tab 13] where Sullivan J was not inclined to accept a ward as a locality.

163. I do not accept that submission. That is because:

- a. The observation of Sullivan J was an *obiter dictum* because the *ratio* of that case was that the landowner's taking of an agricultural crop was fatal to the claim to TVG status;
- b. Sullivan J's observation was, in any event, that Laing's would have had a good prospect of showing that there was no locality *either*

because wards could not be localities *or* if they are, the wards from where the users came constituted two localities;

- c. No authority directly on the point of the ability of electoral wards to be localities has been drawn to my attention (and I know of no such authority). However, decided cases have referred to a locality being some unit of this country which is recognised by the law and where there is a defined body of persons capable of granting or exercising the rights over any TVG: see *MOD v Wiltshire* [supra] at page 937 b to c [2/tab 11] and, most recently, *Leeds Group PLC v Leeds City Council* [2010] EWCA Civ 1438 at [16] where Sullivan LJ noted that counsel for the Appellant accepted that the neighbourhoods in dispute “fell within an administrative area known to the law” and at [18] where he recorded that a particular parish was “was an area known to the law, and was therefore a locality”. I note also that, in the same case at [56] Arden LJ noted:

“There is no necessary link between a locality (an administrative area) and a neighbourhood”.

- d. Further, HHJ Waksman QC in *R (Oxfordshire and Buckinghamshire Mental NHS Foundation Trust & Ors) v Deluce and Ors* [2010] EWHC 530 Admin noted, albeit on a concession, at paragraph 69 that “a locality had to be some form of administrative unit, like a town or parish or ward”.

164. In my view, an electoral ward can be a locality for the purposes of the Commons Act 2006. I am comforted in that conclusion when noting that Mr. Webster has reached the same conclusion when he sat as Inspector dealing with a TVG application in Barnet [B/Barnet TVG report paragraph 52 to 53].
165. If a case is put on the basis of “locality” then there must be a single locality that can be identified. When the word “locality” appears on its own, and not as part of the phrase “neighbourhood within a locality”, the word means a single locality: *Oxfordshire County Council v Oxford City Council and another* [2006] 2 AC 674 at [27] per Lord Hoffmann.
166. It was held at first instance by HHJ Behrens in the *Leeds Group* case referred to above, [2010] EWHC 810 (Ch) that the two limbs dealing with “locality” needed to be interpreted separately. If a case was put on the basis that the users were from a neighbourhood within a locality (a so-called “limb (ii) case”), then “locality” was a term which did not have to have imported into it “all the technical difficulties in the word ‘locality’ that have arisen in relation to common law greens”. That was because “it was the clear intention of Parliament in a limb (ii) case to relax the requirements necessary to register a TVG and to weaken the links with a common law village green” (both quotations from paragraph 89 of the judgment [4/tab 9]). Thus, a local government area which ceased to exist in the 1930s could be a limb (ii) locality, if the users came from an identifiable neighbourhood within it. This issue fell away when the case was considered by the Court of Appeal, who noted that the Judge had held, in the alternative, that the neighbourhoods were located within the locality of an ecclesiastical parish. It

therefore appears that HHJ Behrens' finding on this issue stands, and so "locality" means different things in both limbs.

167. A "neighbourhood within a locality" does not have to be within one locality (*Oxfordshire* paragraph 27). Further, the users can come from more than one neighbourhood within the locality and "neighbourhood" includes "neighbourhoods": *Leeds Group* in the Court of Appeal. It remains the law that a neighbourhood must be an area which has a sufficient degree of cohesiveness: *Cheltenham Builders*, [4/tab 6] paragraph 85.

168. Whether use has been by a significant number has been held to be a matter of impression and "significant" is to be approached according to its ordinary meaning. The use has to be sufficient to indicate that the land is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: *R (on the application of Alfred McAlpine Homes Limited v Staffordshire CC* [2002] EWHC 76 (Admin) [2/tab 9]. There is no longer any need to show that the users were predominantly from the claimed locality or neighbourhood: *R (Oxfordshire and Buckinghamshire Mental NHS Foundation Trust & Ors) v Deluce and Ors* [2010] EWHC 530 Admin.

### ***Extent of User***

169. The Registration Authority does not have to look for evidence that every square foot of a site has been used. Nor is there any mathematical formula to be used. Rather, the RA needs to be persuaded that for all practical purposes it can

sensibly be said that the whole of the site had been used for lawful sports and pastimes for the 20 period.

***Continuity / Interruption.***

170. The use has to be continuous throughout the relevant twenty year period: *Hollins v Verney* (1884) 13 QBD 304. The use has to show the landowner that a right is being asserted and must be more than sporadic intrusion onto the land. It must be use which suggests that rights of a continuous nature were being asserted. That is not to equate an intermission in use with a lack of continuity. What matters is that the use is frequent and when sports and pastimes are not being indulged in, there must have been no other activity happening which would have prevented lawful sports and pastimes from being enjoyed.

***As of Right.***

171. Use which is as of right has to be use which is made openly, without force and without permission, and the intention of the users of the land is irrelevant: *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 [2/tab 10].

172. There is no principle of deference and if (subject to what I say about use “by right” below) use by the relevant persons has been open, without force and without revocable permission then the use has been as of right and the land should be registered as a TVG. However, registration neither enlarges the inhabitants'

rights nor diminishes those of the landowner, who retains the right to use the land as he has done before, and in practice it is possible for the respective rights of the owner and of the local inhabitants to co-exist with give and take on both sides: *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70 [Supreme Court].

173. Permission can either be expressly given or implied from conduct, but the permission which is given or implied has to be revocable permission: *R (Beresford) v Sunderland CC* [2004] 1 AC 889.

174. However, this has, in my view, to be seen subject to the question of whether use “by right” can be use “as of right”.

175. The Borough of Poole is an authority able to maintain lands as pleasure grounds for the purpose of section 164 of the Public Health Act 1875 and it is also a local authority which is able to exercise the powers of the Open Spaces Act 1906.

176. The dedication of land to the public as a pleasure ground within the meaning of section 164 of the Public Health Act 1875 creates a substantive right for the public to use the land: *Hall v Beckenham Corporation* [1949] 1 KB 716 [2/tab 16].

177. Land acquired or held by a local authority as “open space” within the meaning of the Open Spaces Act 1906 is held subject to an express statutory trust set out in

section 10 of that Act. That statutory trust creates a substantive right for the public to use the land: see the reasoning in *Hall v Beckenham Corporation* [1949] 1 KB 716.

178. In my view, use “as of right” is to be distinguished from use “by right”: see *Beresford* where it was observed, *obiter* per that such use would not be qualifying use for the TVG legislation: see, in particular, Lord Bingham at [2004] 1 AC 889 at 896B, where Lord Bingham described use in pursuance of a statutory right to “be inconsistent with use as of right”; at 909A where Lord Rodger suggests that such use would be “of right” not “as of right” and at 911 G to H where Lord Walker notes that “as of right” does not mean “of right”.

179. I accept that these comments are *obiter*. But they are highly persuasive and, in my view, correct. The legal purpose of considering use which is open, without force and without permission is to consider how the use of the land by local people would appear to the landowner and what, if any, attempts a landowner has made to prevent such use, or show the local people that he or she was not acquiescing in that use, during the relevant 20 year period, having proper ability to note the use and challenge it. But that analysis is wholly inappropriate to apply to a situation where the landowner is a local authority which has taken positive steps under the exercise of its statutory powers to dedicate the land to public use as a recreation ground or open space within the scope of a different and detailed statutory regime.

180. In such a case, from the first day of the use after dedication of the land as a pleasure ground or as open space, the use by local people would appear to the landowner as use in pursuance of the right which the landowner has given them by the exercise of the statutory power. There is absolutely no reason to expect the landowner to seek to prevent such use or erect signs. Indeed, there is every reason to expect the landowning Council to encourage such use. But such a situation is distinct from that typical of the accrual of a prescriptive right. In a case where the prescriptive right accrues, it builds up over a twenty year period. So, on day 1 of the use, all that the local inhabitants have done is to start out on the task of accruing sufficient use which appears to the landowner to be use asserting a right. However, in the case of dedication of the land as a pleasure ground, the public have the substantive right, fully accrued, upon the act of dedication.

### ***Lawful sports and pastimes***

181. Lawful sports and pastimes is a composite class. In *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335 [2/tab 10] the House of Lords held that “lawful sports and pastimes” is a single composite class which includes modern activities such as dog-walking and playing with children, provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user as of right. Use of a footpath for the purposes of passing and re-passing cannot be use for lawful sports and pastimes.

## **APPLYING THE LAW TO THE FACTS**

182. In order to demonstrate my reasoning, I shall set out my conclusions in relation to each element of the statutory definition. Where there were differences in the parties' positions on the conclusions to be drawn on factual matters, I set them out in this section too, together with my conclusions. However, I do not forget that the statutory definition has, in the end, to be interpreted and applied as a whole.

183. At the outset I wish to state that I believe that every witness who gave relevant evidence at the inquiry gave evidence which was honest and was their best recollection of events. I do not consider that any witness was anything less than wholly truthful. Nor do I accept the point implicitly made by Mr. Webster at paragraph 4.6 of his closing, that the raising of emotions can colour evidence and recollections and has done so in this case. I did not have the impression that any witness in favour of the application was exaggerating or tailoring their evidence to suit their purpose. Nor, for that matter, did I have any impression that any witness called by the objector had any intention to tailor his or her evidence to the purpose of defeating the claim.

184. I have taken into account the written material, as well as the live evidence, although I recognise that less weight should be attached to evidence which cannot be tested. I am particularly conscious that the user forms are not particularly helpful on the question of locality or neighbourhood, because the only marked area they seem to refer to is the application site as it was originally defined. The

summary of the user forms I have set out above shows that some of them are vague about the types of use being claimed and also the periods and frequencies of use. I have borne those aspects of them in mind when ascribing weight to their contents.

### ***Land***

185. All subsections of section 15 of the CA 2006 concern the use of “land”. The land in this case is not within one of the exemptions from the application of Part I of the CA 2006 set out in section 5 of the Act. There is no difficulty in identifying the relevant land and this element of the definition is clearly met.

### ***On which a significant number of the inhabitants of a locality or neighbourhood within a locality***

186. Mr. Maile was careful to formulate the applicant’s case on two alternative bases, which I have set out above. The first is that use was by a significant number of the inhabitants of the locality of Branksome West Ward.

187. In my view, this formulation cannot assist the Claimant. This argument is a “limb (i)” case where the more relaxed approach to interpreting “locality” set out at first instance in *Leeds Group* does not apply. Branksome West Ward did not exist prior to 2003. As a result, use in the period from 2<sup>nd</sup> January 1989 until the taking effect of the ward changes in 2003 cannot be use by the inhabitants of that locality, because the locality simply did not exist. Even though I have concluded

that an electoral ward can be a locality, it seems to me to be self-evident that the locality upon which the applicant relies has to have existed throughout the relevant twenty year period, because the definition of qualifying user set out in section 15(2) of the Commons Act 2006 has to be read as a whole.

188. I therefore conclude that the applicant's "limb (i)" case based on the locality of Branksome West Ward cannot succeed.

189. The second formulation is to rely upon limb (ii), use by the inhabitants of the neighbourhood of the Branksome West Ward within the locality of the former Bourne Valley ward.

190. In this formulation, *Leeds Group* would suggest that I am to take a less restrictive approach to the definition of "locality" and that term is not to be interpreted as the common law demanded. So, just as Yeadon could still be a locality for the purposes of limb (ii) in *Leeds Group*, I conclude that Bourne Valley can be a limb (ii) locality in this case, even though it ceased to exist as an administrative unit in 2003. Mr. Webster invites me to find that *Leeds Group* was wrongly decided at first instance on this point. I do not believe I am free to do so. It forms part of a finding of the High Court and was not dealt with by the Court of Appeal. It is for the Courts to find that HHJ Behrens was wrong, not me, and I ought to regard myself as bound by that part of HHJ Behrens' findings and which was not dealt with in the appeal.

191. However, I still have to consider whether Branksome West Ward is a “neighbourhood”. I do so taking account of the Parliamentary intention, in referring to a neighbourhood, to make TVG registration easier and less technical. However, there still must be a proven neighbourhood. If Parliament wished to allow use by the residents of any area within a line drawn on a map to register land, then it could have said so. It did not.

192. I heard and read very little evidence from the applicant and her witnesses as to why the area within the boundaries of what is now the Branksome West Ward is a neighbourhood. Its only significance is as an electoral ward. That status did not exist until 2003 and so for the pre-2003 part of the twenty year period, what is now Branksome West Ward must, if the applicant is to succeed on this issue, have been a neighbourhood for some reason other than its later status as an electoral ward. That is because I am of the view that the status of an area as a neighbourhood must also exist throughout the relevant twenty year period. There is no evidence that would show that between 2<sup>nd</sup> January 1989 and 2003 the area which would become Branksome West Ward was an area with a degree of cohesiveness which made it a neighbourhood for the purposes of the 2006 Act. What are now the ward boundaries were fixed for the reasons required by the law and practice relating to elections. Certainly, the present ward boundaries do not correspond to any obvious physical features which mean that within them one is within one neighbourhood and outside them one is in another neighbourhood. The ward does not, for example, define the limits of an enclave of development surrounded by countryside or an area of housing surrounded by other land uses. The land use patterns, building styles and ages are no different within the ward

than outside it. Nor is there any evidence of any non-physical facts which would suggest that the area has a cohesiveness which, to some degree, sets it apart from areas around it, for example, any feeling of community or any social, economic or other activity within its boundaries which sets it apart from its surroundings.

193. In closing, Mr. Maile referred to the evidence of street names in the area having names connected to the Wimborne family: closing paragraph 7 and Mrs. Wilson's research notes [A/148]. I do not consider that a small proportion of street names in the ward having connections to the Wimborne family has any bearing on the question of whether the area of what is now Branksome West Ward is a neighbourhood. The disposition of those street names has no obvious relation to the boundaries of what is now the ward.

194. I have come to the view that the second formulation of the locality and neighbourhood issue also fails in that the applicant has not proven that use of the application site has been by a significant number of the inhabitants of the neighbourhood of the current Branksome West Ward within the locality of the former ward of Bourne Valley.

195. I do not think it appropriate for me to case about to find evidence which might support the establishment of a locality or neighbourhood. That is for the following reasons:

- a. As set out above, the burden of proof is on the applicant to make out her case;

- b. Lord Hoffmann in *Oxfordshire* at paragraph [61] made it clear that the RA has no investigative duty requiring it to find evidence or reformulate the applicant's case but should deal with the evidence as presented by the parties;
- c. The objector has had no opportunity to deal with any other formulations of these issues and I must act fairly to all parties; and
- d. Mr. Maile was given every opportunity to clarify his case, did so and expressly disavowed any reliance upon other localities or neighbourhoods. He specifically disavowed any intention to rely upon Poole Borough as a locality: see paragraph 6 of his closing submissions.

196. In the light of the conclusions I have reached, I do not need to express a firm view on the issue of "significant number", but it seems to me that had I been satisfied that the areas put forward as a locality or as a neighbourhood did have that status, that there would have been use of the application site by a significant number of the inhabitants of either of those areas. The evidence is that the Recreation Ground was used throughout the twenty year period by a significant number of such inhabitants, even leaving out of account the evidence of those persons who were shown not to live within the claimed locality or neighbourhood or who were not proven to have come from within them. The evidence from the live witnesses, the written witness statements and the user forms is ample to demonstrate use by a significant number of inhabitants of the areas within the

claimed locality and neighbourhood. I do not accept that the evidence of the live witnesses was too sparse to show sufficient user. That wrongly sets aside the other material I have available to me, although I do accept that I have to be cautious about the weight I attach to evidence which has not been tested.

*Use of the application site for lawful sports and pastimes.*

197. I am wholly satisfied that there has been use of the application site for lawful sports and pastimes (“LSP”). That finding will be unsurprising given the nature of the site and its status as a Recreation Ground. I do not accept the objector’s case that use was predominantly of the paths so that the landowner would not have been put on notice that use was being made of the whole application site. That is because:

- a. The perimeter path did not exist until 2006 and so the convenience of that circular route did not exist for most of the twenty year period;
- b. The evidence of every one of the applicant’s witnesses to whom the point was put was to deny that was the case and every one insisted that they used the site off the paths. I have no reason to disbelieve them;
- c. That contention is supported by the objector’s own witness Mr. Kimber who referred to use of the grass, even if many people used the path and to there always being someone somewhere on the Rec.

198. In reaching that conclusion I have proceeded on the basis that use of the paths as part of route to get from one point to another, which some witnesses referred to, ought to be left out of account as not being a lawful sport or pastime, but more indicative of an activity exercising or asserting a right of way.

199. I accept that the Rec can become waterlogged. I also accept that such events would make some forms of lawful sports and pastimes wholly unlikely (such as picnicking) or less likely (such as expansive games of football). Witnesses on both sides of the argument referred to the presence of wet and waterlogged areas in their evidence and Mr. Clark's album provides visual evidence of it.

200. However, local people said that such wetness does not prevent them using the site for exercise and dog walking and the Council's own evidence was that save for the wettest areas the site is capable of use within 2 or 3 hours of rain. The view I have formed from the evidence I have seen and heard is that the waterlogging, when it occurs, is generally restricted to parts of the site and causes people to avoid using those areas of the site, and does not mean that the application site is taken out of use during those periods. On the evidence I have, I conclude that the application site can be and is used for lawful sports and pastimes even when wet and partly waterlogged.

201. I also accept that the application site's grass becomes well worn, as set out in the CLL report of June 2009 [1/tab 16]. However, I do not regard that wearing of the grass on the sports pitches as indicating that the application site as a whole, or

even those worn areas, could not or would not be used for lawful sports and pastimes, such as dog walking or football kickabouts.

202. I also accept the objector's point that the use of the application site by local people involved them steering clear of the organised games of football and cricket. I do not, however, accept that those games amount to an interruption of the user. The games take place for short periods over weekends (and perhaps week day evenings in April and May in the case of football), leaving much other time for the use of the site by local people. Further, even when those games are in use, there are other areas of the site across which lawful sports and pastimes can take place. I find that they did and do take place, as that is the evidence I heard and what I saw when I visited the site. There is no reason to conclude that what I saw on my visit was not also typical of what occurred during the twenty year period. As a matter of fact and degree, I conclude that the whole of the application site has been available for lawful sports and pastimes continuously throughout the relevant twenty year period.

203. The other events I have evidence about, such as the circuses, fairs and events listed at [1/tab17] were events of short duration (a few days at most) and always confined to part only of the site. In my view, their limited duration and physical extent means that they should not be regarded as an interruption to the use of the application site as a whole or in part such as to break the continuity of user of the site by local people. The evidence about whether the circuses and fairs were fenced off was contradictory but, even assuming all such events were fenced off from their surroundings, I would not conclude that they interrupted user of the

application site when taken as a whole, given their relatively small extent and short duration.

204. Fairly late in the inquiry Mr. Kimber suggested that the cricket squares are fenced off in the period from October to the following March. I do not consider that this adversely affects the applicant's case, because:

- a. The contention emerged late in the case and was not dealt with in cross-examination of any of the applicant's witnesses<sup>2</sup>, and
- b. The roping off, if it occurs, affected only a very small part of the site for part of the year. It does not affect the position as regards use of the rest of the site and can, in my view, be regarded as *de minimis*.

205. I am of the view that throughout the twenty year period the whole of the application site has been used for lawful sports and pastimes at a level which was far greater than trivial or sporadic.

### *Use as of right*

206. There is no contention that use of the site has been by force or in secret.

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<sup>2</sup> That is not to criticise Mr. Webster. It is not clear that he knew of this point before it was said by Mr. Kimber – it is not in his written statement.

207. I deal first with the contention that the application site is a pleasure ground or open space within the meaning of the Public Health Act 1875 or the Open Spaces Act 1906.

208. The factual position is incomplete. The reports considered by the Full Council on 6<sup>th</sup> July 1926 are not available. There is no evidence of the Parks Committee's agreement to the handing over, for administrative purposes, of the application site from the Estates and Railways Committee as that latter committee suggested at its meeting of 15<sup>th</sup> June 1926. Nor is there any evidence that any appropriation of the application site to use as a recreation ground was approved by the Local Government Board as was required by section 95 of the Public Health Acts (Amendment) Act 1907. However, my view is that the evidence points towards a lawful appropriation having taken place. That is because:

- a. I accept the submission that I should look at all of the surrounding evidence, not just Council resolutions, as my colleague Ruth Stockley did in dealing with a TVG application in Bournemouth [3/tab 2]. The following matters point to the making of an appropriation of the application site to use as a recreation ground:
- b. The 1924 OS map [1/125] shows the application site as open land, with no discernible use or development on it;
- c. The final Deed of Surrender of Lease of land including the application site of 15<sup>th</sup> June 1926 was very swiftly followed by the resolution of

the Estates and Railways Committee on 25<sup>th</sup> June 1926 which refers to the intention to use the application site as a recreation ground. It can be inferred that either or both of the reports of the Railways and Estates Committee and the Parks Committee presented to full Council on 6<sup>th</sup> July 1926 dealt with that issue;

- d. The Parks Committee resolution of 25<sup>th</sup> September 1930 shows that the Council was developing the site in ways which could only have been lawful if it was open space or a pleasure ground;
- e. The 1931 OS map [A/15] shows the application site marked as the “Bourne Moor Recreation Ground”;
- f. The byelaws could only have been made if the application site was either a pleasure ground or open space or both. The applicant has not contended that the byelaws were improperly applied to the application site. I reject the argument made in closing by Mr. Maile that the byelaws could have been made pursuant to section 1 of the Commons Act 1899 for two reasons: (i) that power is not cited in the byelaws when other powers are cited, and (ii) the application site cannot be a TVG unless and until it is registered as such and so the 1899 Act power would not be capable of lawfully being exercised until the land was so registered.

209. In my view, that evidence shows, on the balance of probabilities, that it can be inferred that an appropriation of the application site to use as a recreation ground (which would be either a pleasure ground within the scope of section 164 of the Public Health Act 1875 or open space within the meaning of the Open Spaces Act 1906) took place at some point in the period 1926 to 1930.

210. I accept Mr. Webster's submission, based on a finding by Mr. Vivian Chapman QC in a TVG report dealing with land at Castle Park [3/tab 1], that if a local authority resolves to use land in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation is implicit in the resolution. I consider that the resolution of the Estates and Railways Committee of 5<sup>th</sup> June 1926, and the Council's seeming acceptance of that view at its meeting of 6<sup>th</sup> July 1926, is to be interpreted as an intention to use the application site as a recreation ground – the reference to such a use and the intention to put the land into the hands of the Committee responsible for administering such uses, demonstrates that to be the case.

211. Even if there is no room for an inference, on the evidence, of a proper appropriation, there are two other reasons why the absence of evidence of Local Government Board approval is not material:

- a. First, the status of the application site as a recreation ground has been acted upon by the Council for many years, since no later than 1930 (on the basis of the OS map of that date) or, at the latest, 1968 when the byelaws were made. Any challenge to the absence of a lawful

appropriation is now extremely out of time and, on normal public law principles, a decision to treat the land as open space or a pleasure ground is to be treated as being lawful unless and until the Court quashes it, which is now almost inevitably not going to happen; and

- b. I agree that the legal presumption of regularity would be engaged in this case so that the lawfulness of the treatment of the site as a recreation ground should be presumed unless the contrary has been shown. It has not been shown.

212. I therefore conclude that at all material times during the relevant twenty year period the land has been a pleasure ground or open space such that use of it by the public was use by right, not as of right, and so the land cannot be liable to registration as a TVG.

213. Mr. Webster made other points on the subject of whether use was as of right.

214. I agree that the use of the cricket and football pitches for organised games was permissive and not use as of right. The same conclusion would follow in respect of people undertaking or attending the circuses, fairs and other activities which had been permitted by the Council upon request.

215. Mr. Webster submitted that users of the land could not have believed that they were on the land as of right but were using it by obvious implied permission of the objector and were only there for as long as the objector permitted them to be there.

I do not think that analysis to be correct for two connected reasons. First, I cannot discern anything to distinguish the position here from the situation which existed in *Beresford*. True, the local residents did not interrupt the games of football, cricket, or other activities undertaken with the sanction of the Council, but those activities did not prevent local people from using the application site for their own purposes at the same time, although it did dissuade them from using certain parts of the site. Second, I think that this is an argument which, in truth, is trying to revive the deference argument rejected in *Lewis*. In closing Mr. Webster submitted that the acquiescence in being excluded from the pitches when matches were in progress was referable to the rest of the land so that a reasonable landowner would not have concluded that the local people were asserting any rights. He conceded that that was “a bold submission”. In my judgment, that was an understatement. It is, so far as I am aware, unsupported by any authority.

216. My view is that the organised cricket and football matches, the circuses and fairs and the other activities licensed by the objector could and did sensibly co-exist with the use of the land by local people. The relationship between the use of the site made by locals and by the footballers/cricketers/fair and circus visitors/other licensed visitors at Branksome Recreation Ground is the same relationship as existed between the use of the Redcar site by golfers and the local people in *Lewis*. I do not accept that this is a case where local people were excluded from the application site but *Lewis* was a case where concurrent user of the whole site took place. In *Lewis*, save for the one exception of Sqn Ldr Kime, the locals did refrain from using the greens and fairways. I see no true distinction between this case and *Lewis* in the nature of user by local people and the user by

and on behalf of the landowner. Were it not the lack of proof of a locality or neighbourhood and for the site having the status of a pleasure ground, open space (or both) I would have concluded that the land would have been registrable as a TVG but that the local inhabitants' rights had been and should continue to be exercised in co-existence with the use which the objector had made of the site for organised games, fairs, circuses and other permitted events.

217. There is no evidence to support the contention that the application site was given to the people of Poole by Lady Wimborne and I reject that contention.

*Continuous twenty years user continuing to the date of the application.*

218. As will be clear from the evidence I have set out above, the use of the site for lawful sports and pastimes has endured throughout a period of at least twenty years. That use also continued up to the date of the application.

### **WESSEX WATER'S OBJECTION**

219. I ought to deal with this for completion, as the objection was not withdrawn. Wessex Water's concern did not relate to whether the land was capable of registration as a TVG, but the consequences for it is of it were so registered. It produced no evidence which shed light on whether the land had been put to qualifying use.

## **OVERALL CONCLUSION**

220. I recommend to the Registration Authority that the application be rejected for two reasons, either of which would be sufficient of itself to reject the application:

- a. Because the applicant has not proven use was by inhabitants of a proven locality or a proven neighbourhood within a locality; and
- b. Because the application site was, throughout the relevant twenty year period, either a pleasure ground within the meaning of section 164 of the Public Health Act 1875 or open space within the meaning of the Open Spaces Act 1906, or both, so that use of the land for lawful sports and pastimes was use by right, not as of right.

221. I would strongly advise that this report is made available to the parties in good time prior to its formal consideration by the Registration Authority, so that the parties have ample opportunity to consider it and make any views known upon its contents. It remains only for me to express my gratitude to the parties for the efficient and good natured conduct of the inquiry and my thanks to officers of the Registration Authority, particularly Simon Terry, for their assistance during this process.

MARTIN CARTER  
23<sup>rd</sup> December 2010.

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